# The Search Warrant Process:

## Preconceptions, Perceptions, Practices



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June 1984

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# Introduction

A search warrant is an order issued by a judge authorizing a law enforcement officer, public health officer, beverage control officer or other official to enter private property to search for and seize specified items or a specified individual. In some instances, it may authorize the officer or official to break into a residence, other building, ship or vehicle, or to search a person. The Fourth Amendment to the U.S. Constitution prescribes that a search warrant may be issued only "...upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

The search and seizure may be carried out over the objection of the person who owns or controls the property to be searched and the item to be seized. However, the United States Supreme Court has ruled that if the information supporting a warrant is insufficient, if the warrant itself is defective, or if it is executed improperly, the items seized may not be used by the government at a criminal trial as evidence of the guilt of the person whose Fourth Amendment rights have been violated.[1] A search and seizure may be performed without a warrant,[2] but such searches are, by definition, unreasonable unless they fall within certain specified exceptions.[3]

The reasoning behind this preference was summarized by Justice Robert Jackson in an oft-quoted passage in *Johnson v. United States*.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the

> usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate* instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . *When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.*[4]

Thus, by interposing an independent review by a neutral, objective judicial officer of the evidence presented and the conclusions reached by the police, and by requiring that the scope of any search and seizure authorized be no broader than necessary to secure the individual, evidence, or contraband sought, the warrant requirement is supposed to reduce the likelihood that law enforcement officers or other government officials will unreasonably invade the privacy of an individual.

## Prior Studies of Search Warrant Practice

Over the past twenty-five years, a number of examinations of search warrant practices and procedures have been conducted.[5] These studies have suggested that the suppositions regarding the Fourth Amendment warrant requirement may not be borne out in practice.[6]

First, warrants do not serve as a primary safeguard of privacy because they are sought in relatively few cases.

> Search warrants have never been the heavy artillery in police departments' arsenal of weapons against serious crime. Although the courts consistently encourage police to use warrants by insisting that warrantless searches be scrutinized very carefully, the literature on search warrants shows that the police use them sparingly and selectively. . . .[7]

The most detailed study of warrants prior to this one—the American Bar Foundation's survey of the Administration of Criminal Justice conducted in the late 1950s—found 29 search warrants issued in Detroit, 30 in Milwaukee, and 17 in Wichita during 1956.[8] Following application of the "exclusionary rule" to state court decisions,[9] there was a substantial increase in the use of search warrants, although the number remains a small proportion of all criminal cases. In Boston, for example, the number of search warrants issued annually averaged 693 between 1961 and 1976.[10] Moreover, the types of cases in which warrants were used

appear to be quite limited, according to the literature. Tiffany, McIntyre and Rotenberg found search warrants used primarily in gambling, liquor law, narcotics, and obscenity cases.[11] Krantz *et al.* in their study of Boston police practices found that 83 percent of the warrants issued during 1976 in the city's three busiest district courts "were to investigate suspected violations of the narcotic drug laws or vice laws."[12] Such offenses accounted for less than 12 percent of all arrests nationally for that year.[13]

Second, a serious question has been raised about the intensity and objectivity of the review, since search warrant applications appear to be rejected quite infrequently by reviewing magistrates. Federal data on state court wiretapping and eavesdropping warrants under the 1968 Omnibus Crime Control and Safe Streets Act show that of 5,563 applications made from 1969 through 1976, only 15 were denied. None of the 626 such requests made in 1977 failed to gain approval.[14] The American Bar Foundation study concluded that "the trial judiciary does not always take seriously its commitment to make a 'neutral and detached' decision as to whether there exist grounds for a search."[15] A more recent survey of Virginia magistrates revealed:

> 11.4 percent of the magistrates and chief magistrates responding indicated that their personal philosophy concerning the issuance of criminal warrants amounted to rubber-stamping. These magistrates indicated that they felt the standard for issuance of criminal warrants should be: "The police have the best knowledge of the facts of the case. If brought to trial, the judge will try the case on its merits. Therefore, the magistrate should generally issue the warrant."[16]

The impact of such a philosophy may be heightened by judge-shopping practices[17] and by the fact that many magistrates authorized to issue search warrants are neither lawyers nor required to have any legal training.[18] U.S. Supreme Court Justice Byron White recently characterized Fourth Amendment jurisprudence as an area in which "initially bright-line rules have disappeared in a sea of ever-finer distinctions."[19] To the extent that they follow the decisional cross-currents regarding search and seizure law,[20] how must this sea appear to magistrates not schooled in constitutional law?[21]

A third factor that may cloud the review process is the frequent presentation by the applying officer of second-hand statements—hearsay—by an anonymous informant. In a study of 168 search warrants, Krantz and his colleagues found that "131 affidavits cited informants . . ., only 9 of whom were identified by name."[22] Of the warrants seeking illicit drugs, 94.2 percent were based on informant statements.[23] In June

1983, the Supreme Court, in *Illinois v. Gates,* set forth new guidelines for reviewing informant statements, directing:

> The task of the issuing magistrate is to make a practical, common-sense decision whether given all the circumstances set forth in the affidavit..., including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.[24]

The *Gates* test replaced the so-called *Aguilar-Spinelli* rule, which required the affidavit to describe *both* how the informant learned where the sought-for items were located *and* a basis for believing that the informant was credible or the information supplied was reliable.[25] Even under the more precise test, some magistrates routinely and uncritically accept "boilerplate recitations" by police regarding the past reliability of the informant. In part this may have been a result of the general reluctance to do anything that might compromise the informant's safety or continued usefulness.[26]

Fourth, warrants may broaden rather than limit the area to be searched in some situations. As Tiffany *et al.* point out:

> [A] search incident to arrest... is confined to objects or things or area in the immediate control or possession of the person arrested. Search warrants, on the other hand, may authorize a search of an entire building so long as the premises are described in the warrant.[27]

Finally, it has been suggested that, on balance, search warrants act as an impediment to law enforcement rather than as a protection of personal privacy[28] because of the delay inherent in (1) preparing a written affidavit, application, and warrant; (2) locating a magistrate willing and able to review the presented materials; and (3) going to the site of the search. Even a telephonic application, where authorized, takes time. During this delay period, there is increased opportunity for news of the impending search to leak out before the warrant can be executed, for the items sought to be moved or destroyed, or for the individual to escape, unless exigent circumstances make the risk great enough to support a warrantless search.[29] Furthermore, the warrant may become a tangible target for attacks by defense counsel, which may delay or thwart prosecution.

## Purpose of the Current Study

The research upon which this volume is based was conducted in seven cities around the country. Project staff examined, among other

things, the information on which search warrants were based, the sources of warrant applications, the types of offenses involved and materials sought, the administrative and judicial review procedures employed, and the disposition of cases involving evidence obtained with the aid of a search warrant. The intent was to inform the debate over search-and-seizure policies and practices by presenting a comprehensive picture of the search warrant review process as it operates in urban jurisdictions today. Both quantitative and qualitative data are presented regarding the questions and issues raised in the studies and cases cited above, including the frequency (infrequency) with which search warrants are sought; the types of cases and the manner in which warrants are used; the objectivity and thoroughness of the review accorded the application for a search warrant; the impact of the warrant requirement upon the police and prosecution; how legal, procedural, and technical innovations affect search warrant practices; and the extent to which reliance on a warrant inhibits or encourages legal challenges to the introduction of the materials seized in criminal proceedings.

This report is divided into seven chapters. Chapter 1 describes the methods used in the study and some of the problems encountered in tracking cases and learning about actual practices. Presentation of the results of the study begins in chapter 2, which outlines the sequence of procedures used to apply for, review, and execute a search warrant, and also identifies the points at which the application, warrant, and return are considered during the prosecution of a criminal case. A series of tables conveys a graphic presentation of various aspects of the search warrants in the sample: the duration of proceedings to review search warrant applications, the types of offenses involved, the items sought, the sources of the information presented in affidavits, the type of information used to support statements by confidential informants, the number of cases filed following execution of a search warrant, and the number of motions to suppress that were filed and granted among the warrants in the sample.

Chapter 3 examines to what extent search warrants succeed in performing the functions and providing the protections accorded to them in court opinions. Chapter 4 explores some of the possible adverse consequences of the search warrant requirement. Chapter 5 looks specifically at search warrants from the police perspective. It describes the attitudes of police officers toward the search warrant requirement, the problems that the search warrant process poses and how law enforcement officers deal with these problems, how the availability of telephonic procedures helps or hinders the process for the police officer, and the training that is provided in the use of search warrants. Chapter 6

examines the search warrant process from the perspectives of the prosecutor and the magistrate, discussing the roles played by each in the process, the degree to which an affidavit is accorded a presumption of validity, and the degree to which a search warrant strengthens or weakens a case. Finally, Chapter 7 presents our conclusions and recommendations. An appendix contains a summary and analysis of state statutory provisions governing search warrants.

# Notes to Introduction

1. Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961), *reh'g denied*, 368 U.S. 87 (1961); Wong Sun v. United States, 371 U.S. 471 (1963); Rawlings v. Kentucky, 448 U.S. 98 (1980).

2. Chimel v. California, 395 U.S. 752 (1969) [searches incident to an arrest of the places under the arrestee's immediate control]; Carroll v. United States, 267 U.S. 132 (1925); Chambers v. Maroney, 399 U.S. 42 (1970); United States v. Ross, 456 U.S. 798 (1982) [searches of an automobile and its contents including closed containers]; Warden v. Hayden, 387 U.S. 294 (1967) [searches for a suspect conducted while in "hot pursuit"]; Coolidge v. New Hampshire, 403 U.S. 443 (1971) [seizure of contraband or evidence in "plain view"]; Schneckloth v. Bustamonte, 412 U.S. 218 (1973) [searches when the individual to be searched or in possession of the property consents]; Terry v. Ohio, 392 U.S. 1 (1968) [frisks following a street stop].

3. The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. Mincey v. Arizona, 437 U.S. 385, 390 (1973), quoting Katz v. United States, 389 U.S. 347, 357 (1967). *But cf.* balancing test articulated in United States v. Place; 462 U.S. 696 (1983).

4. 333 U.S. 10, 13-14 (1948) (emphasis added).

5. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME, 99-120 (1967); S. KRANTZ, B. GILMAN, C. BENDA, C. HALLSTROM, & E. NADWORNY, POLICE POLICYMAKING: THE BOSTON EXPERIENCE, 99-147 (1979); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 The Journal of Legal Studies 243 (1973). *See also* M. Ban, *Local Courts v. the Supreme Court: The Impact of Mapp v. Ohio* (unpublished dissertation, Cambridge: Harvard University); J. RUBENSTEIN, CITY POLICE (1973); J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY, 112-63 (1967).

6. *See, e.g.*, LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the Quagmire*, 8 Criminal Law Bulletin 9, 27-28 (1972).

7. Krantz *et al.*, *supra* note 5, at 110.

8. Tiffany *et al.*, *supra* note 5, at 100.

9. Mapp v. Ohio 367 U.S. 643 (1961).

10. Krantz *et al.*, *supra* note 5, at 103. For data taken from state annual reports for 1976, *see* NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1976 (1979).

11. *Supra* note 5, at 102-4.

12. *Supra* note 5, at 105.

13. According to the FBI's Uniform Crime Report, drug abuse violations accounted for 554,800 arrests, gambling 70,000 arrests, liquor law violations 306,300 arrests, and prostitution and commercialized vice 68,900, for a total of 1,000,000 arrests. The total number of persons arrested was 8,531,400. U.S. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: 1976, Tables 309 and 310 (1977).

14. HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, SEARCH WARRANTS AND THE EFFECTS OF THE *STANFORD DAILY* DECISION, H. R. Rep. No. 95-1521, at 4,(95th Cong. 2d Sess., 1978).

15. Tiffany *et al.*, *supra* note 5, at 119-20.

16. NATIONAL CENTER FOR STATE COURTS, VIRGINIA COURT ORGANIZATION STUDY, Chap. 11, at 16 (1979), quoting from the Magistrate Utilization Study, an internal report of the Office of the Executive Secretary of the Supreme Court of Virginia, at B-3.

17. Tiffany *et al.*, *supra* note 5, at 120.

18. *See* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 35-37 (1978); *see also* Shadwick v. City of Tampa, 407 U.S. 345(1972).

19. Illinois v. Gates, 462 U.S. 213, 265 (1983) (White, J.,concurring). Recent studies have suggested that much of the surface intricacy is the result of appellate courts' continuing affirmation of broad due process principles to maintain the legitimacy of the legal system while systematically recognizing deviations and exceptions that serve to uphold the convictions of clearly guilty defendants, and therefore that there is a distinction between doctrinal formula-

tions and law at the operational level. *See* D. MCBARNETT, CONVICTION: LAW, THE STATE, AND THE CONSTRUCTION OF JUSTICE (1981); Davies, *Affirmed: A Study of Criminal Appeals and Decision Making Norms in a California Court of Appeal*, 1982 American Bar Foundation Journal 543 (1982).

20. Illinois v. Gates, 462 U.S. 213, 263-264, fn. 17 (1983) (White, J., concurring).

21. *See* People v. Escamilla, 65 Cal. App. 3d 558, 135 Cal Rptr. 446 (1976).

22. Krantz *et al.*, *supra* note 5, at 109.

23. *Id.*, at 110.

24. Illinois v. Gates, 462 U.S. 213, 238 (1983).

25. Aguilar v. Texas, 378 U.S. 108, 114-15 (1964).

26. Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 Mercer Law Review 741, 760 (1974); *see also* Roviaro v. United States, 353 U.S. 53 (1957).

27. Tiffany *et al.*, *supra* note 5, at 116.

28. *See, e.g.*, Steagald v. United States, 451 U.S. 204, 225 (1981) (Rehnquist, J., dissenting); Robbins v. California, 453 U.S. 420 (1981) (Rehnquist, J., dissenting).

29. Tiffany *et al.*, *supra* note 5, at 115-16.

CHAPTER ONE

# Research Design

The search warrant process has not been the subject of empirical inquiry as frequently as other aspects of criminal justice. Our observations and experiences in designing and conducting this study made the reasons for this lack of attention abundantly clear. We found many of the metholodogical problems that typically beset social science research to be especially troublesome when it came to investigating this particularly sensitive area of criminal justice administration. Some of the major problems we were able to anticipate. A few others were discovered along the way. A summary of these problems and their implications for the research design follows. This is followed by a description of the sites and site-selection process and of the methods used to collect and analyze the data for this study. As noted in the Introduction, presentation of the results of the research begins in chapter 2.

## Research Issues

The first of the major research issues we anticipated was access. Search warrant proceedings are secret and extremely sensitive for courts, prosecutors, and law enforcement officers. Several state statutes make all search warrant documents confidential until the warrant is served; at least four limit access to search warrant materials even after execution of the warrant.[1] Moreover, applications for search warrants may occur at odd hours, on little or no notice, and at remote locations such as a judge's

home. Thus, special authorization and extensive cooperation were required in order for us to observe search warrant reviews.

The second issue was the need to protect against collecting biased data as a result of seasonal variation, systematic differences between observed and nonobserved hearings, observer-caused alterations in behavior, and systematic differences between selected and nonselected records. Thus, the design had to provide for sampling cases over a relatively long period and for collecting and comparing both objective and subjective information from several sources.

The third issue was variation among field researchers in recording information. Because several sites were contemplated, it was not possible for a single member of the staff to perform all of the on-site work. Rather than hire individuals in each site, we agreed that the field research would be divided among the three principal staff members and that questions concerning, or changes in, coding data would be quickly shared.

The problems that were not fully anticipated concerned the quality of recordkeeping and the difficulty in identifying the criminal cases that arise from a warrant-authorized search. We found that the flow of paper between the police and the courts and among court personnel is not always smooth or according to written procedure, and that the particular system used is idiosyncratic to individual jurisdictions. Furthermore, some significant events are not recorded. For example, we were not able to locate a jurisdiction that maintained systematic records for search warrants that were applied for but not issued. Finally, because search warrant records usually are created before a criminal case record and number is established, the warrant files and case files are maintained separately in many jurisdictions; therefore, linking the records sometimes required substantial assistance from local personnel, perseverance, and luck.

## Research Methodology

### *General Information Gathering*

Initially we sought information about the search warrant process from three sources: the legal and social science literature; the case law—primarily, but not exclusively, that of the federal courts; and state statutory provisions [see Appendix]. We sought to clarify in our own minds the legal and practical issues, analytical schemes, and formal ground rules that shape the search warrant process.

Simultaneously, we surveyed by mail and telephone the state court administrator of each state and the District of Columbia to determine the number of search warrants issued annually in the largest local jurisdictions in each state and to identify the person(s) most knowledgeable about trial court procedures in those jurisdictions. We then contacted officials in those local jurisdictions with a volume of issued warrants that was sufficiently large to permit thorough study. Our preliminary inquiries detected substantial variation across these jurisdictions in many significant aspects of the search warrant application and review process. This variation included, but was not limited to, differences in the frequency with which warrants were sought; the rate of judicial approval; the number and qualifications of magistrates legislatively authorized to issue warrants; the potential for, restrictions against, and existence of judge-shopping; the presence and manner of pre-judicial screening of the warrant application by police supervisors or prosecutors; the existence and actual use of telephonic application and review procedures; the presence, availability, and comprehensiveness of records systems that would facilitate the *ex post facto* examination of the process; and the willingness of key justice system personnel to subject their procedures and themselves to scrutiny.

***Site Selection***

The magnitude of such variation among jurisdictions dictated that we include as many sites in our study as possible. We attempted to identify a sample of jurisdictions issuing at least 150 warrants annually that varied sufficiently—both the procedures employed and regional and geographical characteristics—to allow us to detect the widest possible spectrum of variations. This strategy also allowed us to explore the impact of some of the observed differences. It was impossible, of course, to exert any experimental or even statistical "control" over extraneous factors and, thereby, to focus on the "effects" of key variables (e.g., the availability or nonavailability of telephonic procedures for obtaining warrants, or the presence or absence of prosecutorial screening) on the search warrant process and its fruitfulness. Such systematic controls would have required the use of hundreds of sites and the collection of mountains of data. Such an effort far exceeded our resources. We deemed it sufficient to ask local observers and practitioners to assess the probable effects of such variables, to compare responses across sites, and to weigh these comments against the intelligence we were able to glean

from our examination and systematic analysis of more than 900 warrant-based cases. This strategy allowed us to focus our inquiry on a clearly manageable number of carefully selected sites.

Seven sites were chosen. One additional city was selected to serve as a reserve in case arrangements in a proposed site could not be satisfactorily worked out. This in fact occurred, and the alternate site (designated Forest City) was used. A few persons in some of the cities studied were willing to participate in the project only if they were assured anonymity or, in other instances, if their jurisdictions were not identified. Because identification of some individuals or jurisdictions might easily jeopardize the anonymity of others who preferred to remain unnamed, the anonymity of all persons and jurisdictions is preserved throughout this volume. Thus, code names have been assigned to each of the sites.

Border City is the hub of a rapidly growing metropolitan area in the southwestern United States. Forest City is a western industrial and commercial center. Harbor City is a major eastern industrial city. Hill City is part of a major West Coast metropolitan area. Mountain City is the commercial, cultural, and political hub of a western state. Both Plains City and River City are major regional commercial and transportation centers. Plains City lies in the central part of the country, and River City in the southern United States. Table 1 compares the overall and minority group populations and rates of index crimes for each of these sites.

Although our sample cannot be characterized as "representative" of American cities in any meaningful statistical sense, it is fair to say that the jurisdictions studied are sufficiently diverse that (1) it is unlikely that any significant aspect of the process by which search warrants are handled in this country escaped our attention altogether; (2) we gained a sufficiently broad picture of the process to construct a useful "prototypical model" that roughly approximates the way the search warrant process operates in most jurisdictions; and (3) our conclusions about the strengths and weaknesses of the processes we observed can be applied to warrant review procedures in most American metropolitan jurisdictions. Thus, even though the sites selected for our study may not be representative of American cities as a whole, we have no reason to suspect that the search warrant process as it operates in the selected jurisdictions is unrepresentative, in most important respects, of the way search warrants are regarded and handled in most cities.[2]

River City was selected as the focus of an intensive and comprehensive investigation. A member of the project staff established residence in

## Table 1
Population and Index Crime Rates

| City | 1980 Population | Percentage of population that is Black | Hispanic | Index crimes per 100,000 population of SMSA |
|---|---|---|---|---|
| Border City | 750,000-1,000,000 | 0-9% | 10-19% | 7000-7250 |
| Forest City | 250,000-500,000 | 10-19 | 0-9 | 7750-8000 |
| Harbor City | 750,000-1,000,000 | 50-59 | 0-9 | 7250-7500 |
| Hill City | 250,000-500,000 | 40-49 | 10-19 | 8500-8750 |
| Mountain City | 100,000-250,000 | 0-9 | 0-9 | 7000-7250 |
| Plains City | 250,000-500,000 | 10-19 | 10-19 | 8250-8500 |
| River City | 500,000-750,000 | 50-59 | 0-9 | 7750-8000 |

*Note:* Index crimes are murder, non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, theft, motor vehicle theft, and arson.
SMSA: Standard Metropolitan Statistical Area

*Sources:* U.S. Department of Commerce, *Statistical Abstract of the United States: 1982-1983*, 22-24 (1983). U.S. Department of Justice, *Crime in the United States: 1980*, Table 5 (1981).

that city for a period of three and one-half months, during which time all the project staff became intimately familiar with the operation of the search warrant process in the jurisdiction. The full-time presence of a staff member at the principal research site was vital in several respects. Daily presence in the courthouse, where nearly all warrant applications were brought for review, facilitated the development of close working relationships with key justice system personnel, a thorough acquaintance with the official (and unofficial) records systems, and an understanding (as much as any "outsider" can have) of the internal, low-visibility, sometimes irregular workings of the justice machinery. After the observer had become a "fixture" in the judge's courtroom during warrant reviews, both applicants and reviewers became less visibly anxious, sometimes joking with the researchers and occasionally confiding details about the case. An office, telephone, essentially unrestricted access to records, and free movement through the courthouse and judicial chambers were furnished. Such cooperation afforded us the opportunity to study processes and records in detail.

In each of the six secondary sites (Harbor, Plains, Forest, Hill, Mountain, and Border Cities), a staff member spent approximately one week on site. Use of these sites permitted us to examine several variations

in the search warrant application procedures and to check whether the insights gained and patterns observed in the intensive site were applicable generally. In each site we received excellent cooperation, particularly from court administrative personnel, law enforcement officials, prosecutors, and judges.

***Data-Gathering Procedures***

In order to limit the effect of the problems listed earlier, it was decided to use three data-collection strategies: direct observation of warrant review proceedings, analysis of archival records, and interviews.

*Direct Observation.* In the intensive site, 84 presentations of a search warrant application to a magistrate were observed. Our intent was to learn as much as possible about the neutral, objective review that is the centerpiece of the warrant requirement. Although it had been hoped to make such observation in each project site, it was logistically impossible to do so and still accomplish the other objectives in the secondary sites in the time available.

The staff member in River City was "on call" for warrant review hearings. During normal working hours the magistrate on duty (or the magistrate's clerk) would call each time a police officer (or other applicant) appeared with a warrant application. Normally the resultant delay, if any, of the warrant application review was less than two minutes.

In River City, unlike the other sites, a part-time magistrate is on duty at the courthouse all night and on weekends, primarily to conduct bail hearings and issue warrants. Several nights and weekends were spent by the staff member in the misdemeanor courtroom in River City. Because of the paucity of late night and weekend applications, we decided after six weeks that it was unfruitful to conduct such vigils. The paperwork for after-hours unobserved applications was examined on the next working day, and the data obtained from these applications were coded in the same manner as the archival warrants discussed below.

The specific data elements collected from these observations included whether the application was reviewed singly or together with related or unrelated warrant applications, whether the magistrate questioned the applicant and if so, how many substantive questions were asked, whether the applicant offered substantive information not included in the affidavit, whether the magistrate provided an explanation when an application was not approved, and the duration of the application proceeding.

*Analysis of Archival Data.* The second major source of data was the collection of information from archival criminal justice records. This

was accomplished in all seven jurisdictions. The aim was to identify a specific number of instances in which a search warrant was issued (within a specific period), to examine closely the basis for the warrant, and to track the case to determine what had been seized and the consequences of the seizure in terms of a criminal prosecution.

Although the same set of data elements were sought in each of the jurisdictions, the protocol for the archival search varied slightly across the seven cities. The archival collection was, of course, the most extensive in River City. Every warrant approved by a magistrate in River City during 1980 and remaining in the court's records was examined, together with the accompanying affidavit and return, and an attempt was made to identify and track any resulting criminal cases through to disposition and appeal. The warrants, affidavits, and returns from the *observed* application proceedings were tracked as well, during a one-week visit to that city six months after completion of the primary data collection.

We determined that in the comparison sites a sample of approximately 75 warrants per site—representing from 8 to 50 percent of the number of search warrants issued annually in the six sites—would be not only feasible to collect but also adequate to determine whether patterns observed in River City were present elsewhere. Samples of records in each of the six cities were drawn from the logs or files covering January 1 to June 30, 1980. This period was selected as being old enough to allow for the disposition of all but the most protracted criminal cases (of which we encountered only a handful); recent enough to be relevant and interesting; and broad enough (1) to accommodate a sample of 75 cases (even in the smallest of the comparison research sites) and (2) to reduce the possible biases of seasonal patterns of crime or criminal investigation.

The definition of "a case" for the archival record search was an "issued warrant." The previously mentioned absence of recorded evidence of search warrant applications that were rejected made it impossible to document how many applications had been turned down during the sampling period or the characteristics of rejected applications. The strategy for selecting cases from the sampling frame varied slightly across jurisdictions, according to the peculiarities of the specific data set involved and the judgment of project staff. For example, when several warrants were discovered that were clearly related to a single criminal incident or series of related incidents, the later warrants in the series were omitted from the analysis and warrants related to a different criminal incident or incidents were examined instead, to provide greater breadth to the sample.

In all but one of the jurisdictions (Hill City), the original of a search warrant, together with the affidavit and return, was filed in roughly chronological order in envelopes or boxes kept separately from other court records whether or not a criminal case resulted from the search. This made it relatively easy for us to draw our sample and examine the original documents.

In order to link the search warrants in our sample to an actual criminal case, two methods were used. The first method, which proved to be the common denominator of the search process in every study site, involved the tracking of the names of all suspects identified in the affidavit or return for the warrant. First, all names appearing in the affidavit were listed. Then, each name on the list was checked against an alphabetized list maintained by the misdemeanor court of defendants against whom charges had been filed for a period of at least one year after the issuance of the warrant.[3] Whenever there was a "match," the docket number assigned the case was used to retrieve the actual case file. If the misdemeanor court jacket indicated that the case was bound over for trial in the felony court, the felony court docket number (retrieved from the misdemeanor court jacket or the felony court master docket) was used to retrieve the felony court case jacket. The actual case files from the misdemeanor and felony courts were the source of all information about the processing (including motions) and disposition of the case. Before data were actually coded, a check of the contents of the file (charge, date, reference to or a copy of the search warrant) was made to confirm that it did, indeed, derive from the incident that was the focus of the warrant.

The second method involved the use of a Master Search Warrant Log maintained by a court clerk to locate the docket number assigned to a case. Two sites (River City and Hill City) had such a log. In both cities, the log was used in addition to the name-tracking method.[4]

It should be noted that even with the use of this second method, there are several ways that a criminal case resulting from a warrant might have been missed. In some instances, there were no names listed in the affidavit or return. In others, the person named was not the one charged. In still others, the affidavit contained only a nickname or alias that could not be traced or matched to a valid identity. Finally, it is possible that some search warrants were never properly filed or logged. What biases may have been introduced into the data as a result of such problems is unascertainable.

The data sought for each case in the sample included the time, date, and participants in the review proceeding; the area to be searched, the

# List of Data Elements Sought

**Identifying information**
- Name of reviewing magistrate[1]
- Date of warrant application
- Time of day of warrant application
- Rank of officer applying for warrant
- Name of first officer applying for warrant[1]
- Name of second officer applying for warrant[1]
- Department or office to which applicant belongs
- Police district or division to which warrant applicant is assigned

**Scope of search warrant**
- General object of the requested search (residence, business, auto, etc.)
- Specific area to be searched (hotel, house, suitcase, etc.)
- Number of different crimes (e.g., robbery, burglary, rape) being investigated according to the affidavit.
- The number of crimes (incidents) being investigated
- Central offense
- Secondary offense
- Materials being sought (up to three types of materials could be listed)
- Were more than three kinds of materials being sought in the warrant application?

**Basis for search warrant application**
- Evidence upon which warrant application was based (up to four sources of evidence could be listed)
- Did application rely on information provided by confidential informant(s)?
- Is informant a law enforcement officer?
- Is informant named?
- Did the affidavit state that the informant is an "upstanding member" of the community?
- Does informant have history of providing information that has *led to arrest(s) in the past?*
- Does informant have history of providing information that has led to *seizures in the past?*
- Does informant have history of providing information that has led to *conviction in the past?*
- Did informant make a "Declaration Against Interest"?
- Were the details provided by informant so thorough as to create a reasonable inference that information provided was gained reliably?
- Was any of informant's information corroborated?
- Were critical aspects of informant's information corroborated?
- Were numerous aspects of informant's information corroborated?

**Magisterial review procedures**
- Context in which this warrant was reviewed (e.g., separately, with other search warrants for the same investigation, with search warrants for a different investigation, with arrest warrants)[2]
- Did magistrate query applicant?[3]
- How many substantive questions did magistrate ask applicant?[3]
- Did applicant offer additional substantive information (not provided in application) to the magistrate during the proceeding?[3]
- Duration (in seconds) of warrant application proceeding[2]
- If warrant was not issued, did magistrate give applicant a reason for disapproval?[3]

**Disposition of the application**
- Disposition of warrant application
- Number of warrants (other than that relating to instant application) issued in relation to instant case
- If warrant issued, was authorization given for a nighttime or Sunday search?
- If warrant issued, was authorization given for a no-knock entry?

**Execution of the search warrant/filing of the return**
- Was warrant executed?
- Date warrant executed
- Time warrant executed
- Was return filed?
- Name of officer who signed return?[1]

**Results of the search**
- Was a seizure made?
- Materials seized (three types of materials could be listed)
- Were items seized that were not contemplated in the warrant application?
- What proportion of the items named in warrant were seized?

*continued*

**List of Data Elements Sought,** *continued*

**Arrests and prosecutions related to the search warrant**

- Name of person arrested in case[1]
- Date of arrest(s) of arrestee related to warrant[4]
- Was a criminal case filed by the prosecutor against arrestee?[4]
- Date case filed against arrestee[4]
- Misdemeanor court case number assigned the case against arrestee[4]
- Felony court case number assigned to the case against arrestee[4]
- Disposition of case against arrestee[4]
- Date of disposition against arrestee[4]
- Was a motion to suppress evidence filed in case against arrestee?[4]
- Was an appeal filed in case against arrestee?[4]
- Was the appeal warrant-related?[4]
- Was the warrant-related appeal successful?[4]
- Was a motion to disclose identity of informant filed?[4]
- Was a motion to disclose identity of informant successful?[4]
- Name of judge ruling on the suppression motion[4]

1. Actual name not entered into computer data file.
2. Observed proceedings only.
3. Observed proceedings and telephonic application transcripts only.
4. Identical sets of data were recorded for up to four arrestees.

items sought, and the alleged crime(s) involved; the basis for the application and the information provided to support the statements of any confidential informants; whether the application was approved or denied; the time, date, and results of the execution of an approved warrant; whether any arrests were made, charges filed, and convictions obtained relating to the warrant; and whether any motion and appeal was filed relating to the warrant and, if so, its outcome. (See detailed list of the data elements sought.)

It is important to recall the caveat issued earlier. The archival data were used principally to facilitate the exploration of significant patterns or the conspicuous absence of certain events (e.g., successful suppression motions), and to be modestly demonstrative of overarching patterns. Owing to the fact that the cities used in this study are not necessarily representative of all cities and that the cases included in each city sample were not selected in strictly random fashion, statistical reliability of the archival data is not claimed. They remain highly valuable, however, in conjunction with the other sources of data reported here.

*Interviews.* The third data source tapped in our investigation of search warrant processes turned out in many respects to be the most revealing. It became clear that some of the most interesting and relevant material would come from the knowledge and perceptions of the participants in the process rather than from statistical inferences. Notwithstanding our efforts at quantification and measurement, many of the most significant insights about the search warrant process could

not be revealed in this fashion. In an area in which procedure and policy are so largely dictated by individual styles and philosophies, no investigation would be complete that failed to address such factors.

In all seven jurisdictions we sought the reactions and counsel of those involved in the search warrant process on a daily basis—law enforcement officers (particularly those assigned to or in charge of narcotics control and stolen property divisions), prosecutors (particularly those whose duties included screening warrants or opposing motions to suppress), judges (particularly those who regularly review warrant applications or hear motions to suppress), defense attorneys, and court administrative personnel. Specifically, extended interviews were conducted with sixteen judges, nine deputy prosecutors, and more than two dozen police officers. In addition, discussions were held with at least two court clerks or deputy clerks in each city and interviews were conducted with public defense attorneys in three sites.

The specific questions in these semi-structured interviews addressed a variety of subjects including, but not limited to, the following:

> The respondent's perception of how the warrant process works in his or her jurisdiction, the strengths and weaknesses of that jurisdiction's approach compared with approaches used by other jurisdictions, and the procedures or requirements that enhance or frustrate the competing criminal justice objectives of crime control and due process.
>
> The respondent's philosophy about the proper role of the criminal magistrate in the course of the search and seizure of criminal evidence and the extent to which the magistrates in the respondent's jurisdiction conform to that role
>
> His or her interpretation of the "probable cause" standard for issuing a search warrant and assessment of the propriety and sufficiency of that standard
>
> Each respondent's assessment of the number and type of warrants issued in the jurisdiction and the number denied, and his or her perception of the outcome of searches conducted pursuant to a warrant in terms of evidence seized and cases prosecuted

Both open-ended and closed-ended questions were asked in each interview. The interviews averaged an hour in length. Most were conducted with a single respondent, although in a few instances we had the opportunity to engage in open exchanges with groups of law enforcement officers. Many of the respondents we talked with had progressed through several careers (e.g., from prosecutor to defense attorney to judge) and could address the warrant questions from diverse perspectives. Most of the respondents were remarkably candid. Tran-

## Table 2
Data-Collection Strategies

| | Review proceedings observed (including follow-up) | Archival records of issued warrants reviewed | System participants interviewed |
|---|---|---|---|
| Intensive Site | | | |
| River City | 84 | 405 | 12 |
| Comparison sites | | | |
| Border City | .... | 74* | 5 |
| Forest City | .... | 75 | 7 |
| Harbor City | .... | 75 | 4 |
| Hill City | .... | 75 | 3 |
| Mountain City | .... | 65 | 13 |
| Plains City | .... | 75 | 16 |
| Total | 84 | 844 | 60 |

* 11 of these included a transcript of a telephonic application.

scripts or detailed summaries of each interview were prepared and reviewed closely by project staff.

A summary of the data-collection strategies used and the number of cases or persons involved is presented in Table 2.

*Data Analysis.* The information obtained from the observations and records was entered directly onto code sheets to facilitate computer analysis. Before entry of the data into the computer, staff met to reconcile any remaining discrepancies in coding and to develop the final version of the model of the search warrant process described in chapter 2. All names of individuals were deleted or assigned numbers before entry of the data into the computer.[5]

In presenting data that summarize experience across cities, the *mean percentage* for the seven cities is used rather than the percentage of the total number of cases. This procedure is dictated by the highly disproportionate number of cases in the sample from River City: 489 out of the total of 928, or 53 percent. The mean percentage has the effect of weighting each city equally in arriving at a summary statistic to represent the "average" experience across all seven. The procedure creates an awkward wording problem, however. For example, the

average percentage of search warrants in each city that involved the search of a vehicle was 20. In the text, this statistic—the mean percentage—may occasionally be discussed in a way that could be interpreted as referring to 20 percent of the 928 cases in the total sample. We have tried to avoid such confusion, but, for the record, in a discussion of data across cities, the raw percentage is never reported.

Finally, it should be noted that since a formal opinion survey was not conducted as part of the project, it is impossible to say what proportion of judges, prosecutors, and police officers subscribe to the statements of interviewees quoted in this volume. A quotation was not used, however, unless the point had been raised in more than one site or by several interviewees. Given this rule of thumb and the range of persons with whom we spoke, we are confident that the comments and observations presented are illustrative of the variety of views held by members of the criminal justice and judicial communities.

# Notes to Chapter One

1. See Appendix.

2. It should be noted that because jurisdictions were selected in which search warrants are sought with some degree of frequency, the figures presented on the use of search warrants may be somewhat higher than for American urban jurisdictions as a whole.

3. Note that in River City, the court of general jurisdictions tries both misdemeanor and felony cases and a special section of that court performs many of the functions handled by a separate misdemeanor court in other jurisdictions.

4. In River City the Master Search Warrants Log sometimes registered a police "identification number," which, when run through the police computer would indicate whether a person was ever arrested in association with that investigation. That number was cross-indexed with a police "investigation number," which was in turn cross-indexed to a list of persons arrested. The names of arrestees could then be checked manually against the voluminous tomes of the felony court case log to discover the felony court docket number assigned to the case. Using this number, it was possible to locate the actual criminal case file or "jacket," examination of which yielded the desired information about motions, dispositions and appeals.

In Hill City, a clerk would fill in a misdemeanor court docket number on the Master Search Warrant Log, in many instances, if a criminal case had been filed. This number could be cross-checked on the court's computer to find the felony court docket number to determine whether the case was subsequently bound over to the felony court. The felony docket number could then be used to find the case file in which the search warrant documents were located. Search warrant papers not related to a filed case were stored separately. Whenever a misdemeanor docket number was not listed beside a search warrant entered on the master log, the application and other materials were usually in this separate storage area. Our sample in Hill City was drawn from the Master Search Warrant Log.

5. The Statistical Package for the Social Sciences (SPSS) was used to perform the tabulations and cross-tabulations of the data presented in the report.

CHAPTER TWO

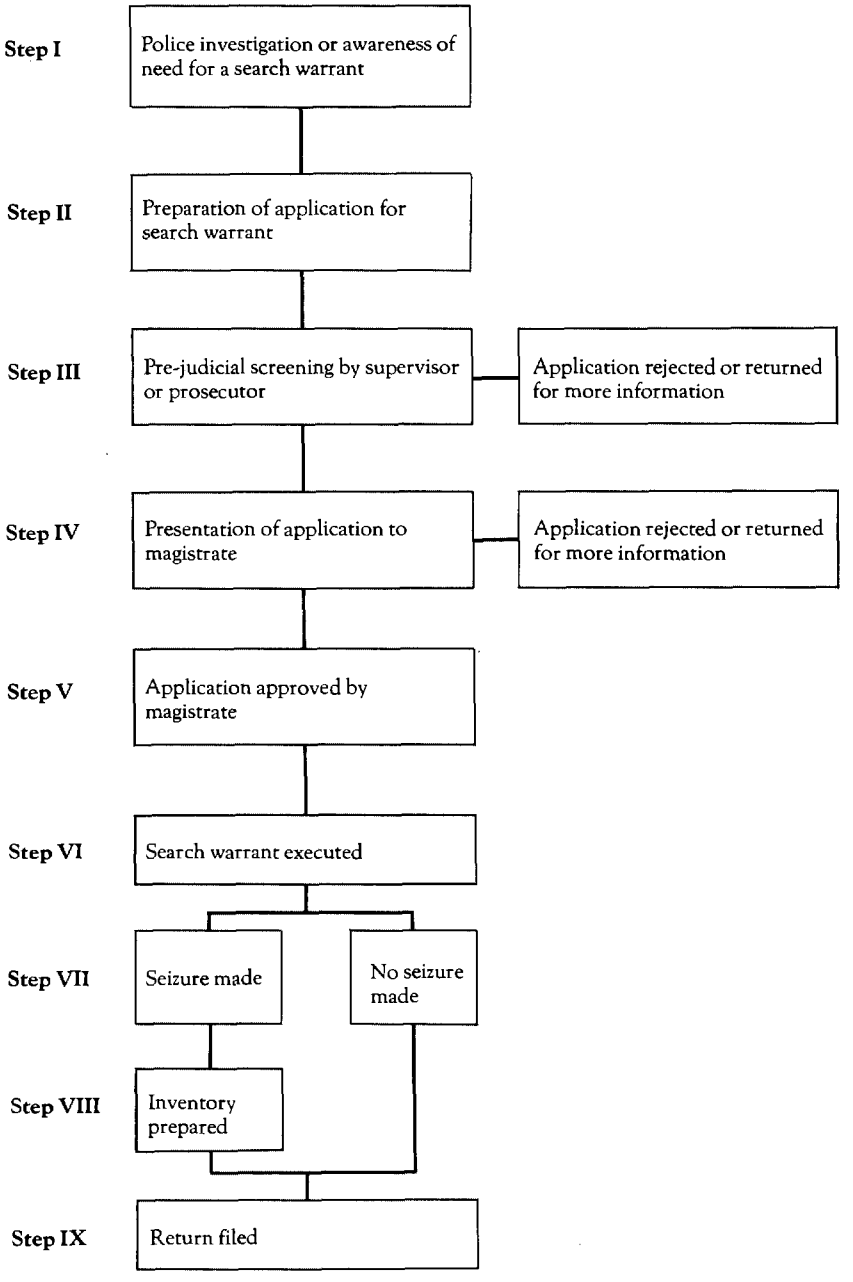
# The Search Warrant Process

Although the particular steps that may be followed in obtaining and executing a search warrant may vary from one jurisdiction to the next, it is nevertheless both possible and useful to posit a prototypical search warrant application process. Such a conceptual model is presented in Figure 1. It serves two purposes.

First, the model outlines the procedural milestones that every jurisdiction may logically and legally include in its own warrant application system. Nine such milestones (steps) are noted, beginning with the investigation disclosing the need for the search warrant and running through application preparation and review, execution of the warrant, and submission of the warrant return. Where notable variations (e.g. telephoned applications) distinguish the approach of a particular jurisdiction, the model will easily accommodate, even facilitate, their recognition and discussion.

Second, as the model outlines the significant events of the search warrant review process, it simultaneously tracks those logical junctures at which some tangible record of proceedings might conceivably be generated. It should be noted that the model more accurately represents the steps in the warrant process than the points at which some tangible record documents the process. This discrepancy (between the occurrence of an event that objectively *must have happened* in the past and the absence of tangible evidence of that event's occurrence) has proven, in some instances, to be a significant impediment to research regarding the search warrant process.

## Figure 1
The Search Warrant Process



This chapter will review each of the nine steps in the search warrant application process as it was observed in general and as it operates in the study sites, noting the document recorded at each stage and reporting some descriptive statistics about the particulars of that process. It will then examine the series of reviews to which a search warrant may be subjected following initiation of a criminal proceeding.

## Step I: Police Investigation or Awareness of a Potential Search-and-Seizure Incident

As noted in the Introduction, past studies have suggested that search warrants have been sought in relatively few cases.[1] Table 3 shows that although more frequent than in pre-*Mapp* days,[2] obtaining a search warrant is still a relatively rare phenomenon. The table compares the number of search warrants issued in the largest city, county, or judicial district of a state during 1980 with the number of major offenses known to the police in that city or the major city within the county or district. The number of warrants is based on estimates provided by the staff of the respective administrative offices of the courts for the states listed.[3] The number of reported offenses is from the FBI's Uniform Crime Report for 1980.[4] Because the number of issued warrants presented in the table is simply an estimate, in many instances, and the definition of "index crimes" does not include crimes of vice such as drug offenses, a ratio of issued warrants to index crimes cannot be used to compare jurisdictions. Nonetheless, the table makes clear that the overwhelming majority of criminal investigations are conducted without recourse to a search warrant.

Not only are search warrants sought in relatively few investigations but the number of law enforcement officers who seek warrants is quite limited. Our interviews with law enforcement officals suggest that search warrants are primarily the province of detectives or officers assigned to specialized investigative units rather than of officers on routine patrol. Although in Forest City a recently enacted departmental policy expressly encouraged uniformed officers to seek warrants in the course of their crime discovery and prevention activity, applications for the most part are the product of follow-up investigations of already known offenses (e.g., burglaries) or part of continuing investigatory or enforcement actions (e.g., fencing, narcotics). When a uniformed officer finds that a search requiring a warrant is called for, the usual practice is to call a

supervisor or specialized investigation unit to obtain advice on whether a warrant is required, and, if so, to obtain assistance in procuring one.

## Table 3

Search Warrants and Index Crimes

Comparison of Number of Search Warrants in Largest City, County or Judicial District With Number of Index Crimes in Largest City in 1980

| State | Search warrants issued in largest local jurisdiction | Index crimes known to police in largest city |
|---|---|---|
| Alaska | 600 | 11,894 |
| California | 1,117[a] | 301,431 |
| Colorado | 1,000 | 59,399 |
| Delaware | 550[b] | 40,305[b] |
| District of Columbia | 966 | 64,041 |
| Hawaii | 195 | 57,878 |
| Illinois | 1,546 | 198,521 |
| Iowa | 250 | 19,615 |
| Kansas | 300 | 24,769 |
| Kentucky | 500 | 20,228 |
| Louisiana | 837 | 53,575 |
| Maryland | 780 | 77,480 |
| Michigan | 400 | 129,510 |
| Minnesota | 771[c] | 36,023 |
| Nebraska | 250 | 24,922 |
| New Hampshire | 75-100 | 6,460 |
| New Mexico | 300 | 29,326 |
| North Dakota | 30 | 3,446 |
| Oklahoma | 150 | 36,622 |
| Oregon | 319 | 41,303 |
| Pennsylvania | 3,000 | 101,412 |
| Utah | 150 | 19,157 |
| Vermont | 30 | 977[d] |
| Virginia | 798[e] | 20,425 |
| West Virginia | 250-350[b] | 49,266 |
| Wisconsin | 300 | 41,808 |

*Note:* Index crimes are murder, non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, theft, motor vehicle theft, and arson. States that could not provide this information are omitted.

a. Central Los Angeles District only.
b. Statewide.
c. Warrants returned rather than warrants issued.
d. South Burlington only.
e. 1979 data.

The vast majority of searches are conducted without a warrant, usually with the consent of the suspect (or someone in legal control of the area to be searched) or incident to the arrest of the suspect. Delay and inconvenience were widely cited as the principal basis for officers' reluctance to seek a search warrant.

Said one detective in Mountain City: "[Y]ou see, search warrants are double the time, sometimes triple the time that you take on arrest warrants, and arrest warrants are long enough. Arrest warrants, you figure a half a day."

Another added: "Actually, there are a lot of warrants that are not sought because of the hassle. You just figure it's not worth the hassle. . . . I don't think you can forgo a case because of the hassle of a search warrant, but you can. . . work some other method. If I can get consent [to search], I'm gonna do it." This detective suggested that as many as 98 percent of the searches were by consent. Ironically, this may be obtained through an officer's mere threat to secure a warrant should the party refuse voluntarily to grant admission to the premises.

We also were told of a host of other strategies that police use to conduct a search without having to go to the trouble of obtaining a warrant, such as by timing an arrest so as to maximize the possibility of being in a position to conduct a search legally and seize any contraband that might be discovered as a result (e.g., by arresting suspected drug dealers in their cars rather than at home).[5]

## Step II: Preparation of an Application

Once a police officer decides a search warrant is necessary, the usual procedure is for the officer to go back to the stationhouse and prepare the application, affidavit, and warrant. During the day, clerical help is usually available to type the materials. After business hours, the investigating officers must type the documents themselves. (We found only a handful of handwritten submissions.) If the situation is novel or the officer is unaccustomed to preparing the application papers, assistance may be sought from colleagues, supervisors, or assistant prosecutors. Except under the alternative procedures described below, investigating officers appear to go to prosecutors for help only on a personal basis—i.e., the officer and the assistant prosecutor have worked together in the past and have developed trust in each other.

We found three alternatives to this operating procedure. In a few jurisdictions (e.g., Mountain City and suburban areas surrounding Plains

City), the search warrant application documents are prepared for the officer by a deputy prosecutor on the basis of the information provided by the officer. In other places, such as Plains City itself, Border City, and to some extent Forest City, the prosecutor systematically reviews all search warrant applications before they are presented to the magistrate and occasionally goes so far as to accompany the applying officer to the judge's chambers to assist in the presentation of the application.

Finally, in rural areas of the states in which Mountain City and Forest City are located and in Border City, a significant number of warrants are obtained by telephone. As described in more detail in chapter 5, officers in Border City seeking a search warrant by telephone first prepare a field sheet noting the items sought, their location, and the basic information required to support a finding of probable cause. They then contact the assistant prosecutor assigned to warrant duty and discuss more fully the basis for seeking a warrant.

## Step III: Pre-Judicial Screening

In all the cities we visited, warrant applications were reviewed either by a supervising officer or by a prosecutor, or in some instances by both, before they were submitted to a magistrate.[6] Table 4 outlines the extent and formality of each jurisdiction's system of pre-judicial review of the warrant application. Generally, the review by a supervisor is a matter of informal practice. Prosecutorial screening, on the other hand, is usually the result of official policy.[7]

The level of involvement of prosecutor's offices varied both among and within the jurisdictions. The range of involvement extended from the police officer summarizing the facts over the telephone and obtaining a verbal authorization, to the prosecutor reading and initialing the papers prepared by the officer, to the practice, described above, in which assistant prosecutors would actually write the affidavit and application. Because no records are kept of the number of applications rejected outright during the preliminary review or sent back for additional information, we were not able to obtain a clear picture of the effectiveness of this review. From our interviews, however, it appears that although few applications are screened out completely, in a signficant number of cases (the estimates varied from 10 percent in Plains City to between 33 and 50 percent in Forest City) the screening prosecutor will ask the police officer to add information to the affidavit. Examples of

## Table 4
Application Preparation Procedure

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City |
|---|---|---|---|---|---|---|---|
| Officer prepares application, occasionally consults others | | X | | X[b] | X[c] | | |
| Police supervisor reviews or assists preparation of application | X | | X[a] | | | | |
| Prosecutor reviews warrant prepared by officer | | | X | X | X | | X[d] |
| Prosecutor actually drafts application | | | | | | X | |

a. Police supervisors are occasionally involved in order to "get it right" before the warrant goes to the prosecutor. Judges routinely inquire as to whether the prosecutor reviewed the application.
b. Narcotics division only. The Standard Operating Procedures of the prosecutor's office do not provide for this exception.
c. Some units and individuals.
d. A "duty prosecutor" must approve and sign the affidavit before it is allowed to be presented to a magistrate. Telephone applications involve a three-way conference call between the applying police officer, the prosecutor, and the magistrate during which the prosecutor typically prompts the officer.

suggested insertions are information concerning the reliability of the informant, a description of the informant's past performance, and the time at which the criminal activity or evidence was observed.

We were told in two jurisdictions that if a prosecutor's initials do not appear on the application, the reviewing magistrate will ask whether it has undergone prosecutorial review. Several judges stated that the quality of affidavits had improved since the initiation of prosecutorial screening of warrant applications. A possible explanation was offered by one Forest City judge who observed that his or her standard for review was higher as a prosecutor than as a judge. As a judge, this magistrate will sign any warrant that meets the threshold standards, but as a prosecutor, he or she was concerned about presenting as strong a future case as possible. In both Mountain and Plains Cities, applications sometimes were screened by supervising police officers before being sent to the prosecutor, to forestall problems later on.

## Step IV: Presentation to the Magistrate

Once preliminary approval has been obtained, the applicant goes to the courthouse, or, if the court is not in session, to the home of a judge to present the application, warrant, and affidavit. Generally, the applicant is alone, although in both River City and Harbor City there were two affiants in about a third of the applications. In very rare instances, the applicant will bring along a witness or informant. In the overwhelming number of the warrant applications examined during the study, the applicant was a municipal police officer. However, as indicated in Table 5, a number of other types of officials applied for warrants.

The practice of determining which judge to go to during normal work hours varied among the jurisdictions. In most jurisdictions in the United States, almost every judicial officer (from a justice of the peace to the chief justice of the state's highest appellate court) is authorized by statute to issue a search warrant.[8] In practice, the authority is exercised almost entirely by felony and misdemeanor court judges, with the latter group actually issuing the search warrant in all but a handful of instances in each of the cities studied.

In Border City and Mountain City, the responsibility for signing warrants was rotated among the lower court judges. In Plains City and Harbor City, the courtrooms for some (Plains) or all (Harbor) of the

**Table 5**
Employers of Applicants for Search Warrants

| | Number of applications | Percentage of applications |
|---|---|---|
| Local police[a] | 823 | 88.7 |
| Sheriff's office | 28 | 3.0 |
| State police | 8 | 0.9 |
| State narcotics bureau | 47 | 5.1 |
| Prosecutor[b] | 18 | 1.9 |
| Local fire department | 2 | 0.2 |
| State regulatory agency[c] | 2 | 0.2 |
| | 928 | 100.0 |

a. Includes municipal, suburban, and harbor police departments.
b. Includes district, county, and city attorneys.
c. E.g., welfare department, pharmacy board.

misdemeanor court judges are immediately adjacent to police stations, and police officers generally, though not always, went to the judge at the station to which the officers were assigned to present a search warrant. In River City, a single magistrate for the entire city is on duty at the courthouse during weekday working hours. In Forest City, officers are able to go to any judge on the county misdemeanor court or municipal court bench.

At night and on weekends, each of the cities uses a duty judge system whereby one judge remains available to sign search warrants and arrest warrants. This duty is rotated among the judges on the lower court bench. In all but River City this is accomplished through a call-in or a beeper system. In River City, part-time magistrates are on duty at the courthouse all night and all weekend on a rotating basis to review warrants and conduct bail hearings. This greatly simplifies the officer's task of obtaining review of a warrant application.

The degree to which officers actually went to the duty magistrate varied considerably. Table 6 shows the percentage of the applications reviewed by the five magistrates in each city who signed the most warrants in our sample, and Figure 2 plots the percentage of misdemeanor court judges against the percentage of search warrants reviewed. As illustrated on both the table and the graph, across all the study sites at least 45 percent of the search warrant applications were reviewed by no more than 21 percent of the judges.

Given the diversity in organizational structures, the varying workload concentrations lead to differing conclusions. In River City and Plains City, the pattern is in accord with the organizational scheme. The magistrate who reviewed the most warrants in River City is the one on duty during weekday working hours, and the two busiest magistrates in Plains City have their courtrooms next to the police department headquarters. In Harbor City, the courtroom of the judge who reviewed the most warrants is also next to the police headquarters, but the proximity of the judge to the stationhouse does not explain all the variance. There are many other courtrooms adjacent to the several district police stations in Harbor City. Furthermore, the magistrate who apparently issued the most search warrants received warrant applications from officers assigned to several (three or more) different districts.[9]

The concentration in Forest City is not as easily explained by scheduling or location. The home of the magistrate who received the most applications was close to a convenient freeway exit,[10] but this magistrate had rejected only one search warrant application in more than

## Table 6
Frequency of Review by Magistrates

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Magistrate No. 1 | 45% | 33% | 27% | 53% | 28% | 25% | 26% | 34% |
| Magistrate No. 2 | 13 | 13 | 23 | 17 | 9 | 25 | 16 | 17 |
| Magistrate No. 3 | 12 | 12 | 9 | 13 | 8 | 17 | 12 | 12 |
| Magistrate No. 4 | 11 | 8 | 9 | 12 | 8 | 14 | 10 | 10 |
| Magistrate No. 5 | 9 | 7 | 7 | 3 | 7 | 9 | 7 | 7 |
| Other magistrates | 10 | 27 | 25 | 1 | 40 | 11 | 30 | 21 |
| Total[a] | 100 | 100 | 100 | 99 | 100 | 101 | 101 | |
| Number of warrant applications | 489 | 75 | 75 | 75 | 75 | 65 | 74 | |
| Number of judges who actually reviewed applications | 13 | 12 | 16 | 6 | 16 | 7 | 17 | |
| Number of misdemeanor court judges in the courts sampled[b] | 7[c] | 26 | 16 | 5[d] | 15 | 11 | 20 | |
| Number of felony court judges[b] | 10 | 23 | 15 | 38 | 29 | 11 | 41 | |

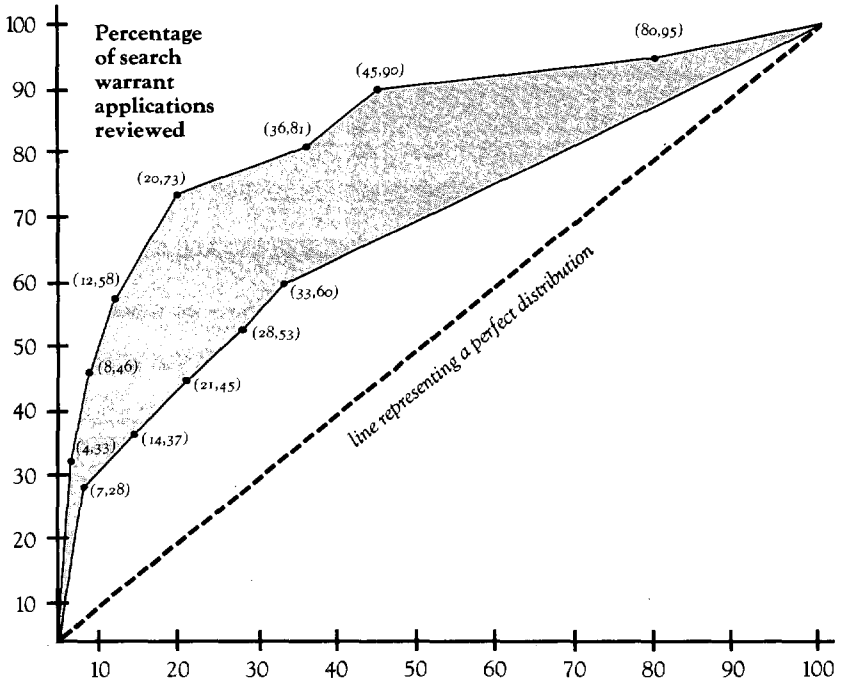
a. Totals greater or less than 100 percent due to rounding.
b. May include both judges who took office and judges who left office during 1980.
c. Including 2 ad hoc judges filling in as magistrates.
d. There were 17 state misdemeanor court judges in other districts in the county.

a decade and a half as a judge. The more even distribution in Mountain City and, to a lesser degree, Border City suggests that the duty arrangement system is working to some extent, although a few magistrates are still signing a disproportionately large number of warrants.[11]

When the warrant application is presented in the courtroom, the review consists of a hushed conversation at the bench. Often a judge will call a brief recess and have the officer make the presentation in chambers. The search warrant application is always considered in isolation from other court business, although several warrants may be reviewed

## Figure 2

Percentage of Search Warrant Applications Reviewed in Each Jurisdiction by the Percentage of Misdemeanor Court Judges




The presentation of data in this form may be new to many readers. The basic plot, called a Lorenz curve, describes the degree to which a total workload (in this instance warrants issued) is evenly distributed across the persons performing the work (i.e., magistrates). The plot of a perfectly distributed workload would follow the diagonal dotted line so that 10% of the judges (horizontal coordinate) conducted 10% of the warrant reviews (vertical coordinate); 25% of the judges conducted 25% of the reviews, and so on. The extent to which a plotted curve deviates from this diagonal represents the magnitude of the "inequity" that can be said to characterize the workload distribution.

The unit of analysis here is the city. The coordinates representing the cumulative percentage of warrant reviews accomplished by a corresponding cumulative percentage of magistrates performing those reviews were plotted for *each* of the seven study sites. Then, to simplify interpretation of the figure, only the *outermost* coordinates were retained in this figure (i.e., the cities). The two curves that remain can be thought of as the theoretically "best" and "worst" cases (theoretically because they are composites of several cities).

The plots for each of the jurisdictions fell somewhere within the shaded area. Thus, 20% of all the judges reviewed somewhere between 40% and 70% of the warrants. Similarly, one-half of all the warrants were issued by between 10% and 25% of the misdemeanor court magistrates.

## Table 7
Duration of Review Proceedings in River City

| Elapsed time | Percentage of applications |
|---|---|
| 1 minute or less | 10 |
| 1.1-2.5 minutes | 55 |
| 2.6-5.0 minutes | 25 |
| Longer than 5 minutes | 11 |
| Total | 101 |
| Number of proceedings = 84 | |
| Total greater than 100 percent is due to rounding. | |

simultaneously when they relate to the same case, or a search warrant may be considered together with both related and nonrelated arrest warrants. Overall, an average of 86.3 percent of the applications were reviewed singly; another 11.1 percent were considered in conjunction with applications for other search warrants regarding the same case. In only 2.6 percent of the cases was an application considered in conjunction with applications for search warrants in completely unrelated cases.

As shown in Table 7, the presentation seldom takes very long. The average length of the magisterial review in the proceedings we observed was two minutes and forty eight seconds. The median time was two minutes and twelve seconds. In River City, the reviewing magistrate asked at least one question in 48 of the 84 observed cases (57 percent). Of the eleven transcripts of telephone applications examined in Border City, ten contained questions asked by the judge (91 percent). In response to a question, the applicant offered to the magistrate information not contained in the affidavit in 16 of the 84 observed River City cases (19 percent).

## Step V: Approval of the Application

After examining the application and affidavit and perhaps querying the applicant, the magistrate must determine whether there is probable cause to believe that the listed items are connected with a criminal offense and that they are located at the place specified in the warrant. It is

## Table 8
Central Offense Leading to the Warrant

| Type of offense | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Violent crime | 14% | 4% | 21% | 51% | 21% | 19% | 19% | 21% |
| Property crime | 34 | 15 | 51 | 9 | 32 | 37 | 27 | 29 |
| Drugs | 26 | 67 | 23 | 37 | 41 | 35 | 35 | 38 |
| Vice and morals | 26 | 15 | 1 | 1 | 0 | 3 | 15 | 9 |
| Other | 0 | 0 | 3 | 1 | 5 | 6 | 4 | 3 |
| Total percentages | 100 | 101 | 99 | 99 | 99 | 100 | 100 | |
| Number of warrants | 478 | 75 | 75 | 75 | 75 | 65 | 74 | |

Totals greater or less than 100 percent are due to rounding.

unfortunate, though not surprising, that documents are not routinely collected that reveal the number of applications that are denied by magistrates. Normally a rejected application is destroyed or revised by the applicant. According to our observations and interviews, the rate of outright rejection is extremely low. Most of the police officers interviewed could not remember having a search warrant application turned down. The estimates by the judges interviewed varied on the number of rejections from almost never to about half. Of the 84 warrant proceedings observed, 7 resulted in denial of the application (8 percent). We were told that most judges permit the officer to add information during the review if the magistrate wishes additional information to be included. Usually the judge, officer, or both will initial the changes. Thus, most of our data are derived from those warrant applications that have survived the pre-judicial screening and have been approved by the magistrate.

### *Type of Crime*

The applications in our sample were usually based on a single type of crime (81 percent). In the relatively rare instances when more than one type of crime was being investigated, we assessed which criminal event or allegation was most central to the request. Table 8 summarizes these "central" crimes using the broader categories of "crimes of violence" (murder, sexual assault, kidnapping, aggravated assault, robbery),

"property crimes" (burglary, fencing, larceny, theft, vandalism, motor vehicle theft, arson), drug offenses, other "vice and morals charges" (e.g., illegal gambling, sale of pornography, obscene phone calls, prostitution) and miscellaneous (including cruelty to animals, food stamp and Medicaid fraud, liquor law violations, and doing business without a license). There are differences among the cities, but the overall conclusion to be drawn from the table is that most of the cities behaved in remarkably similar ways. Harbor City stands out because of the very large proportion (67 percent) of the search warrants involving drugs and the very infrequent use of warrants (4 percent) for violent crimes. River City is notable for the large proportion of nondrug vice and morals charges (26 percent). Forest City is differentiated by the high proportion of violent offenses involved in its sample (51 percent). But aside from these aberrations, the cities look very much alike. In all except Forest City, the top-ranking central offense involved drug or property crime. Indeed, in all except Forest City, those two categories, together, accounted for 60 to 70 percent of the total search warrants issued. The high percentage of search warrants used in property and violent crime investigation differs somewhat from the earlier studies in which the use of search warrants appeared to be limited primarily to drug and vice cases.[12]

***Place to be Searched***

In accord with the historical basis for the warrant requirement, warrants were most often sought for searches of private residences. As shown in Table 9, vehicles constituted the next largest category on average, with business third. Again, the patterns are remarkably consistent. The high number of business searches in River City corresponds to the more stringent enforcement of anti-pornography ordinances there. Similarly, the emphasis on private clubs in Harbor City and telephones in Border City is attributable to gambling enforcement activities in those communities.

Table 10 indicates that about a sixth of the warrants examined, authorized searches of more than one type of target. A clear difference among the jurisdictions is evident here. Harbor and Hill Cities included persons as secondary targets of a search in over half their warrants. In contrast, Border City did so in just over a fifth of its cases, and the other cities only rarely included persons as a secondary target.

***Items Sought***

The items sought under the authority of a search warrant (see Table 11) closely parallel the central offenses (see Table 8). For each warrant

## Table 9
Primary Area to Be Searched

| Site specified in warrant | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Private residence | 65% | 73% | 59% | 65% | 83% | 69% | 51% | 67% |
| Vehicle | 9 | 8 | 29 | 21 | 5 | 11 | 12 | 14 |
| Business, office warehouse | 20 | 9 | 8 | 3 | 8 | 9 | 15 | 10 |
| Hotel or other rented room | 3 | 1 | 1 | 3 | 1 | 1 | 3 | 2 |
| Suitcase or trunk | 0 | 0 | 0 | 0 | 1 | 3 | 1 | 1 |
| Private club | 1 | 7 | 0 | 0 | 0 | 0 | 0 | 1 |
| Telephone (non-wire tap) | 0 | 0 | 0 | 0 | 0 | 0 | 8 | 1 |
| Other (e.g., jail cell, mobile home, terminal locker, garage, storage area, person) | 3 | 1 | 3 | 8 | 1 | 6 | 10 | 5 |
| Total | 101 | 99 | 100 | 100 | 99 | 99 | 100 | |
| Number of warrants | 489 | 75 | 75 | 75 | 75 | 65 | 74 | |

Note: Primary was defined as the only area listed or the area that appeared from the affidavit to be the most important.

Totals greater or less than 100 percent are due to rounding.

issued, field researchers identified the three principal categories of material specifically named in the warrant application. It was rare that more than three categories were named. Drugs and stolen goods accounted for the greatest number of items sought, but "other documents" was the most frequently sought item in four of the cities. In those jurisdictions the search warrant included a standard provision authorizing searches for and seizures of "rent receipts, personal correspondence and effects, keys and other items that demonstrate dominion or control" of the premises. The language is perfunctory, but grants near carte-blanche authority to search, inasmuch as such evidence of dominion and control could reasonably be discovered almost anywhere in the residence. To an officer whose search for a stolen stereo set would otherwise be severely restricted to those areas where a bulky stereo might be secreted, the routine authorization to go through cookie jars, desk and dresser drawers, office papers, and the like in search of documents

## Table 10
Areas to Be Searched

| Areas specified in warrant | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Single target | 94% | 43% | 99% | 89% | 31% | 86% | 70% | 73% |
| Premises and person | 1 | 52 | 0 | 5 | 49 | 5 | 7 | 17 |
| Premises and vehicle | 1 | 0 | 0 | 4 | 3 | 5 | 3 | 2 |
| Premises and telephone | 0 | 0 | 0 | 0 | 0 | 0 | 4 | 1 |
| Person and vehicle | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| Premises, person and vehicle | 0 | 4 | 0 | 0 | 0 | 3 | 5 | 2 |
| Premises, person and telephone | 5 | 0 | 1 | 1 | 17 | 2 | 10 | 5 |
| Total | 101 | 100 | 100 | 99 | 100 | 101 | 100 | |
| Number of warrants | 489 | 75 | 75 | 75 | 75 | 65 | 74 | |

Totals greater or less than 100 percent are due to rounding.

showing who has dominion and control of the premises (and the corresponding right to seize any contraband that might be incidentally discovered) provides a significant expansion of authority.[13]

### *Sources of Information*

The sources of information on which search warrant affidavits were based ranged from police officers to informants to eyewitnesses to suspects. Table 12 shows the percentage of applications in which each major source was mentioned as one of the bases for the application. Up to four bases were recorded for each warrant examined.

The single most common source was the affiant's personal observation. Among the seven cities, an average of almost half of the warrant applications (46 percent) cited the affiant as one source.[14] Forest City was conspicuously unlike the other cities in this regard, with only nine percent of the warrants citing the affiant.

The second most common source of information was a confidential informant, mentioned in an average of 40 percent of the applications. Harbor City was the chief exception in this instance: 80 percent of the

## Table 11
Materials Sought

| Items specified in warrants | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Stolen goods | 35% | 19% | 47% | 25% | 31% | 40% | 23% | 31% |
| Drugs/drug paraphernalia | 31 | 67 | 24 | 40 | 44 | 40 | 38 | 41 |
| Obscene material | 20 | 0 | 0 | 0 | 1 | 1 | 0 | 3 |
| Weapon | 14 | 3 | 19 | 20 | 23 | 9 | 24 | 16 |
| Gambling paraphernalia | 4 | 13 | 1 | 0 | 0 | 0 | 12 | 4 |
| Phone, phone list | 7 | 0 | 1 | 0 | 0 | 0 | 16 | 3 |
| Other documents | 4 | 17 | 81 | 41 | 67 | 6 | 77 | 42 |
| Money | 1 | 15 | 0 | 1 | 25 | 8 | 8 | 8 |
| Other evidence of crime | 9 | 16 | 24 | 44 | 29 | 15 | 15 | 22 |
| Number of warrants | 489 | 75 | 75 | 75 | 75 | 65 | 74 | |

Multiple items were specified in some warrants.

applications there relied upon a confidential informant, more than double the proportion in any of the other cities. This is probably related to the greater use of search warrants in drug cases in Harbor City.[15]

As Table 12 indicates, the use of other sources was scattered. Nonconfidential informants, victim eyewitnesses, other eyewitnesses, and other law enforcement officers constituted important sources of evidence, but on the average more than 16 to 20 percent of the applications did not cite any of these other sources.

Table 13 provides the same information from a different perspective. The table shows the source ranked by the field researcher as the most important in each case. It is of considerable significance that confidential informants were the primary source of information for search warrants in each of the cities studied. In two cities (Forest and Mountain), confidential informants tied with another source of evidence (affiant's observations and victim eyewitnesses, respectively) as the primary source. It also is noteworthy, as shown in Table 14, that in all the sites, confidential informants were used primarily, and in most cities over-

## Table 12

Sources of Evidence for the Application

| Sources cited | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Affiant's personal observations | 49% | 69% | 33% | 9% | 45% | 63% | 57% | 46% |
| Confidential informant | 36 | 80 | 23 | 37 | 39 | 25 | 39 | 40 |
| Law enforcement officer other than affiant | 12 | 9 | 33 | 25 | 15 | 14 | 26 | 19 |
| Nonconfidential informant | 19 | 1 | 27 | 27 | 13 | 15 | 12 | 16 |
| Victim-eyewitness | 20 | 4 | 15 | 41 | 13 | 9 | 11 | 16 |
| Eyewitness-nonvictim | 12 | 12 | 21 | 9 | 11 | 18 | 9 | 13 |
| Victim/non-eyewitness | 7 | 3 | 16 | 11 | 7 | 8 | 12 | 9 |
| Co-suspect | 11 | 4 | 12 | 4 | 7 | 2 | 3 | 6 |
| Suspect | 2 | 1 | 4 | 8 | 1 | 5 | 4 | 4 |
| Number of warrants | 489 | 75 | 75 | 75 | 75 | 65 | 74 | |

Multiple sources were cited in some warrants.

whelmingly, in drug-related cases.[16] This interdependence of drug-related warrants and confidential informants is shown even more vividly in Table 15, which presents the percent of cases in which a drug offense was the central crime cited in the application and a confidential informant was either the sole or the primary source of information for the warrant. Confidential informants were used in over 70 percent of the drug-related warrants in six of the seven cities studied.[17]

Tables 16 and 17 delineate the type of information on which the trustworthiness of the informant's tip and the credibility of the informant was based. Forest City affiants almost never provided information corroborating the statement of a confidential informant. In Hill City, the only form of corroboration was the affiant's observation. Elsewhere, some information was usually offered to substantiate the informant's statement. Most commonly this corroborative information was based on the affiant's own observation. These observations ranged from actual surveillance of the premises, to verification that a car meeting the description provided by the informant was parked in front of the

## Table 13

Primary Source of Information Contained in Affidavit As Ranked by Researchers

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Confidential informant | 36% | 71% | 20% | 35% | 39% | 22% | 38% | 37% |
| Affiant's observation | 18 | 15 | 13 | 1 | 11 | 22 | 15 | 14 |
| Victim-eyewitness | 10 | 3 | 9 | 35 | 11 | 6 | 10 | 12 |
| Nonconfidential informant | 16 | 1 | 15 | 5 | 8 | 12 | 8 | 9 |
| Nonvictim-eyewitness | 4 | 0 | 12 | 5 | 8 | 14 | 5 | 7 |
| Victim/non-eyewitness | 2 | 1 | 7 | 8 | 5 | 5 | 12 | 6 |
| Law enforcement officer other than affiant | 2 | 4 | 12 | 3 | 9 | 3 | 5 | 5 |
| Co-suspect | 7 | 4 | 9 | 3 | 7 | 1 | 3 | 5 |
| Suspect | 1 | 0 | 3 | 4 | 0 | 3 | 3 | 2 |
| Unclassified | 3 | 1 | 0 | 1 | 3 | 12 | 1 | 3 |
| Total | 99 | 100 | 100 | 100 | 101 | 99 | 100 | |
| Number of affidavits | 489 | 75 | 75 | 75 | 75 | 65 | 74 | |

Totals greater or less than 100 percent are due to rounding.

## Table 14

Types of Crime in Applications Relying on Confidential Informants

| Type of Crime | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Violent crimes | 6% | 0% | 0% | 4% | 7% | 0% | 0% | 2% |
| Property crimes | 26 | 7 | 14 | 0 | 4 | 36 | 4 | 13 |
| Drug-related | 55 | 75 | 79 | 96 | 89 | 57 | 71 | 75 |
| Other vice & morals | 12 | 16 | 0 | 0 | 0 | 0 | 18 | 7 |
| Other | 2 | 2 | 7 | 0 | 0 | 7 | 7 | 4 |
| Total | 101 | 100 | 100 | 100 | 100 | 100 | 100 | |
| Number of applications | 173 | 55 | 14 | 24 | 28 | 14 | 28 | |

Totals greater than 100 percent are due to rounding.

## Table 15

Search Warrants Seeking Drugs
Confidential Informant as Sole or Primary Source of Information

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Sole source | 9% | 18% | 47% | 86% | 52% | 0% | 27% | 34% |
| Primary source | 69 | 64 | 24 | 7 | 32 | 44 | 46 | 41 |
| Total | 78 | 82 | 71 | 93 | 84 | 44 | 73 | 75 |
| Number of warrants | 126 | 50 | 17 | 28 | 31 | 23 | 26 | |

## Table 16

Corroboration of Confidential Informant's Information

| Type of corroboration | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| None | 8% | 7% | 14% | 88% | 57% | 14% | 25% | 30% |
| Affiant's observations | 49 | 20 | 29 | 4 | 43 | 50 | 54 | 36 |
| Other reliable source | 10 | 13 | 14 | 4 | 0 | 0 | 4 | 6 |
| Investigation | 10 | 26 | 29 | 0 | 0 | 21 | 7 | 13 |
| Combination of two or more types of corroboration | 23 | 34 | 14 | 4 | 0 | 14 | 11 | 14 |
| Total | 100 | 100 | 100 | 100 | 100 | 99 | 101 | |
| Number of applications | 173 | 55 | 14 | 24 | 28 | 14 | 28 | |

Totals greater or less than 100 percent are due to rounding.

prospective search site, to confirmation predicated on the affiant's past experience that the particular type of illicit activity involved was carried out in the manner described by the confidential informant.

The informant's track record of providing productive information was the most frequent basis for assuring credibility across all the sites. River City, Mountain City, and, particularly, Harbor City relied heavily on declarations against interest—usually that the informant had actually purchased drugs from the suspect. Highly detailed information was presented in over half the Plains City confidential informant warrants and in over 40 percent of those in Harbor City.

## Table 17
Basis for Establishing Credibility of Confidential Informant

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Past information has led to arrests | 73% | 80% | 71% | 71% | 71% | 29% | 79% | 68% |
| Past information has led to seizures | 10 | 49 | 71 | 71 | 79 | 29 | 75 | 55 |
| Past information has led to convictions | 57 | 66 | 0 | 8 | 29 | 21 | 18 | 28 |
| Informant made a declaration against interest | 33 | 60 | 14 | 8 | 0 | 21 | 7 | 20 |
| Informant is an "upstanding" member of the community | 0 | 0 | 0 | 0 | 0 | 14 | 11 | 4 |
| Informant is a law enforcement officer | 14 | 0 | 0 | 4 | 0 | 0 | 0 | 3 |
| Information is highly detailed, thorough | 13 | 42 | 57 | 0 | 0 | 21 | 0 | 18 |
| Number of applications | 173 | 55 | 14 | 24 | 28 | 14 | 28 | |

Multiple bases were given in some applications.

## Table 18
Returns Filed

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City |
|---|---|---|---|---|---|---|---|
| Number of warrants approved | 458 | 75 | 75 | 75 | 75 | 56 | 74 |
| Number of returns filed | 245 | 73 | 66 | 72 | 60 | 56 | 70 |
| Returns as a percentage of approved warrants | 54% | 97% | 88% | 96% | 82% | 100% | 95% |

***Post-Application Filing Procedures***

After a search warrant has been approved, the judge gives the original and at least one copy to the applicant and retains a copy of the warrant and its underlying documentation. Practices differ with regard to what the judge does with the copy of the unexecuted warrant. In some jurisdictions, e.g., River City and Hill City, the warrant, application, and affidavit are given to a clerk who establishes a file, registers it in a special log, and assigns it a log number. In others, e.g., Harbor City and Plains City, the judges seal the warrant materials in an envelope which they carry with them or place in a locked file cabinet until a return is filed.

## Steps VI-IX: Service of Warrant, Seizure of Items, Preparation of Inventory, Filing of Return

The next step after approval of the warrant is its execution. The authorized law enforcement officer or other official serves the warrant, conducts the search, and seizes the items specified in the warrant if they are found. Statutory law generally requires that the officer serve the warrant and file a "return" in the issuing or designated court, usually within 10 days of the issuance of the warrant. The return normally indicates whether the warrant was executed, the date and time of service, and what was seized. The return, the original warrant, and the supporting documentation usually are appended to the judge's copy of the warrant and filed with the clerk of the issuing court or the court with jurisdiction over the offense.[18]

Although we were told almost universally by police officers that they file a return regardless of whether the warrant was executed or a seizure made, the rate at which returns were actually filed varied considerably. As shown in Table 18, a return was filed for every or nearly every warrant issued in four cities. In Plains City, Hill City, and particularly River City, a sizable percentage of returns were not in the files.

For Plains City and Hill City, the missing documents probably signify that executing officers sometimes neglect to file a return when nothing is found during the search. The large gap in River City may be explained similarly. Although the River City police officer's manual instructs officers to file all returns, regardless of whether evidence is found, several police officers indicated that many of their colleagues, especially those who deal infrequently with search warrants, are unaware that this is the proper procedure and fail to file a return when the search is unproductive.

A second explanation for the "missing" returns in River City is that the return is filed but is never matched with the appropriate search warrant. Several reasons may account for this. Returns are filed with the judge who signed the search warrant. That judge's clerk is responsible for sending the return to the search warrant assistant in the main clerk's office. It is possible that some of these returns are never received in the clerk's office. Moreover, of those that do reach the search warrant assistant, a substantial number are never matched to a search warrant and affidavit, because the number that should appear on both the affidavit and return is missing and the clerk is unable to match them on the basis of a name or address. (Approximately 116 of the affidavits filed in 1980 did not contain this number.) Which of these factors is primarily responsible for the ostensibly low filing rate remains uncertain, as does the bias that may have resulted in our data (see Table 19).

**Table 19**
Approved and Executed Warrants

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Approved warrants | 458 | 75 | 75 | 75 | 73 | 56 | 74 | |
| Returns filed | 245 | 73 | 66 | 72 | 60 | 56 | 70 | |
| Executed warrants | 238 | 68 | 65 | 71 | 59 | 56 | 66 | |
| Executed warrants as percent of returns filed | 97% | 93% | 99% | 99% | 98% | 100% | 94% | 97% |
| Executed warrants as percent of approved warrants | 52% | 91% | 87% | 95% | 81% | 100% | 89% | 85% |

With this possible distortion in mind, it appears that almost every warrant for which a return has been filed was served.[19] This squares with the perception of the officers we interviewed. They told us that once they have gone through the effort to obtain a search warrant, they will execute it unless it is clear that the items sought have been moved or destroyed. Almost without exception, the officer who applied for the warrant served it and, in most cases, did so promptly. However, in three cities, Harbor, Hill, and Border, a significant number of warrants were not served for several days (see Table 20).

## Table 20

Elapsed Days Between Approval and Execution of Warrant

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Same day | 71% | 46% | 85% | 70% | 39% | 73% | 50% | 62% |
| Within 48 hours | 16 | 24 | 11 | 24 | 20 | 16 | 30 | 20 |
| Within 72 hours | 2 | 3 | 0 | 3 | 12 | 5 | 2 | 4 |
| Within 96 hours | 3 | 3 | 0 | 3 | 3 | 0 | 0 | 2 |
| Within 120 hours | 1 | 2 | 0 | 0 | 7 | 2 | 3 | 2 |
| More than 120 hours | 3 | 21 | 2 | 0 | 17 | 0 | 12 | 8 |
| Not known | 4 | 3 | 3 | 0 | 2 | 4 | 3 | 3 |
| Total | 100 | 102 | 101 | 100 | 100 | 100 | 100 | |
| Mean number of days | .48 | 2.92 | .30 | .38 | 1.95 | .55 | 1.24 | 1.12 |
| Number of returned, executed warrants | 238 | 68 | 65 | 71 | 59 | 56 | 66 | |

Totals greater than 100 percent are due to rounding.

## Table 21

Basic Characteristics of Seizures

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Some seizure was made | 88% | 84% | 91% | 96% | 97% | 93% | 91% | 91% |
| Seizure included warranted items | 79 | 76 | 86 | 93 | 93 | 88 | 85 | 86 |
| Seizure included items not listed in the warrant | 32 | 57 | 40 | 34 | 37 | 16 | 29 | 35 |
| Number of returned, executed warrants | 238 | 68 | 65 | 71 | 59 | 56 | 66 | |

The reader is reminded that these percentages are probably inflated for at least some of the cities because of the apparent practice of failing to file a return in the case of a fruitless search.

## Table 22
Proportion of Listed Items Seized

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| None | 21% | 24% | 14% | 9% | 9% | 13% | 15% | 15% |
| Some (no more than half) | 16 | 12 | 14 | 11 | 10 | 5 | 9 | 11 |
| Most or all (more than half) | 64 | 65 | 72 | 80 | 81 | 82 | 76 | 74 |
| Total | 101 | 101 | 100 | 100 | 100 | 100 | 100 | |
| Number of returned, executed warrants | 238 | 68 | 65 | 71 | 59 | 56 | 66 | |

Totals greater than 100 percent are due to rounding.

## Table 23
Materials Seized

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Drugs or drug paraphernalia | 58% | 72% | 27% | 47% | 47% | 48% | 38% | 48% |
| Stolen goods | 43 | 25 | 46 | 24 | 30 | 42 | 28 | 34 |
| Weapon(s) | 28 | 25 | 27 | 22 | 21 | 19 | 20 | 23 |
| Cash | 5 | 6 | 3 | 4 | 18 | 8 | 15 | 9 |
| Gambling paraphernalia | 9 | 11 | 2 | 0 | 2 | 0 | 13 | 5 |
| Obscene materials | 26 | 2 | 0 | 0 | 2 | 0 | 0 | 4 |
| Telephones and lists of names | 9 | 0 | 0 | 0 | 0 | 0 | 13 | 3 |
| Other documents | 8 | 47 | 67 | 43 | 70 | 14 | 67 | 45 |
| Other evidence of crime | 11 | 19 | 24 | 38 | 37 | 27 | 13 | 24 |
| Number of warrants resulting in seizures | 210 | 57 | 59 | 68 | 57 | 52 | 60 | |

Multiple types of material can be seized in the execution of a single warrant.

The executing officers seldom came back empty-handed, judging from the cases for which returns were filed. The basic characteristics of the seizures are presented in Table 21 and Table 22. All jurisdictions except River and Harbor turned up something worth seizing in at least 90 percent of the reported searches. In Forest City and Hill City, the percentage was nearly 100. Moreover, the seizures corresponded with the items specified in the warrant in at least 75 percent of the reported searches, the percentage being over 85 percent everywhere but River City and Harbor City.[20] In an average of more than a third of the cases, the police also came away with significant additional evidence that had not been specifically named in the warrant.

Officers in River City explained that the amount of evidence seized during the execution of a warrant varies with the type of case and the experience and expertise of the officer. For example, the execution of search warrants for obscene materials or gambling evidence rarely results in nothing being seized. Because of the possibility of narcotics being removed or destroyed and the unlikely places in which drugs can be hidden (e.g., under wall-to-wall carpeting, inside hollow toilet paper rolls, or inside light fixtures), it was estimated that five percent of the narcotics warrants might result in no seizure of evidence. With stolen property cases, however, officers are likely to come up empty-handed as often as 20 percent of the time, because suspects do not keep the property in their possession for any substantial length of time, and property that has been stolen is often hard to identify unless it has an identification number, serial number, or other distinguishing characteristic.

Table 23 shows items actually seized. The materials most commonly seized were drugs and drug paraphernalia, stolen goods, and weapons, in that order. The distributions were not markedly discrepant across sites. The differences among the cities reflect the differences in the warrant applications discussed earlier—that is, the items seized generally correspond to the types of items specified in the warrant (see Tables 11 and 23). In comparing these two tables, however, it is apparent that, although police officers in four of the cities (River, Harbor, Plains and Mountain) seek authorization to seize weapons less often than do their colleagues in Forest, Hill, and Border, they nevertheless seize weapons just as frequently. Also, although documents demonstrating dominion or control are specified targets in only 17 percent of Harbor City warrants, such documents are seized in the course of nearly half (47 percent) of the searches.

## Filing a Criminal Case After Execution of a Warrant

### *Identifying Cases*

Retrieval of information about whether a criminal case ever evolved from an issued warrant constituted, without doubt, the most taxing and troublesome aspect of our data-collection effort. Specifically, the link between the issued warrant and the subsequent filing of a case was difficult to establish. Furthermore, the recent development of various offender-based transaction records systems in several of the study sites was of no assistance at this particular point in our task, because the unique identifiers used in such systems are generally assigned to a case when a suspect is arrested. The problem we faced is that the search warrant not only precedes arrest, it is not generally found in law enforcement records. It can be found routinely only in the judicial archives, with no number that could act as a link that might allow us to track the case forward to its conclusion. As a result we cannot say with confidence that all the court cases that evolved from our original sample of warrants were successfully identified. The data from Harbor City are particularly sparse because misdemeanor court records are maintained at fourteen courthouses scattered throughout the city rather than at a central repository, and project resources did not permit a search of all these sets of files.[21] Thus, some caution should be exercised in interpreting the data presented below.

Table 24 presents the number of executed warrants in the sample that resulted in the filing of at least one criminal case. The relatively low

**Table 24**
Cases Filed

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City |
|---|---|---|---|---|---|---|---|
| Executed warrants | 238[a] | 68 | 65 | 72 | 59 | 56 | 66 |
| Cases filed | 197 | 17[b] | 31 | 27 | 27 | 25 | 23 |
| Cases filed as percentage of executed warrants for which a return was filed | 83% | 25% | 48% | 38% | 46% | 45% | 35% |

a. No returns could be found for 46 percent of the approved search warrants.
b. Misdemeanor court records scattered among several courthouses. Figure may not accurately represent the total number of search-warrant-related cases filed.

percentage of executed warrants that have this result may be attributable to several factors (beyond the recordkeeping problems noted). We were told by prosecutors in several jurisdictions that it is often difficult to link seized contraband or stolen goods to a particular individual with sufficient certainty to permit prosecution. In addition, it was suggested in a number of cities that some searches are conducted solely to seize drugs or retrieve stolen property and not necessarily to support a prosecution. Finally, prosecutorial screening of cases before filing was strict in most of the jurisdictions, so that many police investigations did not result in formal prosecution.

We have no ready explanation of the high percentage of cases filed in River City. It may be the result of having had a field researcher on site with sufficient time to dig out the filed cases; or, as is more likely, it may be the result of officers failing to file a return when execution of a warrant was fruitless. The low filing percentage for Harbor City can be explained partially by the fact that the figure reflects only felony and not misdemeanor court filings; thus, the actual rate based on all prosecutions would likely be higher.

***Motions to Suppress***

Several interviewees expressed the belief that motions to suppress evidence (alleged to have been seized illegally) were filed in every case involving a search warrant. Table 25 suggests that this impression is mistaken. In Plains City, a separate review was made of 250 felony case files in 1980. Few motions to suppress any type of evidence were found in the files, and those that were located concerned primarily confessions, line-ups, and searches incident to an arrest. In Forest City, a motion to suppress evidence resulting from a warrant could be "filed" simply by checking a box on an omnibus hearing form. Not only was this box seldom checked, in most of the instances in which it was, there was no record that the motion was heard.

Motions to suppress seized pursuant to a search warrant were granted in only 17 of the 347 warrant-related cases. This represents approximately twelve percent of the cases in which such motions were filed, and just under five percent of the total number of search-warrant-related cases in our sample that were filed. Convictions were obtained in at least 12 of the cases in which a motion to suppress regarding the warrant was granted.

Motions to disclose the identity of a confidential informant were also very rare—a total of eleven. Of those, only four were successful (one

## Table 25
Motions to Suppress

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City |
|---|---|---|---|---|---|---|---|
| Number of search-warrant-related cases filed | 197 | 17 | 31 | 27 | 27 | 25 | 23 |
| Cases in which at least one motion to suppress was filed | 88 | 9 | 2 | 5 | 13 | 13 | 9 |
| Percentage of cases in which a motion to suppress was filed[a] | 45% | 53% | 7% | 19% | 57% | 52% | 39% |
| Cases in which at least one motion to suppress was granted | 11 | 1 | 0 | 0 | 1 | 2 | 2 |
| Percentage of cases in which a motion to suppress was granted[b] | 6% | 6% | 0% | 0% | 4% | 8% | 9% |

a. Mean percentage 39%.
b. Mean percentage 5%.

## Table 26
Disposition of Cases

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City |
|---|---|---|---|---|---|---|---|
| Number of search-warrant-related cases filed | 197 | 17 | 31 | 27 | 27 | 25 | 23 |
| Search-warrant-related cases resulting in the conviction of at least one person | 140 | 12 | 19 | 25 | 23 | 24 | 23 |
| Percentage of search-warrant-related cases resulting in conviction of at least one person | 71% | 71% | 61% | 93% | 85% | 96% | 100% |

each in River City and Mountain City, two in Border City). What is especially interesting is that the granting of a motion to disclose the informant is tantamount to a dismissal. Law enforcement officers and prosecutors prefer to forgo the possibility of a conviction rather than to jeopardize the safety of informants by divulging their identity.[22]

Although we have no way of knowing the specific role played by the seized evidence in the eventual disposition of the case, the disposition of the cases studied (as of the end of data collection) is displayed in Table 26.

Appeals related to the warrant were trivially few. We found only nineteen appeals, and of these only four (two in River City and one each in Mountain City and Border City) were appeals that related to the search. In only one of those four instances was the appeal successful and the evidence consequently suppressed.

# Notes to Chapter Two

1. *See, e.g.*, KRANTZ, B. GILMAN, C. BENDA, C. HALLSTROM, & E. NADWORNY, POLICE POLICY MAKING: THE BOSTON EXPERIENCE, 99-113 (1979).

2. L. TIFFANY, D. MCINTYRE, & D. ROTHENBERG, DETECTION OF CRIME, 100 (1967); Mapp v. Ohio, 367 U.S. 643 (1961), *reh'g denied*, 368 U.S. 871 (1961).

3. Some of the figures presented are based on statistics reported to the state administrative office of the courts by local jurisdictions. Others are more in the nature of an informal guess. States that were unable to provide this information are omitted from the table.

4. UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES: 1980, 87-136 (1981).

5. For a more extensive discussion of police practices, see Chapter 5.

6. Krantz *et al.* also observed prosecutorial screening in Boston, *supra* note 1, at 146, and the practice was noted by Tiffany *et al.* as well, *supra* note 2, at 114.

7. At least one state expressly makes prosecutorial screening an option in its rules of criminal procedure. Pennsylvania Rule of Criminal Procedure 2002A.

8. See Appendix.

9. It is possible that this apparent concentration is an artifact of recordkeeping problems since there were substantial delays in transferring warrant documents from the various misdemeanor courts to the central felony court where the research was conducted.

10. Because the application time was not recorded in Forest City, we were unable to determine what portion of the warrants signed by the magistrate were sought after working hours.

11. In Mountain City, a judge is supposed to be assigned to "arraignment court" for one week out of every eleven weeks. Thus, if the system were working strictly according to procedure, each judge would sign between nine and ten percent of the search warrants.

12. See Krantz *et al.*, *supra* note 1, at 105 and Tiffany *et al.*, *supra* note 2, at 102-4.

13. *Accord* Tiffany *et al.*, *supra* note 2, at 116.

14. As discussed in the Introduction, this is a mean percentage—i.e., the average of the percentage of warrant applications in each city that cite the affiant as a source—rather than the percentage of affiant citations for the entire sample.

15. See Table 8.

16. See Krantz *et al.*, *supra* note 1, at 109.

17. We spoke to both sheriff's department and municipal police department detectives in Mountain City. Although both agencies were active in narcotics enforcement, one relies primarily on the statements of proven informants and the other on controlled purchases of narcotics. This is largely responsible for the discrepancy in the Mountain City pattern in Table 15.

18. See Appendix.

19. Our sample contained a higher percentage of search warrants that were served than Krantz *et al.* observed in Boston, *supra* note 1, at 106.

20. The percent of served warrants in our sample in which at least something was found is higher than that noted by Krantz *et al.*, *supra* note 1, at 108.

21. Juvenile court records also were not checked. Thus, a few cases in each city may have been missed because they were filed in juvenile court rather than in the adult criminal justice system.

22. The failure to file motions to disclose more frequently (fatal as they may be to the prosecution's case when the motion is sustained) is at least partially attributable to the limitation that such a motion is in order only if the informant likely possesses information material to the guilt or innocence of the defendant. *See* Roviaro v. United States, 353 U.S. 53 (1957); McCray v. Illinois, 386 U.S. 200 (1967); *but cf.* Franks v. Delaware, 438 U.S. 157 (1978); United States v. Kiser 716 F.2d 1268 (9th Cir. 1983.)

CHAPTER THREE

# Protection of Fourth Amendment Rights: The Intended Effects

The warrant requirement was included in the Bill of Rights, at least in part, in reaction to the use of broad "writs of assistance" by British customs officials prior to 1776.[1] These writs, according to James Otis, "did not require an oath, allowed virtually anyone to search, did not require a return, and subjected any house to entry at will during the day."[2] Thus, as indicated in the introduction to this study, the Fourth Amendment limits the discretion of law enforcement officers to search and seize private property by

- interposing an "orderly" review process by a "neutral and detached magistrate";[3]
- specifying that a search and seizure may be authorized only upon a showing that there is at least probable cause to believe that "the item to be seized is located in a particular place";[4]
- mandating that the necessary information be presented under oath to the magistrate, to protect against the issuance of a warrant based on false or knowingly inaccurate statements;[5]
- requiring that both the items to be seized and the place to be searched be described in some detail; and
- providing for a record that may subsequently be examined.

In addition, most states impose statutory limits on when and how warrants may be executed and require the filing of a detailed return, which includes a list of the items seized.[6] The overriding objective is to safeguard "an individual's interest in the privacy of his home and possessions against unjustified intrusion of the police."[7] The purpose of

this chapter is to examine the extent to which the search warrant requirement actually imposes the limits listed above and achieves its stated purpose.

## Interposition of a Neutral and Detached Magistrate

Under Supreme Court decisions, a neutral and detached magistrate is one who is "removed from [the] prosecutor or police..., works within the judicial branch,"[8] and acts as "a judicial officer...[rather than] as an adjunct law-enforcement officer."[9] The magistrates with whom we spoke viewed their role in varying ways. One judge in Mountain City expressed the belief that "a lot of judges," particularly those in rural areas or without legal training, see their role as assisting the police rather than as being objective independent observers of the facts. Another suggested that some colleagues were little more than "ornaments for the prosecution," and a magistrate in Hill City recalled that upon being sworn in as a judge, a colleague remarked, "Welcome to law enforcement."

This magistrate and most of the others with whom we spoke clearly distinguished themselves from both the police and the prosecutors. As one put it, the judge has to guard against "some sort of witch hunt." A Plains City judge summed up the role of the magistrate as going over the affidavit carefully to make certain that there is no defect and to check that there is a link between the information in the affidavit and each of the items sought, so as to ensure that the officer is not on "a fishing expedition." Although many of the judges we spoke with rarely denied a warrant application (one had rejected only one warrant application in more than a decade and a half on the bench), none expressed reluctance to do so should an inadequate application be presented. Several stated that they sometimes request officers to obtain additional information even though this delays the search.

Law enforcement officers and prosecutors confirmed that magisterial reviews vary from judge to judge. Our analysis of case records supported this difference as well. A Hill City detective remarked that "you can have a case that seems fairly solid to nine out of ten judges, but that number ten judge can throw the whole thing out." One Border City Police officer observed: "It's the old bell curve, you have a few on either end and everybody else falls in the middle."

As described in chapter 2, the majority of the search warrants in each city were reviewed by only a few of the magistrates. This was due, in

part, to the location of the magistrate's court in a high crime area or adjacent to the police headquarters, or to the duty hours of the judge or judges involved. But this concentration was augmented by the police practice of selecting the judge with whom an individual officer feels comfortable or who is perceived as less likely to raise questions. For example, the Forest City judge, noted above, who had denied only one warrant during a lengthy tenure on the bench, signed 53 percent of the warrants in our sample. As mentioned earlier, the explanation given was that the magistrate's home was near an expressway exit, making it convenient for officers needing a nighttime review. A prosecutor with whom we spoke acknowledged, however, that, at least in some circumstances, applications are presented to those judges who do not usually press deeply into the facts. In Mountain City, as well, we were told of systematic efforts to avoid at least one judge who had a reputation for being particularly demanding. The reason most often given for choosing or avoiding particular judges was to limit "the hassle." A Hill City prosecutor put it this way:

> I'm sure there are judges there who the officer knows are. . . going to sign anything. . . . The skilled officer. . . who does this day in and day out [knows] the easy way to do it and the hard way to do it, and once he learns which one is which, he's going to go the easy way when he can. Now I, to be a lawyer and to be overly protective, I'd probably prefer that they go to the nitpicking judge. But I understand why they don't.

There appeared to be two areas in which the standard of strict neutrality may have been compromised, even among those magistrates who were most careful about their constitutional responsibilities.

The first area is the reputation of the officer, organizational unit, or police department presenting the warrant application, or to the prosecutor who screened it. Several of the law enforcement officers and judges with whom we spoke commented that the intensity of the review is strongly influenced by the officer's reputation for truthfulness. The comment of a Mountain City officer recurred in Harbor, Hills, Plains, and River Cities: "Once you've established yourself with the judge, then they [*sic*] know what is required and they know what limitations you place on yourself. So I think that makes a big difference." A River City judge observed that if an officer has always been honest in his or her dealings, the judge may be willing to give more leeway to that officer than to others.

The importance of an individual's reputation and propensities also applies to prosecutors. A Mountain City magistrate stated that there was considerable variation in the quality of applications as a function of the

particular attorney who prepared the affidavit. This magistrate conceded, "I've relied a great deal more upon search warrant affidavits that come from some attorneys than [upon those that come from] others."

As Skolnick has pointed out, personal relations play a large role in the operation of the criminal justice system.[10] Thus, it is not surprising that such relations play an important part in a discretionary decision-making process such as the review of search warrant applications. The second area of vulnerability is the type or seriousness of the offense. On the one hand, two judges who had expressed a strong commitment to performing neutral and detached reviews of warrant applications informed us that they might sign search warrants when the showing of probable cause was questionable in order to get a large quantity of narcotics off the street or to assist in capturing a suspect in a major homicide case. In one instance, the judge, after signing a search warrant, advised the officers: "This is a bad warrant. Don't kill nobody; don't shoot nobody; just get the stuff [narcotics] off the street." The other judge stated: "If [a police officer] is rousting someone, he isn't going to prevail on me [to issue the warrant], unless he's tripped over somebody big, and I want that [person] in. If he trips over the trunk murderer, Charlie Manson, or this, that, or the other thing, I might torture the standard."[11]

On the other hand, a police officer in Harbor City suggested that some of the local judges may refuse to approve any warrant in a gambling case or may not wish to become involved in pornography investigations. A judge in Harbor City who characterized gambling cases as the most difficult to deal with described gambling raids as a ritual of nominal enforcement—the same people are arrested over and over; the affidavits all read the same; and nothing new happens.

## Orderly Review Process

As noted in the preceding chapter, the "orderly" warrant review process before a magistrate transpires very quickly. Magistrates with whom we spoke estimated that the average application review lasted three to ten minutes. The average in our observed cases was between two and three minutes. When magistrates questioned affiants, they often sought information already contained in the affidavit rather than additional substantive information.

Although each of the cities we studied made some provision for having a magistrate assigned to review search warrant applications twenty-four hours per day, seven days per week, police officers in all but

River City expressed frustration at the difficulty of finding a magistrate ready and willing to review a warrant. We heard stories of officers spending hours in an anteroom or courtroom, waiting for a judge to take the time to review an application, or having difficulty locating the night-time duty judge. How often such problems occur is not known, but such delays clearly upset law enforcement officers and discourage use of warrants. As one Plains City detective put it, having to go from judge to judge (or prosecutor to prosecutor) is an inconvenience for experienced detectives; for the inexperienced patrol officer, it adds substantially to the intimidating nature of the warrant-seeking process and the reluctance to engage in it.

The orderliness of middle-of-the-night reviews is also open to question. A Forest City judge recalled being so sleepy during such a review that he or she remembered little of the application in the morning even though it had been signed. A judge in Mountain City conceded that in at least one instance, he or she had concluded, upon morning reflection, that a warrant signed "in the dead of the night" should not have been approved. A Forest City police sergeant admitted that, especially at night, judges who scrutinize warrants less closely are often selected not to slip improper warrants by, but simply "to reduce the hassle."

It is misleading, however, to look only at the official judicial review. Warrant applications in many jurisdictions are examined once, sometimes twice, before being submitted to a judge. In each of our sites other than River City and Harbor City, the prosecutor's office is routinely involved in warrant applications. In both River and Harbor Cities, police supervisory personnel frequently review warrant applications before they are presented to a magistrate.

The intensity of this preliminary involvement varies, in much the same way as the magisterial review itself, from a perfunctory review to actual drafting of the affidavit. Furthermore, prosecutorial or supervisory review suffers from many of the same problems as reviews by magistrates. For example, there was grumbling among some of the police interviewees that prosecutors were as reluctant to review a warrant or as difficult to find as were judges. A Mountain City officer commented that it is very rare for officers telephoning to request a prosecutor to be told that someone will be waiting to help them when they arrive at the office. The officer said: "If you really pressure them, then maybe they can grab somebody on his way back from court or something and he may want to do it."

We also heard complaints that inexperienced assistant prosecutors who know comparatively little about the law concerning search warrants are assigned to conduct the reviews, resulting in "prosecutor shopping."

## Probable Cause

The precise meaning of probable cause is somewhat elusive. The U.S. Supreme Court recently observed in *Gates:* "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily or even usefully, reduced to a neat set of legal rules."[12] A traditional definition of probable cause is facts and circumstances sufficient to justify a "reasonable and prudent" person to believe that a crime has been committed and that evidence or contraband related to that crime is at a specified location.[13] In the *Gates* decision, the Supreme Court characterized the showing necessary to meet the probable cause standard as "a fair probability that contraband or evidence of crime will be found in a particular place."[14] In determining whether probable cause exists, a magistrate "must judge for himself the facts relied upon by a complaining officer"[15] drawing "such reasonable inferences as he will"[16] "in a common sense and realistic fashion" rather than "hypertechnically."[17]

What constitutes probable cause and the weight given to the information presented by a law enforcement officer varies. A few judges expressed reluctance to substitute their judgment for that of the investigating officers; a few judges painstakingly scrutinized the application; most told us they read through the application, trying to identify the links between what was presented in the affidavit and what was sought in the warrant. A number of mental checklists were used, such as time, place, leads, reliability, jurisdiction, substantiation, specificity, adequate address or description, and reliability.[18]

The police response to the probable cause requirement in all of the cities studied was to develop standardized text and formats into which the specifics of the case could be inserted. This text includes the "magic words" needed for an application to pass muster in the particular jurisdiction. The police officers with whom we spoke acknowleged that they were often teased about and sometimes challenged over the use of "boilerplate" affidavits, but as one Plains City detective remarked, "Why change a good thing?" A public defender in Hill City explained the recitations this way:

> The cops are trying to follow the law of the cases that said certain things make a good warrant and certain things don't. So they are trying to go by

> that format. That phrase ["Said informant has never given false or misleading information."] happens to be something that some case said is important, and so they put it in.

Although there is nothing inherently improper about the practice of routinely incorporating certain court-sanctioned language into a warrant affidavit, it is a matter of concern that many factors that lie at the heart of the need for review by a neutral and detached magistrate are routinely reduced to boilerplate language. We saw a number of factors treated in this fashion. For example:

- the inference that a crime had been committed;[19]
- evidence that an officer had probable cause to believe that the evidence could be found in the place specified in the warrant;[20] and
- evidence that an informant was reliable and that the information provided was trustworthy.

Boilerplate recitations about the statements, activities, reliability, and trustworthiness of confidential informants are perhaps the most troubling of all. Judges are asked to believe in both the existence and the truthfulness of persons whose identities and movements are cloaked in standardized legalese. Concerning the issue of the need for informant confidentiality, *every* warrant application involving such an informant in Border City recited:

> I desire to keep said informant anonymous because said informant has requested me to do so, because it is my experience that informants suffer physical, social, and emotional retribution when their identities are revealed, and because it is my experience that revealing such informants' identities prevents other citizens from disclosing confidential information to law officers.

With regard to the reliability of informants, magistrates in Plains City routinely read that "to the knowledge of the affiant, this informant has never supplied your affiant with information that was proven to be false"; that reliable information was provided on "at least two prior occasions"; and that the items sought had been seen on the premises "within the past 72 hours."[21]

It is easy to imagine how a magistrate, seeing the same recitation over and over, can be tempted to skim over these important pieces of evidence, looking for key words and phrases.[22] Asked what he or she looked for when reviewing boilerplate affidavits, a Border City magistrate responded: "You gotta read it and make sure that it's there, because once in a while the typist will leave something out. It's boilerplate, but it's all

got to be there." The presence of boilerplate statements is certainly important, but the question of their truthfulness is far more critical. This latter concern is more than argumentative, for it seems that one of the more insidious qualities of boilerplate presentations is that the affiant may take them only half-seriously, as part of the game that must be played, as form rather than substance.

In this vein, we were told in Harbor, Forest, and Plains Cities that affidavits are drafted to include the minimum amount of information necessary to establish probable cause, in order to limit the avenues of attack by the defense and to protect the identity of informants. The amount of information considered the minimum necessary, however, varies considerably from city to city. In Harbor City, the affidavits routinely begin with a paragraph describing the affiant's training and police experience, presumably to provide the magistrate with information on the affiant's credibility. In Plains City and Hill City, most affidavits examined contained a reference to the number of years that the affiant had served on the city police force and sometimes to the number of years in his or her current division. Biographical sketches are seldom included in affidavits in other cities.

In Harbor City warrants seeking illicit drugs, there is often extensive corroboration provided to validate a tip from a confidential informant that narcotics were present at a particular address. This usually includes some combination of observation by police officers, one or more controlled buys, a check of the suspect's prior record, and verification through utility records of the person in whose name the telephone and electric services at the suspected residence are listed. Affidavits typically are two to three pages in length.

In contrast, a typical Forest City drug case affidavit contains only two to three short paragraphs, including statements on how long the affiant or other officers have known the informant, and statements intended to support both the basis of the informant's knowledge and the informant's record of prior reliable statements. Affidavits typically provide no independent corroboration and little, if any, information on where in the building to be searched the alleged drugs had been seen or how they were packaged. A Forest City detective commented that first-time drug informants usually are required to make a series of controlled buys before the police will rely on them, but, if an informant is a demonstrated truth-teller, the police will seek a warrant on the basis of a simple telephone call without further corroboration. In the other cities,

the amount of information typically provided in warrants based upon a tip from a confidential informant about illicit drugs falls somewhere in between that in Harbor and Forest City (see Table 16).

Another illustration of the variation in practice is the information presented to demonstrate an informant's past reliability. Our examination of search warrant applications and observation of application review procedings revealed that although all of the jurisdictions, except Mountain City, include a reference to arrests resulting from past tips in about three-quarters of the confidential informant affidavits examined, only in River City and Harbor City did references to convictions occur in more than a handful of cases (see Table 27). The explanation from one officer was that conviction data is omitted to protect the identity of the informant. A Mountain City deputy sheriff attributed the infrequent presentation of information regarding reliability in that city to the extensive use of controlled buys by the sheriff's department.[23]

Affidavits for warrants seeking to recover stolen property or evidence of a violent crime are generally more detailed than drug warrants. We discovered, however, one aspect of affidavits regarding property and violent crime that was more troublesome to many judges and prosecutors than was their concern about the reliability of confidential informants in applications concerning drug offenses. This

## Table 27

Evidence Used to Support Reliability of Confidential Informants

| Type of evidence | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| Past information resulted in arrest | 75% | 80% | 79% | 75% | 75% | 29% | 79% | 70% |
| Past information resulted in seizures | 10 | 58 | 71 | 75 | 96 | 29 | 79 | 60 |
| Past information resulted in convictions | 58 | 73 | 0 | 8 | 29 | 21 | 18 | 30 |
| Number of cases involving confidential informants | 173 | 55 | 14 | 24 | 28 | 14 | 28 | |

River City and Harbor City have no prescreening of search warrant applications by the prosecutor.

Multiple types of evidence may have been used.

involved searches of a suspect's residence on the assumption that property stolen by the suspect or arrestee or the clothing worn at the time of the offense were left there. (The same situation occurs in drug cases when a suspected drug dealer who is under surveillance stops briefly in several locations in which the observing officers believe drug transactions have taken place.) As one prosecutor put it, these affidavits are shaky because there is no basis other than intuition for believing that the goods sought are at the designated location. This prosecutor remarked, however, that such affidavits are normally presented regardless of their impact on prosecuting the case, because they enable officers to retrieve the stolen goods or drugs.[24]

## Significance of the Oath

The oath appears to be treated as a procedural formality rather than as a significant protection against false statements. It was rarely mentioned during our interviews. One judge in River City remarked that although police officers can be questioned, once they have taken an oath their statements have to be accepted on faith. A judge in Mountain City told us about recently warning that an officer could be subject to a lawsuit for swearing to an affidavit drafted by the prosecutor which the officer had signed but not read. A number of judges stated that if information needed to establish probable cause were not contained in the affidavit but were revealed orally, they would require that the affidavit be rewritten or, at least, that an addition be made in the margin. It appeared that this was done to ensure that the information was on record for later review or to satisfy a statutory requirement. Even the training materials examined in Forest City and Plains City merely mention that the applying officer must be sworn by the judge, without exploring the purpose or consequences of the oath.

It should be noted, though, that much of the information forming the basis for warrants, particularly in drug-related cases, is not sworn testimony provided under oath, but rather consists of unsworn statements of confidential informants (see Tables 13, and 14, chapter 2). Indeed, in Plains City, it is a common practice to use double hearsay—the confidential informant makes a statement to Officer A, who relates it to Officer B, who applies for the warrant. In Border City this practice is strictly forbidden.[25] As discussed earlier, the amount of information presented to a magistrate concerning the reliability of the informant and the trustworthiness of the information supplied also varies considerably

across the jurisdictions we visited and is often couched in mind-glazing standardized language. Even when corroboration is presented, in some cities it amounts to little more than the suspect's prior record of arrests for similar offenses or the fact that a person by that name is listed in the utility company records as a resident of the specified address. Corroboration by direct observation, controlled purchases, or the presentation of detailed information by the confidential sources is a rarity in those jurisdictions.[26]

The danger inherent in this practice is illustrated by the 1982 arrest of the head of the narcotics bureau of the St. Charles Parish, Louisiana, sheriff's office for violating his oath on a search warrant affidavit.

> Before the raid, [the agent] swore out an affidavit saying a confidential informant told him that [the suspect] had marijuana in his home.... According to the district attorney handling the case: "There was no factual basis for issuing that search warrant. In effect, there was no confidential informant. We feel certain that he did perjure himself."[27]

The district attorney expressed concern over the effect of the charge on other pending drug cases, since the officer involved had participated "in about 99 percent" of the drug investigations in that jurisdiction over a period of years.[28]

Although there is no basis in our data for believing that abuses such as that alleged to have occurred in St. Charles Parish or documented in *People v. Garcia* and *United States v. Cortina* are widespread,[29] the sterile formality of the oath and the limited information necessary in some jurisdictions to establish probable cause on the basis of the statement of a confidential informant provide, as a Hill City judge observed, a tempting opportunity for the ambitious officer "to fudge a little on probable cause... if he knows he's got [a suspect] dirty."[30] The district attorney's eulogy for the arrested Louisiana officer was especially telling: "Paul was a good policeman. He was just overzealous in overstepping the bounds and the rules he should have followed."[31]

## Specifying the Place and Items

Both the place to be searched and the items to be seized are to be described in detail, in order to prevent random and wholesale searches. The description of the site must be sufficiently specific that "the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended."[32] In general, address or vehicle identification information appeared to meet the constitutional requirement. Except

when the area to be searched was an outbuilding such as a garage or shed, there was little effort to specify the area within a residence or business that was to be searched. A Mountain City judge told us of one instance in which a search had been limited to a specific container in a house, but this was clearly the exception rather than the rule. Indeed, in describing the advantages of getting a search warrant, one police captain commented on the extensiveness of the search possible when a warrant had been obtained.

As to the specification of the items sought, a number of common practices appear to us to stretch the intent, if not the letter, of the constitutional directive. The first—a common practice in drug cases—is to describe the item or items to be seized by quoting or paraphrasing statutory provisions regarding the illegal possession of a gamut of controlled substances and related paraphernalia, though the supporting affidavit provides information about only one particular drug. For example, one Plains City affidavit that articulated probable cause to believe only that cocaine would be found, resulted in the issuance of a warrant that authorized seizure of "narcotic drugs (coca leaves, coca leaf derivative, opium, opium derivatives) as defined...together with such vessels, implements, and furniture used in connection with the manufacture, production, storage or dispensing of such drugs...." In Mountain City, it was routine to include as an object of drug searches "any literature regarding the production, preparation or use of narcotic substances."

Besides inviting officers to seize materials they had no particular grounds to suspect might be found, such phrasing also enables police to expand substantially the scope of the search. For example, is probable cause to believe that an individual is selling marijuana sufficient to support a warrant permitting a search for less bulky controlled substances such as heroin or cocaine when they are included in the same statutory provision? Warrants containing descriptions such as those quoted above or such as "any and all substances controlled by [statutory section]" seem dangerously close, in our opinion, to permitting the open-ended general searches that the Fourth Amendment was intended to proscribe.[33]

The second practice noted in a number of cities was the routine inclusion of the following language in the list of items sought:

> Property tending to establish the identity of persons in control, care, and maintenance of the premises to be searched, including but not limited to cancelled mail envelopes, utility bills, rent receipts, photographs, and keys.

Similar standardized language was used for searches of automobiles. The listed evidence regarding domicile and control are of obvious value in prosecuting a case. Indeed, one prosecutor attributed the relatively low number of cases resulting from search warrants to the inability to relate the items seized to a particular person. But in the context of a search of a residence or business, inclusion of items such as rent receipts or envelopes permits a far more extensive and detailed search than could be justified if the search were limited in scope to areas where one might reasonably expect to find stolen merchandise such as televisions or tires, or large quantities of marijuana. Moreover, inclusions of such indicia allow intrusions into private papers and effects, areas that have been held to be particularly sensitive and deserving of protection.[34]

The third practice of note involves a residential search to recover clothing worn at the time of the offense, when there is nothing other than intuition to suggest that the blood-stained clothing or ski mask, for example, is at the residence. One officer explained to us that it is often difficult to obtain a warrant to search the residence of a violent crime suspect for instruments of a crime because of the inability to provide probable cause to believe that the items sought are there. By stating that they are looking for clothing, the police are able to enter the residence under authority of a warrant and look around. This ploy was illustrated for us by a judge in Mountain City. There, the warrant sought only a shirt worn by the suspect. Only after the executing officer thoroughly searched the kitchen and located drugs hidden in a coffee pot did the officer search the bedroom.

Detectives in the same city, however, insisted that searching for clothing is not a ruse. "Usually, you want the piece listed there for some reason. . .[getting a subterfuge warrant is] too much hassle." Although *Coolidge v. New Hampshire* permits seizure of evidence that is inadvertently found during the course of a lawful search,[35] some courts have questioned obvious "subterfuge searches," suggesting that a good faith standard can be used to suppress as well as admit the fruits of a search when the true object of the search differs from that described in the warrant.[36]

In contrast, we encountered repeated instances in which executing officers sought a second warrant rather than seize evidence or contraband unexpectedly found in "plain view" during an authorized search.[37] This cautiousness was apparently the result of uncertainty concerning the scope of the "plain view" and inventory search doctrines under state appellate court rulings and occurred in searches of both residences and

automobiles. The officers in these cases appeared to be unwilling to jeopardize the case after having gone to the trouble of obtaining a warrant to assure the legality of the initial search.

## Limits on Execution

Three types of limits are placed on the execution of search warrants: an overall time limit, most commonly ten days; special procedures if the warrant is to be executed at night; and, in some states, special authorization procedures permitting entry without knocking.[38]

### *Overall Time Limit*

The general time limit is to encourage warrants to be served promptly, while probable cause is still fresh. Table 20 (chapter 2) shows that in all but two of the jurisdictions, 80 percent or more of the search warrants were served the same day or the day after they were signed. This practice is consistent with the major concern about search warrants expressed during our interviews, namely, the delay in seizing evidence and contraband incurred as a result of having to obtain a warrant. In Harbor City, Hill City, and Border City, a significant number of warrants were not executed until five or more days after they had been issued. In Harbor City and Hill City, these were predominantly drug cases; in Border City, delayed executions were equally divided between drug and theft cases. The explanation we received from one police lieutenant was that the delay occurs when the executing officers wait until the suspect receives a new shipment of drugs or until illegal activity such as gambling is at its peak.

On the other hand, there is special pressure in some jurisdictions to expedite the execution of warrants. In Forest City, for example, where judges routinely impose time limits less than the statutory allowance, we were told that if the warrant is not served within twenty-four hours, the officer who obtained the warrant will have to explain the delay to his or her superiors. If there is a longer delay, the officer must ordinarily obtain a new warrant. Of the 71 executed Forest City warrants we examined, all but two had been served within two days of issuance.

### *Nighttime Searches*

A special finding is required in five of the cities studied to conduct a nighttime search. These range from a higher level of proof that the sought-for items are at the specified location, to a recitation of good cause

## Table 28
Time of Execution

| Time | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City | Mean percentage |
|---|---|---|---|---|---|---|---|---|
| 7:00 A.M.-10:59 A.M. | 13% | 12% | 16% | — | — | 22% | 14% | 14% |
| 11:00 A.M.-3:59 P.M. | 34 | 38 | 35 | — | — | 33 | 48 | 37 |
| 4:00 P.M.-10:59 P.M. | 42 | 35 | 22 | — | — | 44 | 36 | 37 |
| 11:00 P.M.-6:59 A.M. | 11 | 15 | 27 | — | — | 0 | 2 | 12 |
| Total | 100 | 100 | 100 | — | — | 99 | 100 | |
| Number of warrants | 236 | 66 | 63 | — | — | 9 | 64 | |

Time of serving was not noted in Forest City and Hill City.

Total less than 100 percent is due to rounding.

for the search to be conducted at night. In one city, no special showing is required, but the judge is given a choice of crossing out one of a pair of alternative phrases: "You are therefore commanded to search forthwith the place or person described (during the day)(at any time)...." In our review of issued warrants, we noted many instances in which neither phrase was deleted; we took this to mean that no restriction was placed on the time of the search. In another jurisdiction, "positive proof" of the location of the searched-for items had to be presented to the magistrate to justify a nighttime search.

As Table 28 demonstrates, few warrants are served late at night or early in the morning. Most are executed between 7:00 A.M. and 11:00 P.M., according to our interviewees, to coincide with peak hours of criminal activity and the executing officer's duty hours. It was explained to us that nighttime searches are not desirable because of the increased risk of injury to the executing officer and because, at night, it is easier for suspects to escape.

### *No-knock Entry*

In two jurisdictions, we encountered requests for so-called no-knock warrants—warrants authorizing officers to break into a room or building without announcing their presence and authority. In most

states, prior approval for such entries is not required. Executing officers are authorized to make an unannounced entry if notice would endanger the officers or lead to destruction of the items sought.[39] In Plains City, 20 percent of the applications used a special "Immediate Entry" form. In Mountain City special requests were made in 17 percent of the cases. Standardized text was usually offered to support the no-knock request. None of the officers interviewed indicated that such warrant applications were scrutinized any more stringently than others, although officers in Plains City were apprehensive that this might change when a new form became effective which would require a separate signature by the judge.

Law enforcement officers with whom we spoke were divided about the usefulness of no-knock entries. One Mountain City narcotics officer remarked: "We still get no-knocks on occasion but most of the time we don't use them. A lot of times there are disadvantages that way. [If] you take a guy's door off and run into the house, you're really looking for problems." This view was echoed in River City. On the other hand, we heard of officers in several cities "kicking down doors" without waiting for a response—"all you've got to [do is] raise your palm up beside the door" to announce your presence before forcing your way into a house.

## Submission of an Inventory and Return

We were told, almost uniformly, by police personnel that a return was filed in every case, even those in which the warrant was not executed or in which no seizure was made. As indicated in chapter 2, this appeared to be the practice in five of the seven cities visited. The return generally appeared to meet the statutory requirements. The items seized were usually listed and described in detail. The returns were signed and dated by the executing officer (almost invariably the warrant applicant) and by a witness (sometimes a fellow officer, sometimes a resident of the site searched, occasionally a neighbor). As suggested by Table 28, in all but Forest City and Hill City, there was a space on the return form for recording the time of execution.

## Availability of the Record

Although search warrants provide a record that can be examined by the defense and the trial and appellate courts, it is not always clear how the record is made available. Although the warrants, affidavits, and returns were retained in the court records in each of the jurisdictions we

examined, only in River City and Hill City was a systematic attempt made to match the court's copy with a case file, and the success of this effort was far less than universal in River City. In the other cities, warrant records were kept in chronological order in envelopes or boxes. The case file contained a copy (usually that of the prosecutor) only as a result of a suppression motion. In Harbor and River Cities, a copy of the affidavit is left at the site of the search. In the other jurisdictions, defense counsel apparently obtained a copy from the prosecutor through the discovery process.

## Do Practices Meet Constitutional and Statutory Requirements?

It is impossible to be definitive about the legal sufficiency of the search warrants we examined. The variations in police practice and judicial interpretation are too great, and the study was not geared to conduct the rigorous analysis required to support conclusions regarding legal sufficiency. At best, it can be stated that there are certain areas of warrant practice which raise questions about validity. This is especially true of cases involving illicit drugs and relying on the statements of confidential informants. The absence of any verification of informant statements in some cities is troubling even under the more relaxed standard recently announced by the U.S. Supreme Court (which became effective after data collection for the project had been completed.)[40] The use of boilerplate language combined with the brevity of the magisterial review is more suggestive of a routinized administrative procedure than a constitutional check on police power. The use of statutory language rather than a listing of the specific items believed to be on the premises, together with the standard authorization to seize evidence of domicile and control, substantially broadens the scope of authority granted officers armed with a search warrant. Finally, the issuance of warrants to conduct searches when no prosecution is contemplated exempts the process from the ordinary remedy against unreasonable searches, the motion to suppress. These and other issues are discussed at greater length in chapter 7. As Justice Jackson and, more recently, Justice Brennan have made clear, these points are hardly academic or "hyper-technical" quibbles:

> [Fourth Amendment rights]...are not mere second class freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart.

> Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. . . .
> But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.[41]

# Notes to Chapter Three

1. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 American Criminal Law Review 601, 618 (1982); W. LAFAVE, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 4-5 (1978); D. RISIG, SEARCHES AND SEIZURES HANDBOOK, 57-58 (1968).

2. Grano, *supra* note 1, citing 1 SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS, 190-91 (1971).

3. United States v. Jeffers, 342 U.S. 48 (1951); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Shadwick v. City of Tampa, 407 U.S. 345 (1972).

4. Steagald v. United States, 451 U.S. 204, 213, (1981); *accord* Stanford v. Texas, 379 U.S. 476 (1965).

5. LaFave, *supra* note 1, at 52; Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli* Primer, 25 Mercer Law Review 741, 743 (1974); *see* Franks v. Delaware, 438 U.S. 154, 169 (1978); United States v. Cortina, 630 F.2d 1207 (7th Cir. 1980); People v. Garcia, 109 Ill. App.3d 142, 440 N.E. 2d 269 (1982), *cert. den.* 460 U.S. 1040, (1983).

6. *See* Appendix.

7. Steagald v. United States 451 U.S. 204, 213 (1981); *accord* Texas v. Brown, 460 U.S. 730(1983)(Stevens, J., concurring).

8. Shadwick v. City of Tampa, 407 U.S. 345 (1972).

9. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

10. J. SKOLNICK, JUSTICE WITHOUT TRIAL (1964).

11. *See* Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 American Bar Foundation Research Journal 543, 628 (1982) for a comparable view by an appellate judge. *See also* Brinegar v. United States 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

12. Illinois v. Gates, 462 U.S. 213, 232 (1983).

13. BLACK'S LAW DICTIONARY, 1365 (4th ed. 1968); *see also* Brinegar v. United States, 388 U.S. 160, 175 (1949).

14. Illinois v. Gates, 462 U.S. 213, 238 (1983).

15. Giordenello v. United States, 357 U.S. 480, 486 (1958).

16. Illinois v. Gates, 462 U.S. 213, 240 (1983).

17. United States v. Ventresca, 380 U.S. 102, 109 (1965).

18. A police officer characterized the elements that must be contained in an affidavit as "who, what, where, and why."

19. *E.g.*, in Border City it was common for warrants for search of a drug dealer's residence to include a recitation that "dealers are known to accept stolen property in exchange for the drugs they sell." We examined a number of warrants directed at premises known to be occupied by members of a motorcycle gang. Such warrants sought authorization for Border City police officers to seize not only drugs, for which probable cause was amply demonstrated, but also guns and stolen property based on the assertion that "in the affiant's experience," members of the gang are "known to carry weapons" and "to accept stolen property."

20. E.g., "I also know [being an officer with ___ years of experience in narcotics investigations and responsible for no less than ___ arrests for drug-related offenses] that those who sell narcotics are frequently users of narcotics and other drugs and will commonly have narcotics and other controlled substances on hand to maintain the confidence of their customers and to satisfy their own habits."
"My experience indicates that persons who deal in stolen property often keep it around for weeks or months, frequently keeping it for their own use, or waiting for a safe time to move it."

21. In another city, nearly every search warrant affidavit involving statements of a confidential informant recited:

> The informant has given me information in the past that drugs were to be found at specified locations and on specified persons. I subsequently investigated those locations and persons and determined the information was correct in all respects. Information provided by this informant has resulted in at least ___[usually in increments of 5] arrests and the recovery of contraband. Informant has never given false or misleading information, nor have I been given reason to doubt informant's ability to identify controlled substances, including [fill in type of drug]. Informant has previously identified [fill in type of drug] in my presence. I know informant to be familiar with methods of

packaging, consumption, and transfer of [fill in type of drug].

22. Many, though not all, of the judges with whom we spoke denied that they ever gave affidavits a cursory reading. Many of the police officers we interviewed, however, believed that judges often skim affidavits in routine cases such as searches for drugs and seizure of pornographic films.

23. In a controlled buy, a police informant is given a specified amount of cash after a thorough search to verify that the informant is drug-free and has no other money. The informant is then sent into a building in which drug transactions are suspected. Surveillance of the area is maintained by the police. The informant returns from the building to the observing officers and turns over the alleged drugs purchased with the provided funds.

24. For further discussion of this point, see chapter 6.

25. For an example of the dangers of the double affidavit, *see* United States v. Cortina 630 F.2d 1207 (7th Cir. 1980).

26. For discussion of the importance of a corroborative evidence see Illinois v. Gates, 462 U.S. 213, 241-246 (1983), and 103 S. Ct. 2348-2349 (White, J., concurring).

27. New Orleans Times-Picayune, June 12, 1982; Section 1, p. 15. The officer subsequently pleaded guilty to perjury. *See also* People v. Garcia, 109 Ill. App. 3d 142, 440 N.E.2d 269 (1982), *cert. den.* 460 U.S. 1040 (1983) and United States v. Cortina 630 F.2d 1207 (7th Cir. 1980).

28. Times-Picayune, *supra* note 27.

29. Cited in note 27, *supra.*

30. See Fyfe, *Don't Loosen Curbs on Cop Searches,* Washington Post, Feb. 27, 1983, at B1.

31. Times-Picayune, *supra* note 27.

32. Steele v. United States, 267 U.S. 498, 503 (1925).

33. *See, e.g.,* State v. Clark, 281 N.W.2d 412, 417 (S.D. 1979) (Henderson, J. concurring). *But see, e.g.,* Gonzales v. State 577 S.W.2d 226 (Tex. Crim. 1979), *cert. den.,* 444 U.S. 853 (1979); People v. Schmidt, 172 Colo. 285, 473 P.2d 698 (1970).

34. *See, e.g.,* Andresen v. Maryland, 427 U.S. 463 (1976); State v. Kealoha, 62 Haw. 166, 613 P.2d 645 (1980); *but see, e.g.,* State v. Legas, 20 Wash. App. 535, 581 P.2d 172 (1978).

35. 403 U.S. 443 (1971).

36. LaFave, *supra* note 1, at 183-84.

37. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

38. *See* Appendix.

39. No-knock (unannounced) entry should be distinguished from forcible entry which is authorized in many jurisdictions if there is no response to the executing officer's knock (see Appendix).

40. Illinois v. Gates, 462 U.S. 213 (1983).

41. Brinegar v. United States, 338 U.S. 160 (1949) (Jackson, J., dissenting).

CHAPTER FOUR

# Protection of Fourth Amendment Rights: Unintended Effects

In the course of the preceding discussion of the degree to which search warrant practices provide the protection intended by the Fourth Amendment, a number of dysfunctional effects were mentioned. These include cases lost because of the delay inherent in obtaining a warrant, the use of alternative search strategies that stretch and, at times, exceed the legal limits, and the perception that search warrants act as a lightning rod for challenges to the admissibility of the evidence seized, thereby protracting and jeopardizing prosecutions. Each of these possible unintended effects of the use of a search warrant will be explored more thoroughly in this chapter.

## Losing Cases Because of Delay

One of the most common and understandable complaints of the police officers we talked with was that the requirements of the Fourth Amendment resulted in the loss of "good cases." Delay occasioned by the need to prepare the warrant application and to locate all the appropriate officials required to approve it had to be weighed against the risk that any evidence seized might be suppressed if the officer erred in deciding to proceed with the search without a warrant. The delay and the arduous administrative process many police officers feel they suffer because of the Fourth Amendment requirement are so frequently cited that they seem self-evident. Indeed, they form the basis of the "exigent circumstances," and "automobile" exceptions to the warrant require-

ment.[1] Nevertheless, it is useful to document this near-universal perception.

In every site except River City, we were told by police officers of the inevitable—and often unnecessarily protracted—wait for the magistrate. We were told that typically it takes several hours (e.g., "a minimum of four hours" in Mountain City, and three to four hours in Border City) from the time an officer decides a warrant is needed to the time the officer actually has one in hand. The following description is representative:

> [I]f everything goes right, you find people, and the girls get 'em typed and you can find the judges when they are sitting at the bench—because a lot of judges won't see people in their offices. [If you miss them there,] they leave and go to lunch and you have to wait until they come back for the afternoon dockets, and if they are already into the afternoon dockets, they are not going to interrupt the procedures [for a warrant]. So you sit and wait through three or four docket sessions. . . . It can take all day.

Another detective in Mountain City observed that it was the particular personalities, not the legal procedures involved, that were the real problem. A judge in Border City characterized this as the difference between judges who feel they are "appointed as public servants" and those who feel they are "anointed and won't even take telephone calls."

The prosecutorial screening of the warrant application can exacerbate the problem of delay for the warrant-minded officer. In fact, in some jurisdictions where "duty prosecutors" were supposedly on standby status to expedite the officer's acquisition of a warrant, we heard horror stories regarding the difficulty of getting a warrant. One officer in Mountain City told us:

> There could be three or four attorneys over there right now who don't have court or who don't have anything going on. But if you say that I have a search warrant that needs to be done, they panic. . . . So, I've been told, "Wait until so-and-so gets back from court and he'll do it for you."

The reaction of the officer was echoed by others.

> You say to yourself, "My God, you know, if I'm putting you out, you know, I'll run back out to the house and try bargaining for consent, you know, 'cause I can get that done." We're looking at it from our point of view, too. I'm saying that I don't want to be here 'til tomorrow morning trying to get the damned search warrant.

On the other hand, a narcotics enforcement supervisor in Border City commented that the prospect of delay often requires that the officer

carefully reconsider the comparative costs and benefits of a particular line of action.

> It causes him to reassess what he has, based upon all the evidence he has, and if he thinks in his own best judgment, at best, he is going to come up with a baggie of marijuana, even though maybe he has probable cause to obtain a search warrant, you know he's going to be really reluctant to go through all that to get it.

Police officers are clearly irritated by the impediments placed in their path when they try to follow the rules. But our data do not show that the delays encountered in procuring a search warrant actually thwarted the officers' efforts to seize contraband, stolen property or evidence in those cases. As shown in chapter 2, seldom did police officers fail to seize something when serving a search warrant. In an average of 91 percent of the executed warrants, at least some seizure was made, and in an average of 74 percent of those warrants, the officers seized all or most of the items sought.[2] These averages may be somewhat inflated. As suggested above, when time is of the essence, searches are conducted under one of the exceptions to the warrant requirement. Moreover, these figures are affected by failures to file a return when nothing is seized, and by the practice described to us by a Plains City detective of seizing something, even if it is only identification, to protect the "reliability" of an informant. But it should be noted that there was general agreement among the police officers to whom we spoke that "bloop warrants" (Harbor City) or "dry holes" (Plains City) are few.

## Use of Alternative Methods for Conducting a Search

One consequence of the delays and irritation associated with the warrant process is that police officers have developed and routinely employ, at least in some jurisdictions, a variety of techniques that allow an officer to avoid obtaining a warrant before conducting the search. The strategies include obtaining "consent" from the person whose property is to be searched, and timing an arrest so that a search "incident to the arrest" is likely to yield the desired incriminating evidence.[3]

According to the officers interviewed in Harbor, Mountain, and Plains Cities, many searches are actually conducted pursuant to the consent of the person searched. In Mountain City, we were told that 98 percent of the searches were by consent; in Plains City, we were told 10 percent. Indeed, listening to some law enforcement officers would lead to

the conclusion that consent is the easiest thing in the world to obtain. As one Mountain City detective explained, you just make an offer that cannot be refused:

> [You] tell the guy, "Let me come in and take a look at your house." And he says, "No, I don't want to." And then you tell him, "Then, I'm going to leave Sam here, and he's going to live with you until we come back [with a search warrant.] Now we can do it either way." And very rarely do the people say, "Go get your search warrant, then."

Both Harbor and Plains Cities used written consent forms that had to be signed by the consenting individual. The Plains City form stated:

> I, _____, know my constitutional right to refuse to allow a police search of my house and/or apartment at _____ *(address)* _____, and/or my _____ automobile. However, I have decided to allow _____ *(names(s) of officers(s))* _____ to search every part of my house and/or apartment and/or my automobile. They have my permission to take any letters, papers, materials or other property they want. I have decided to make this consent carefully of my own free will without being subject to threats or promises. I know that anything they discover can and may be used against me in a Court of Law.

The consent is to be signed, dated, and witnessed, and the form has space for a list of property taken.

Consent to a search must be "voluntarily given, and not the result of duress or coercion, express or implied."[4] We were assured that consent searches using these procedures nearly always stood up under challenge in court. At least one senior Plains City police officer doubted, however, that the city's consent form would ensure that a consensual search would be sustained if the voluntary nature of the consent were questioned, and several Mountain City judges expressed uncertainty over the degree to which consents to search were truly voluntary. One told us:

> I always wonder about actual consent. Of course, the officer is going to say, "Oh, yes, this person consented. I told him he didn't have to do it." And the defendant's going, "Yeah, sure," sarcastically. They always bother me—consent searches—because I don't know how the individual could really give informed consent.

Another judge put his finger on the problem when he said, "The very fact that you've got three 250-pound guys standing there with badges and guns on [means] the person isn't going to say no." In other words, some situations get dangerously close to being inherently coercive.

A third judge was even more skeptical: "This is one area of police testimony [with which] I find I have to be very careful." The judge suggested the following exchange to illustrate the point:

Judge: What did the man say, when you said you wanted to come in and look around?
Officer: [He said,] "Oh, be my guest, come right in."
Judge: What happened?
Officer: Well, I walked in.
Judge: And what did you see on the coffee table?
Officer: I saw an ounce of heroin, 50 condoms, and a scale.
Judge: So it's your testimony that this man gave you consent to enter?
Officer: Oh, yes, your Honor!

The judge evaluated the scenario in this way:

> Well, I'd say that's either a damned lie or that the con is so sophisticated that he actually did say those things, and he thinks, when he gets up [in court] and says [the cop is lying], that nobody in his right mind is going to believe the cop. I've had such testimony that is just nonsensical.

A number of officers informed us that another effective way to avoid the hassle of getting a warrant is to time the execution of an arrest warrant and then conduct a search (of the area within the immediate control of the defendant) incident to the arrest. The payoff is a product of timing and judgment.

> It comes down to planning and depends on what you're looking for. . . . If you think it's going to be in the car, you'd like to arrest the guy in the car, because then you've got the car. You can do an inventory search of the car; you can have it impounded. If you get him at home, you are kind of precluded from doing too much. I mean, you go in and you arrest him, and you start going through bed linen and stuff like that, you know you're going to be thrown out of court. It comes down to just how important the piece of evidence is you're looking for.

The most extreme consequence of the reluctance or inability (because of time) to meet fully the requirements for a search warrant involved incidents in which searches were conducted or threatened simply to confiscate contraband or harass drug dealers. In some instances such searches were conducted when probable cause was questionable; in others, the officers on the scene concluded that obtaining a search warrant was not worth the effort. A Forest City prosecutor related that police officers have occasionally been authorized to apply for a warrant that is intended solely to retrieve stolen goods or seize drugs, whether or not it helps in prosecuting a case. The prosecutor added that normally such a search will not harm the prosecution. The point is to "get the stuff

off the street." A veteran sheriff in Mountain City told us that warrantless "sneak attacks" on the residences of "known drug dealers" was a "favorite ploy" of the department. According to the sheriff, deputies would surround the house and holler, "Police! Open up!" and then sit back and laugh as they heard the toilets in the house flush repeatedly as a small fortune in illicit narcotics was presumably being destroyed. "We couldn't get the stuff legally, of course. So, in our own small way, we were just making it a little tougher for those guys to stay in business."

It is probably fair to say that submission and approval of warrants known to be inadequate are the exception rather than the rule, and it should be noted that interviewees in other cities fervently rejected such practices as not worth the cost and risks involved. As one Border City officer put it:

> We have reached the point [where] we no longer have the luxury of being able to make those types of arrests. [You] just cannot any longer sentence someone to 48 hours in jail. . . . You in fact have taken dope off the streets but you also put yourself in a precarious position.

It is clear, however, that at least on some occasions, in many jurisdictions search warrants are used to accomplish law enforcement objectives beyond those related to the capture and prosecution of offenders.

## An Easy Target for Constitutional Challenge

One unintended effect we expected, but did not find, was the occurrence of frequent challenges to search warrants by the defense. We were told by judges and law enforcement officers that motions to suppress are filed as a matter of course. As indicated in chapter 2, however, we found written records of such motions in an average of only 39 percent of the cases filed, with a range of 7 percent in Plains City to 57 percent in Hill City. In few instances were these motions actually heard, much less granted. We found evidence of just seventeen cases in which a motion to suppress evidence was granted. Only one of these cases was dismissed; twelve actually resulted in a conviction despite the suppression of evidence.

Several possible explanations exist. The simplest was presented to us by the attorney who handles almost all the motion work for the Hill City Public Defender Office: "Most search warrants are good. Occasionally I find one I can do something with. . . less than five percent." This lawyer's explanation for the lack of hearings on the motions that were

filed by private attorneys was that retained counsel often file a motion to suppress evidence simply to protect themselves against claims of incompetence of counsel, and that court-appointed private attorneys file such motions to "make a little money on a case." Although filing the papers takes little effort, the actual suppression hearing can be time consuming. Thus, the motion is withdrawn, often on the day of the hearing, or is obviated by a plea of guilty.[5]

A second explanation could be that most of the cases involving a search warrant that is constitutionally suspect are dismissed by the prosecutor before filing. We were unable to collect quantitative data on this point, but were told by the prosecutors with whom we spoke that screening out a case because of a bad warrant was a very rare occurrence. This is borne out by California data showing that fewer than eight-tenths of one percent of all felony arrests were rejected by the district attorney because of a search-and-seizure problem. The data did not reveal how many of these cases involved search warrants.[6]

A third possible explanation was provided by a Border City defense attorney who told us of a variety of defense strategies other than a motion to suppress to test the validity of a search or to suggest to a prosecutor that the case may be appropriate for settlement through plea negotiation. These included extended examination of the investigating officer regarding the search at the preliminary hearing, seeking information about the informant through discovery or a motion to disclose the informant's identity, and advising the prosecutor directly of any shortcomings in the warrant or its execution. In each of our sites, a high percentage of cases were disposed of through pleas of guilty. Related to this, and the probable reason for the exceptionally low rate of motions to suppress in Plains City, was an extensive diversion program for alleged drug offenders and other individuals accused of nonviolent crimes. Guilty pleas and diversion siphon off the cases in which a motion to suppress might otherwise be heard.

Finally, there is the comment of a Forest City prosecutor that defense attorneys "roll over" when they see a warrant. The presumption of validity accorded a warrant was seen as a significant hurdle to overcome. As a Hill City prosecutor put it:

> [T]he warrant insulates the police considerably more than a warrantless search, because there has been the interdiction of the independent magistrate, where he [and not the police] is the one determining probable cause. . . . [T]he warrant is presumed to be valid; the burden is on the defendant to show that it isn't.

There may be a negative side to the presumed legitimacy of a warrant and the resulting lack of challenges, however, if the initial scrutiny by the magistrate is not as probing as the creation of just such a presumption would seem to require. An underlying sentiment that we detected at several different stages of review was, *if this instrument were faulty, they wouldn't have let it get past point 'x' (e.g., the trusted detective, the screening prosecutor, or the magistrate) or, if it's bad, they'll catch it at 'y' (felony court, or on appeal).* As one Border City police officer phrased it, "Some judges will let you walk in and out. . . . You have to feel that they are counting on the DA." As a result, the warrant may never receive the neutral and objective scrutiny presumed by the Fourth Amendment.

# Notes to Chapter Four

1. Warden v. Hayden, 387, U.S. 294 (1967); United States v. Ross, 456 U.S. 798 (1982); Carroll v. United States, 267 U.S. 132 (1925).

2. See Table 22, chapter 2.

3. *Cf.* Illinois v. Gates, 462 U.S. 213, 236 (1983).

4. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). This decision applies "totality of the circumstances" test to assessing the voluntariness of a consent (at 248-49). Some jurisdictions impose a higher standard of proof when a search is conducted by consent than when it is conducted pursuant to a warrant. *See, e.g.,* Military Rules of Evidence 314 (e)(5).

5. The same attorney told us that hasty motions filed at arraignment by a public defender are withdrawn immediately after review by the screening attorney if there are no grounds for challenge.

6. This percentage is derived from the data contained in S. MELNICOE, A. SCHMIDT, L. MCKAY, AND C. MARTORANA, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982); See also Davies, A *Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests,* 1983 American Bar Foundation Research Journal 611 (1983).

CHAPTER FIVE

# The Search Warrant Process From the Police Perspective

Project staff interviewed law enforcement officers in all but one of the research sites. Our interviewees included narcotics division supervisors in Border, Harbor, and Plains Cities, detectives in Forest, Mountain, Plains, and River Cities, division heads in Forest and Plains Cities, and county sheriff department officers in Mountain City. Interviewees were asked about their attitudes toward the prior review requirement, their use of confidential informants, their training in search-and-seizure law, and their recommendations for beneficial changes in the system.

## Attitudes in General

The views of police officers toward the limitations imposed by the Fourth Amendment were quite disparate. A few acknowledged that the warrant requirement is appropriate for everyone's—including their own—protection. Many seemed to accept the requirement as a necessary part of law enforcement procedure. Others were begrudgingly resigned to it as a reality with which they must deal. Still others appeared to regard the requirement as one of a long series of unnecessary intrusions by the courts into what they considered to be the proper province of law enforcement; to these officers, the requirement is largely something to be "gotten around."

Because our sampling was not random, it is impossible for us to estimate the prevalence of each of these kinds of attitudes among law

enforcement officers everywhere. Because of the frequency and intensity with which all views were articulated, however, we are confident that each is an important aspect of the overall police perspective.

One empathetic judge suggested that the police view of the warrant requirement depends largely upon the legal culture into which individual officers were assimilated when they joined the force.

> I suppose [for] officers who came up on the force within the last five years, [the warrant requirement is viewed as requiring] a lot of running around, but they grew up with it, and they don't know anything different. I suppose the old hats that have been on for twenty years still gripe and moan about search warrants. I think it depends on what their experience has been. If they operated under the law twenty years ago, then search warrants are kind of winked at more than anything else, and I think they gripe about it.

Because we found considerable evidence for this perception, and because it goes to the very core of the integrity of the search warrant application and review process, we believe the subject merits close attention.

### *Conflict Between Law Enforcement and Judicial Objectives*

Underlying the operation of the Fourth Amendment is a fundamental conflict of objectives between law enforcement and the judiciary. Herbert Packer's abstraction of the competing value systems underlying his "crime control" and "due process" models of criminal justice administration is apropos:

> We are faced with an interesting paradox: the more we learn about the Is of the criminal process, the more we are instructed about its Ought and the greater the gulf between Is and Ought appears to become. . . . We discover that the police often use methods in gathering evidence that violate the norms of privacy protected by the Fourth Amendment; we are told that evidence obtained in this way must be excluded from the criminal trial. But these prescriptions about how the process ought to operate do not automatically become part of the patterns of official behavior in the criminal process. Is and Ought share an increasingly uneasy coexistence. Doubts are stirred about the kind of criminal process we want to have.[1]

Adapting Packer's conceptualization to our data suggests that at least some members of the law enforcement community embrace a system of values that places the apprehension of offenders above all else. This observation does not imply that those "crime control" values are necessarily good or bad, only that they are in direct conflict with a competing system of values that places a premium on the right of all persons to be protected from unwarranted invasions of their privacy.

We submit that it is precisely this conflict that lies at the heart of many of the problems discussed in this report. The plain fact of the

matter is that many police officers perceive the warrant requirement as inhibiting the effective performance of their duty. As they see it, the dilemma is clear: obey the law and watch the criminal walk, or disregard it and send the offender to jail.

One veteran law enforcement officer suggested to us that the search warrant requirement is just another "game" the courts have created. It is not difficult, however, to "beat" the game; one way or another, the officer assured us, cops could get what they wanted. Indeed, in the course of our research, we were often told of how the game was played. The tactics—some of which are legal, some of which are not—fall into three major categories: circumventing the requirement, ignoring the requirement altogether, or ostensibly meeting the requirement via fabrication or falsification of evidence. The first strategy is discussed in chapter 4. It includes various techniques for obtaining consent to search and timing an arrest to permit a search of the target area pursuant thereto. The second strategy is epitomized by the actions of a few officers who told us they conduct a search when they "feel like it," and "let the judge worry about probable cause." The third strategy—the fabrication of probable cause—is discussed below.

The problem of police perjury goes to the heart of the integrity of the warrant review process. Accordingly, the nature and motivation of "the police lie" demand special attention. Although our research was not designed to focus on this particularly troublesome phenomenon, our findings, coupled with the writings of others in this area, can help to inform our response to the problem.

That police lie is a disturbingly well-documented aspect of criminal justice administration.[2] Legal scholar Jerome Skolnick cites the social organization of policing, complete with its own "moral norms and constraints" as being at the heart of police deception:

> The police subculture—the workaday normative order of police—permits, and sometimes demands, deception of courts, prosecutors, defense attorneys, and defendants, but rarely, if ever, allows for deception of fellow policemen. Police thus work within a severe, but often agonizingly contradictory, moral order which demands certain kinds of fidelities and insists upon other kinds of betrayals.[3]

The consequence of this double standard is predictable:

> Within an adversary system of criminal justice, governed by due process rules for obtaining evidence, the policeman will thus lie to get at the truth. The contradiction may be surprising, but it may be inevitable in an adversary system of justice where police perceive procedural due process norms and legal requirements as inconsistent obstacles to truth and the meting out of just deserts for the commission of crime.[4]

Doubtless, there is plenty of blame to go around. Police administrators, prosecutors, judges, and the general public are all, in part, responsible for the problem. In a recent column in the *Washington Post*, a police veteran of sixteen years cited administrative pressures on police to flaunt the law they are sworn to uphold and then to lie about it to keep the guilty from going free (as well as to protect themselves).

> In the real world, police chiefs, under great pressure to reduce crime, pass that pressure on to officers, evaluating them almost exclusively by how many arrests and convictions they chalk up. Some officers—though not most—respond by overlooking constitutional niceties and conduct willfully illegal searches. . . . The targets are simply left humiliated, resentful and—since cops are not foolish enough to do these things before audiences—without means of proving what happened. . . . [Furthermore,] police who conduct illegal searches do not go around admitting that on witness stands.[5]

Judges and others we talked with were conscious of the problem of police deception. A veteran Mountain City prosecutor, a city where the district attorney is responsible for drafting most of the warrants, noted:

> Sometimes [police] are willing to stretch the facts and circumstances a little bit, and we have to have them clearly understand that maybe we're going to have to defend that warrant. A lot of work may go down the drain if the information isn't absolutely correct and precise.

A Hill City judge voiced the same concern regarding the reliability of police testimony:

> Most of the time the cops will leave the facts alone. But if he knows he's got [a suspect] dirty, as far as he's concerned, what difference does it make if you have to fudge a little on probable cause? . . . [At times,] my concern is [the cops] didn't have a damned thing; they were playing their hunches and they parlayed in and now they are going to turn around and change the facts. . . .

A Mountain City judge conceded both the likelihood, and the difficulty of detecting, police deception:

> It would be very easy for a police officer to manipulate the facts . . . but I'm not certain how the judge can prevent that from happening, unless the judge has some prior knowledge of those facts. Traditionally, of course, the judge is extremely busy and the policeman comes in with a search warrant, sits down, you have a million other things happening, you go through the warrant and make your decision as to whether or not the affidavit is sufficient . . . and you don't have a lot of other conversation with the police officer. . . . So, I'm sure that [deception] goes on.

The comments of several officers we interviewed characterized the conflict between the law enforcement and judicial perspectives in

essentially the same terms as the literature cited above. One River City detective, for example, told us that many uniformed officers resent the review requirement because they tend to believe police deal only with criminals, not innocent people. Others told us they felt that the application review requirement ignores the experience, professionalism, and expertise of police officers. In this context, the words, quoted in chapter 3, that were used to describe the narcotics officer who committed perjury to obtain a search warrant bear repeating: "Paul was a good policeman. He was just overzealous. . . ."

***Judicial and Prosecutorial Inconsistency and Inexperience***

From many officers we heard complaints that judges and prosecutors were sometimes of little help, and at other times, actual impediments to obtaining a search. Doubtless, such perceptions contribute to the kind of conflict discussed above. In this regard, we frequently heard complaints about judicial inconsistencies in interpreting and applying the law on search and seizure. The lament of one detective was typical: "You get a lot of different rulings from different judges; judges don't all see the law exactly the same. I could say in both [misdemeanor] and [felony] court that one judge might make one ruling on that and one judge might throw it out. . . ."

In both Mountain and Harbor Cities, officers commented that appellate cases concerning search warrants are often decided by close majorities with multiple opinions. This makes it difficult for law enforcement officers to know the appropriate way to proceed. Even greater uncertainty is introduced by the varying views of trial court judges. One Mountain City detective told us the pains that had been taken at every important step to assure the propriety of a major investigation. The officer's exasperation is understandable:

> We went through everything—search warrants, etc.—all the way down the line. We go to the [misdemeanor] court, and [his/her] royal highness thought [he/she] knew more than the U.S. Supreme Court who ruled on a case identical to [ours] and [the misdemeanor court judge] said [what we had done] wasn't good enough.

The judge in question was well known by officers and prosecutors throughout the jurisdiction as subscribing to especially high standards regarding search warrant applications. Another detective told us that officers were routinely advised by various deputy county attorneys to "take this to anybody but [the judge in question] and have it signed."

Officers also observed that considerable variation exists among judges not only in their interpretation of the probable cause standard but

also in their attitudes about whether laws against certain crimes ought even to be enforced. For example, we were informed that some judges are so dubious about the utility of enforcing gambling laws that they refuse to approve any warrant sought in a gambling case, even though it may meet legal muster. Others do not want to involve themselves in pornography cases, or dislike narcotics enforcement activities. The problem was explained by a Border City police lieutenant:

> If [the judge] feels comfortable with the area of law—say narcotics law—[then he] doesn't treat you like a pain in the ass. [He will] show some desire, some willingness to work [with you], look at the thing, ask you some questions, professionally discuss the thing. [Conversely,] there are those judges obviously who don't believe that strongly in taking a hard-line approach to narcotics enforcement. I think that is reflected in their attitudes when we come in to get search warrants.

As suggested earlier, the idiosyncracies of individual judges were also said to be irksome. We were told that some judges will not sign warrants while they are in chambers. Some judges will make officers wait, while others are anxious to minimize delay. Some judges see nighttime visits as part of their duties, while others will tell officers to call someone else. Understandably, police tend to view the variations noted here—legal and personal—as needlessly making the already difficult task of law enforcement even more frustrating.

Some of the same tensions were evident between police officers and prosecutors. While some officers expressed appreciation for the help prosecutors offered in drafting a search warrant application, others resented the "interference." Comments were made in several cities about "greenhorn" prosecutors who asserted their views over those of experienced police supervisors. Detectives in Plains City assigned to a special stolen property recovery unit told us that when officers face a new situation or one involving some type of ruse or undercover operation, they go either to the prosecutor's fraud unit or directly to a senior attorney in the office, rather than to those generally assigned to review warrant applications. Officers from the narcotics division in both Forest City and Hill City told us they will simply draft and file search warrant applications by themselves, without seeking the prosecutorial assistance or review usually accorded applications from other divisions in those cities.

Further evidence of the strain some officers feel in performing their jobs was apparent as they spoke of the role of the police officer at

suppression hearings, a time when officers are often called to relate specific details that underlay their original request for a search warrant. It was clear from the tenor of their remarks and the glee in their voices as they regaled us with vignettes of how they had "beaten" the defense, that at least some officers enjoyed the challenge of matching wits with defense attorneys in court. More typical reactions, however, ranged from resignation ("It's just part of the job.") to resentment ("Who's on trial here, anyway?"). Some officers we talked with said that the implication is often made in suppression hearings that all police are liars, and that it is the officer, not the accused, who is the real offender. A River City detective went so far as to suggest that it was the judge, who found probable cause and signed the warrant, who should testify rather than the investigating officer.

Others resent the amount of time consumed by such hearings, time which they have to take away from their other law enforcement duties. Officers blamed the prosecution, as well as the defense, for this loss of valuable time. A police captain in Plains City even told us of a form developed by the department to document the frequency of such abuses. Testifying officers are instructed to log all incidents of being called to court unnecessarily. This understandable resentment is exacerbated when, as a Harbor City lieutenant told us is frequently the case, prosecutors are unprepared or have barely found time to read the officer's copy of the affidavit before the hearing begins.

***Acceptance of the Fourth Amendment***

Notwithstanding the tensions described above, a substantial number of officers recognize the significance of—or accept as necessary—the Fourth Amendment requirement of judicial review. In defense of the warrant requirement, officers noted that it works to ensure fairness and objectivity, provides them with a measure of the success of their investigation, makes for a stronger case for prosecution of the accused, and may even strengthen the officers' hand during an investigation. For example, a River City officer accepted the warrant review process as necessary to protect individual privacy rights and wanted the same protection extended to him or her. It forces the officer to stop and think, not just react, we were told. Several others conceded that it was necessary to have a legally trained official make the authoritative decision whether or not the legal standard of probable cause is met by the facts of a case. Another urged that the review requirement is a "necessary evil,"

suggesting that it was the abuse of privacy rights by police officers that made the requirement necessary in the first place.

Second, it was noted that the search warrant requirement helps to make a stronger case for prosecution. Many officers we interviewed indicated that they would seek a warrant when they wanted to be "absolutely certain that a search would be upheld" if the case went to trial. Others suggested that they were quite willing to seek the independent review of a magistrate (and prosecutor, in some cases) before conducting a search "just to be safe." They saw independent review as necessary to establish the legitimacy of the warrant and the police action behind it. As a Forest City officer put it, "We need the layering."

Third, some narcotics officers indicated that they use the warrant review as a measure of the success of their investigation. By approving their application for a warrant, they said, a judge was telling them that they were trusted and were doing a good job. Furthermore, they suggested that because a warrantless search in the typical narcotics case would not withstand a suppression challenge, they always strived to obtain enough evidence to obtain a warrant. When they received the magistrate's approval, they could be confident that they had a solid case against the accused.

Fourth, we were told how obtaining a warrant could actually strengthen the officer's hand during an investigation. One detective told us, for example, that a search pursuant to a warrant offers certain advantages over a warrantless search. Specifically, the warrant is seen to afford the opportunity to search a much broader area for evidence of a crime than might otherwise be possible—e.g., in the case of a search incident to arrest, wherein the search is narrowly restricted to the area within the suspect's immediate control. We were also told that a search warrant can be used as a bargaining tool to induce suspects into becoming informants, especially in cases involving drugs and stolen property.

The most graphic illustration of law enforcement support for the warrant requirement we encountered was a police supervisor in Plains City who kept track of the number of search warrants obtained by each detective in the divison. Successfully obtaining and properly executing a warrant was considered a mark of good performance.

## Preparing the Search Warrant Affidavit

We asked police officers to describe the process of determining when to obtain a warrant, preparing the warrant affidavit, and obtaining

any internal screening before taking the warrant to the judicial officer for review. The procedures varied considerably among the project sites: in some cities, the police rarely consult the prosecutor's office; in others, the prosecutor screens the applications to assure their adequacy; and in still others, the prosecutor virtually writes the affidavit.

Forest City police officers rely heavily upon the prosecutor's office. Officers are trained to call a prosecutor and ask whether they should obtain a warrant at their first suspicion that they may be going into a protected Fourth Amendment area—i.e., when a person has a reasonable expectation of privacy. An officer explains to the prosecutor the facts on which the warrant is to be based. The prosecutor then assists in writing the affidavit and often appears with the officer before the judge. The procedures employed by the narcotics division constitute an unofficial exception to this practice, inasmuch as narcotics detectives usually prepare affidavits on their own. We were told that prosecutors reject very few of the narcotics warrant applications they see, though they may suggest a modification in 30 to 50 percent of the applications.

In Plains City, all search warrant applications are prescreened by the prosecutor's office after they have been prepared by detectives. We were told that some detectives, especially those in specialized divisions, are sufficiently experienced in writing search warrant affidavits that it takes them only about an hour to prepare an affidavit. Once the affidavit is prepared—and, in some cases, reviewed by a supervising officer—the affiant must contact the prosecutor on duty and read him or her the affidavit. Normally, this is done over the phone or in the presence of prosecutors on duty at the misdemeanor court adjacent to the police station. Unless the officer has obtained a prosecutor's signature on the face of the affidavit itself, the reviewing judge will normally—and almost always at night—ask whether the affidavit has been reviewed by a deputy prosecutor.

In Harbor City, officers rarely obtain advice from prosecutors before presenting a warrant application to a judge, unless the case is "close to being made." Officers are instructed to be prepared to defend anything they put in the affidavit. We were told by a police lieutenant that the rule of thumb for drafting search warrant affidavits is to ask, "How can I make the judge believe what I am saying?" Often, state or U.S. Supreme Court cases are quoted in the affidavit to indicate to the reviewing magistrate that the particiular fact situation under investigation falls within current judicial guidelines.

River City narcotics officers stated that absent exigent circumstances, they automatically apply for a search warrant, especially if the

search is to be conducted at a private residence. The development of a typical case requiring a search warrant was described as follows. Once an officer receives information about a particular subject from a confidential informant or an undercover agent, the officer starts a file on the individual. Depending on the circumstances, it may take as little as a few days or as much as six weeks to gather sufficient information to show probable cause for a search warrant. Officers stop their investigation as soon as they think they have sufficient information to establish probable cause, since pressing the investigation too far beyond this threshold increases the risk of tipping their hand to those under investigation.

While no formal prosecutorial screening of affidavits occurs before their presentation to a reviewing magistrate in River City, officers there will occasionally contact a prosecutor with whom they have a personal relationship, asking the latter informally to review an application. We were told that vice squad officers attempted several years ago to institute systematic review by the prosecutor's office, but met with little success because of the attorneys' heavy caseloads. Officers in both the vice and narcotics squads said they have close working relationships with the vice and narcotics screeners in the prosecutor's office; these screeners consult with officers when deciding whether to accept or refuse a case for prosecution. Several officers indicated they find advisory consultations with these officials helpful, for the screeners are the ones who ultimately accept or reject the case that is being made; other officers will question the district attorney only about specific legal points, not wishing to "tip their hand" regarding any "real" information about a case.

As described previously, informant testimony played a significant role in a substantial number of investigations. In this regard we found that the perceived importance of corroborating informant testimony before presenting it to a judge varied across the cities. River City officers, for example, committed substantial time and effort to corroborating information provided them by an informant before they sought a warrant based on that information. In sharp contrast, we were advised by Forest City narcotics officers that once an informant's reliability has been established, a phone call from that informant was considered a sufficient basis for drafting and presenting an affidavit.

The most notable feature of the review process in Border City is its highly successful procedure for screening and review of warrant applications by telephone. Because this procedure holds great promise for encouraging the use of search warrants review in many jurisdictions, it

is appropriate to discuss in some detail both how the procedure was seen to operate and with what results.

## Telephone Review of Warrant Applications

Twelve states and the federal government permit a magistrate to issue a search warrant by telephone.[6] Typically, the statutes provide that the officer calls the judge or the judge calls the officer after having been notified by a prosecutor of the waiting applicant. The officer is placed under oath and relates the facts supporting a finding of probable cause to believe that the incriminating items sought are to be found at the site of the proposed search. If probable cause is found, the magistrate signs the original warrant, showing the date and time of issuance; the officer is then authorized to sign and serve a "duplicate original warrant." The conversation is recorded either by a device on the magistrate's phone or at a central switchboard. The tape is then transcribed, certified as accurate by the magistrate, attached to the original warrant, and filed with the clerk of the court.

Telephone applications were permitted in four of the project sites, but only in Border City were they used systematically. The procedure used there is much like that described above. In Border City, however, the officer usually first telephones his or her field supervisor to obtain authorization to apply. If authorization is given, the affiant calls the dispatcher at the county sheriff's office. The dispatcher connects the deputy prosecutor assigned to warrant duty with the applying officer. Working from a field sheet listing the items sought and the basic facts regarding probable cause, the officer discusses the case with the prosecutor. If the prosecutor believes the facts to be sufficient, the dispatcher is instructed to contact a magistrate and to arrange and record a three-way conference call among the officer, the prosecutor, and the magistrate. After the officer is sworn by the magistrate, the three-way conference ensues, during which the prosecutor asks the officer a series of questions designed to elicit the responses needed to secure a warrant. On occasion, the magistrate may intrude upon this colloquy with questions; frequently, however, it remains undisturbed. If the application is approved by the magistrate, the magistrate directs the officer to sign the magistrate's name (with the officer's initials next to the signature) to a "duplicate original warrant" and to serve that copy.

The tape of the conversation is forwarded from the sheriff's office to

the court for transcription the following day. The magistrate reads the transcript to ensure its accuracy, certifies the transcript, and has it filed along with the tape cassette, the original and duplicate warrants, and the return. The entire procedure appears to work quite smoothly.

Of the 74 search warrants examined in Border City, 11 were applied for by telephone. The types of cases in which these application procedures were used did not appear to be significantly different from those for which a written affidavit was presented.[7] The telephone applications were heard by nine different magistrates, with only one of the nine judges hearing more than one application (that judge heard three). This is a considerably less concentrated pattern than observed for written applications. In fact, four of the judges who reviewed a telephone application reviewed no other warrant applications in our sample. Conversely, the judge who reviewed over 30 percent of the written applications was called for a telephonic authorization only once. This suggests that there is little opportunity for the applicant to select the reviewing magistrate when seeking a search warrant by telephone and that the duty judge system, at least with regard to the telephonic procedure, inhibits judge-shopping.

Questions were asked by the reviewing magistrate in eight of the telephone conversations, but substantive changes to the warrant resulted in only three instances. All of the telephonic applications we reviewed were approved and all warrants were executed. Execution generally occurred within 40 minutes, much sooner than for written applications.

A key to the procedure in Border City is the use of the sheriff's dispatcher as the technical fulcrum for the process. In both Hill City and Forest City, unsuccessful attempts were made to implement a telephonic application procedure by installing recording equipment on the judges' phones and having calls made directly to a judge (sometimes via a municipal operator). Both attempts foundered because of equipment problems, the expense of simultaneously equipping several judges' homes, or the difficulty of transferring portable equipment from one judge to another. In both cities, it was also noted that the telephonic application provision was really intended for rural areas of the respective states, where a warrant-seeking officer might be a hundred or more miles from the nearest magistrate, rather than for the cities.

The success Border City has had with the telephonic procedure may be due, in part, to the city's extensive experience in the area. The procedure was introduced there about eight years prior to the cases we

examined, shortly after the number of warrants issued annually had suddenly begun to skyrocket to unprecedented figures. In its first three years, the procedure grew steadily in use, being the basis for 50, 100, and then 150 issued warrants annually, and accounting for from 10 to 25 percent of all warrants. After this initial surge, officers' reliance on telephonic procedures diminished and leveled off, resulting in an annual figure that has remained between 50 and 100 applications for the last several years. During the same period, telephonic applications have accounted for between 10 and 15 percent of all warrants issued, even though the total number of issued warrants varied substantially over that period (i.e., from a low of about 350 to a high of nearly 900).

To assess the effect of telephone application procedures, two questions must be answered: (1) Are time and trouble really saved? (2) Are the constitutional standards regarding probable cause and detailed descriptions maintained? As to the first, the time needed to obtain authorization to search is cut from an average of three or four hours to about one and one-half hours, according to estimates of the Border City officers we interviewed. The "hassle" of the telephonic procedure appears to be only slightly reduced for them, however, because of the necessity of multiple telephone calls, having to wait on the line, and the added layer of field supervisor review. As for the content of the application itself, the transcripts of telephone applications often contained more information than written affidavits in similar cases. Furthermore, the quality (i.e., relevance and completeness) of the information was also quite good, compared with written applications. We are persuaded that this is due largely to two factors. First, it is easier and faster to convey all the information a judge might deem necessary for a finding of probable cause orally than in writing. Second—in Border City, at least—the information provided is very carefully and efficiently solicited by prosecutors, who know both what the judge needs to hear and how to interrogate a witness to elicit just that information.

## Police Training in Fourth Amendment Law

Although police officers in each of the study sites received some formal training in search-and-seizure law and the procedures for obtaining a search warrant, such training was generally viewed—by police as well as other officials involved in the warrant process—as extremely limited and of little practical use.[8] Typically, officers relied either upon

knowledge "picked up" on the job or provided by a supervisor or the prosecutor.

Formal training usually takes the form of a lecture (or series of lectures) at the police academy. The Harbor City Police Academy, for example, addresses substantive search-and-seizure law and administrative procedures for obtaining a warrant. The academy course in Forest City provides guidelines for distinguishing between searches permissible incident to arrest and those requiring a warrant. The Plains City Department recently instituted an in-service training program on search warrants. Several officers there suggested that the academy courses might be improved by requiring students to write a few sample affidavits to be critiqued by the instructor and by teaching officers to state the "who, what, when, where, and how" in each affidavit. Although River City had a "crash course" covering the elements needed to establish probable cause for a search, officers generally agreed that the course was superficial and provided little practical assistance. In Hill City, advanced training is conducted by the prosecutor's office and by the public defender during in-service classes and through videotapes prepared to explore issues presented by new cases.

Beyond this kind of departmentally sponsored formal training, we were told of supplemental efforts to keep officers abreast of developments in Fourth Amendment law. In Forest City, for example, the state attorney general's office publishes a monthly digest of the latest court decisions (including comments) regarding important law enforcement issues. The county prosecutor in Mountain City periodically publishes a newsletter with the same kind of information for police officers. We were also reminded that the FBI routinely presents seminars on search-and-seizure law for local law enforcement officers from all over the country.

Notwithstanding the kinds of formal efforts described above, almost to a person, police officers we spoke with indicated that the usual—and best—kind of training they received regarding Fourth Amendment law was "on the job," as they rode and worked with more experienced officers, tried their own hand at drafting an affidavit, and otherwise "learned the ropes." A Harbor City judge confirmed the inadequacy of the formal training received by officers with whom he worked, noting that the rate of search warrant application rejections increases whenever a group of new officers is rotated into the central investigations unit and diminishes as those officers gain experience. Several judges acknowledged that search and seizure is a difficult area of

law because of the rapid changes that have occurred, and a few observed that judges and prosecutors could also benefit from more training in this area. Others pointed out that the level of police training varies among police divisions and between metropolitan law enforcement agencies and rural law enforcement agencies.

## The Exclusionary Rule and the "Good Faith" Exception

Although the exclusionary rule and the increasingly discussed "good faith" or "reasonable mistake" exception to it were not the primary focus of our research, the significant attention these issues have received requires us to address them insofar as our research allows.

At the outset, it should be noted that the so-called good faith exception does not address search warrants *per se*. Instead, it affects the judicially fashioned rule that prohibits the state from using illegally seized evidence at trial. The good faith exception to the rule would permit the introduction of evidence illegally seized by police officers if a court finds that they had a reasonable and good faith belief that they were acting in conformity with the law. This exception has been endorsed by the U.S. Attorney General's Task Force on Violent Crime,[9] adopted by a number of federal and state appellate courts,[10] legislatively enacted into law by a number of state legislatures,[11] and was recently upheld by the United States Supreme Court in the context of searches conducted pursuant to a warrant.[12] One state has recently gone one step further by enacting the following statute:

> Property or evidence seized pursuant to a search warrant shall not be suppressed *unless the unlawful conduct. . . is considered substantial and in bad faith*. . .[i.e.,] the warrant was obtained with malicious purpose and without probable cause or was executed maliciously and willfully beyond the authority of the warrant or with unnecessary severity.[13]

This statute would thus allow illegally seized evidence to be used to convict the accused in some instances. It reintroduces the pre-Mapp remedy for the accused whose Fourth Amendment rights have been violated by permitting him or her to sue to recover civil damages from state and local governments and the individual officer or officers involved. Significantly, however, such a suit is precluded altogether if a motion to suppress is granted, or the prosecution is dismissed, or the prosecutor declines to file the case because of the violation of Fourth

Amendment guarantees.[14] In other words, under this statute the accused effectively loses the traditional benefit of the exclusionary rule in exchange for the right to sue the government for damages if, and only if, the illegal search results in his or her prosecution.

Most of the police officers with whom we spoke felt that application of a good faith exception to search warrant cases would make little difference or would be helpful primarily in preventing innocuous typographical errors from invalidating a warrant. Judges and police officers in Forest City and a judge in Harbor City pointed out that a good faith rule is already tacitly in effect with regard to much of the information the officer provides as a basis for his or her affidavit, particularly in terms of information supplied by "confidential and reliable" informants.

Judges, prosecutors, and defense attorneys had mixed views of the impact of a good faith exception. One cautious prosecutor, for example, reminded us that some officers are "prone to violate rights," a tendency that is not only not deterred by the exclusionary rule, but one that might very well be fostered by a good faith exception to it. That some police officers harbor animosity toward the exclusionary rule is clear from the previous discussion; but more to the point, if some officers feel so little compunction in "getting around" the Fourth Amendment as suggested previously, there is good reason to suspect that the introduction of a "good faith" exception to the rule would only facilitate the erosion of current procedural standards.[15] The heart of the problem is that at least a few police officers are willing to fudge the affidavit as part of what *they* consider to be a "good faith" effort to convict the guilty. A formal good faith exception could further encourage such officers to seek out the less inquisitive magistrates and to rely on boilerplate formulae, thereby lessening the value of search warrants overall.

Several judges and prosecutors further suggested that it would be very difficult to define good faith precisely, especially when confidential informants were involved. Others, including some defense attorneys, suggested that the exception would require even more intense cross-examination of police officers during suppression hearings, by exposing their subjective good faith to direct attack by the defense.[16]

On the other hand, other defense attorneys did not revel in the prospect of challenging officers' good faith, suggesting it would be an impossible issue to litigate successfully. Accordingly, some told us they thought the good faith exception was merely a device to gut the

exclusionary rule and give police officers a free hand to conduct searches. As a Hill City public defender put it:

> If there is no penalty for breaking the fourth amendment, then there is no fourth amendment. . . . It's quite true that if police officers were allowed to . . . walk into any house they want to, to see if they can find evidence of a crime, a lot of criminals would be caught who otherwise would not be caught. . . . If you like that kind of society . . . , go to the Soviet Union . . . ; that's what they've got there.

Some judges and a prosecutor went so far as to suggest that the good faith exception might diminish the quality of police work, suggesting that the current low levels of application rejections and successful suppression motions are, in part, due to police having learned to carry out their duties within the bounds of the Fourth Amendment.

Given these mixed reviews, how significant is the good faith exception in the context of search warrants? As it is now, relatively few search warrants are ever challenged, only a tiny percentage of challenges are successful, and only a fraction of the successful challenges result in the loss of a case. As noted earlier, an assistant public defender in Hill City told us that 95 percent of the warrants were good ones and that, on the basis of an informal study of all the felonies handled by the Hill City office, only six-tenths of one percent were dismissed for any kind of search-and-seizure reason.

This pattern was evident in the comments of the defense attorneys, prosecutors, judges, and police officers we spoke to in other cities as well. In fact, many of the interviewed police officers who were most involved in the warrant process could not remember the last time they—or a close associate—were involved in a case in which a motion to suppress was granted or a prosecution dismissed because of a faulty warrant. The figures regarding suppression motions cited in chapter 2 lend further support to this view.[17] Thus, there is little to suggest that relaxation of the exclusionary rule is required to facilitate prosecution of cases involving search warrants. Conversely, many we spoke with noted that loosening the rule may have a significantly deleterious effect.[18]

Finally, it should be noted that courts have been willing to overlook such reasonable mistakes as typographical errors in addresses in some instances where it is clear that the applicant could identify the place to be searched,[19] and inadvertent misstatements in an affidavit are not sufficient grounds to suppress evidence[20]—two of the most likely types of errors to be covered by a good faith exception. As for the mistaken

approval of a warrant by a magistrate (i.e., issuance of a warrant in the absence of probable cause), this study's documentation of the cursory nature of the judicial review accorded many warrant applications suggests that extending the good faith exception to cover such instances may undermine the integrity of the entire warrant process.

## Officers' Suggested Improvements

We asked officers for suggestions of changes that would make the search warrant process operate more smoothly. Several officers suggested that new procedures are needed to speed the warrant application process. Some suggested more clearly designating duty judges and prosecutors on nights and weekends, or following the River City system of having a judge available at the courthouse at all times, or simply having judges on a "beeper" system like that used by hospitals to contact doctors when there is an emergency. Officers in several jurisdictions without telephone application procedures expressed the opinion that such a system would be quite useful. One officer said that word processing equipment could substantially expedite the preparation of applications, given the laborious routine of including certain "stock" paragraphs in those applications. Others proposed more substantive changes, such as altering the law so that an affidavit would have to be filed only if the search were unsuccessful, or restricting the authority of lower court judges to make determinations of constitutionality or preventing the possibility of their nonenforcement of particular statutes. Finally, there was an almost universal plea for clarifying the application of the law governing searches and seizures.

# Notes to Chapter Five

1. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION, 150 (1968). *Cf.* Davies, *Affirmed: A Study of Criminal Appeals and Decision Making Norms in a California Court of Appeal*, 1982 American Bar Foundation Journal, 546 (1982); D. MCBARNETT, CONVICTION: LAW, THE STATE, AND THE CONSTRUCTION OF JUSTICE (1981).

2. *See, e.g.*, Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 University of Illinois Law Forum 405, 408-410 (1971); LAFAVE, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 3.3, p. 571 (1978); Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 University of Missouri at Kansas City Law Review 24, 35 (1980); Fyfe, *In Search of the "Bad Faith Search,"* 18 Criminal Law Bulletin 260, 262 (1982).

3. Skolnick, *Deception by Police*, 1 Criminal Justice Ethics 41 (Summer/Fall 1982).

4. *Id.*, at 42.

5. Fyfe, James J., *Don't Loosen Curbs on Cop Searches*, Washington Post, B-1 (Feb. 27, 1983).

6. See Appendix.

7. Specifically, telephone applications were used and sought in 6 drug cases, 4 burglary or theft cases, and 1 aggravated assault.

8. This appears consistent with the results of the study conducted in Boston by Krantz *et al.* S. KRANTZ, B. GILMAN, C. BENDA, C. HALLSTROM, & E. NADWORMY, POLICE POLICYMAKING: THE BOSTON EXPERIENCE, 145 (1979).

9. UNITED STATES DEPARTMENT OF JUSTICE, REPORT OF THE TASK FORCE ON VIOLENT CRIME, Recommendation 40 (1981).

10. *E.g.*, United States v. Williams, 622 F.2d 830, 840-846 (5th Cir. 1980), *cert. denied* 449 U.S. 1127 (1981); Richmond v. Commonwealth, 29 Crim. L. Rep. 1097 (Ky 7/31/81); *but see* Commonwealth v. Sheppard, 387 Mass. 458, 441 N.E.2d 725 (1982), *rev'd sub nom.* Massachusetts v. Sheppard, ___ U.S. ___, 104 S. Ct. ___ 82 L. Ed 2d 737 (1984); People v. David, 119 Mich. App. 289, 326 N.W. 2d 485 (1982).

11. *E.g.*, Colorado Revised Stat. 16-3-3-8 (Supp. 1983); Indiana H.B. 1378 (1983).

12. Massachusetts v. Sheppard, ___U.S. ___, 104 S. Ct. 3424 (1984); United States v. Leon, ___ U.S. ___, 104 S. Ct. 3430 (1984).

13. Utah Code Annotated § 77-23-12 (Supp. 1983). (Emphasis added.)

14. Utah Code Annotated §§ 63-30-10(2) and 78-16-1 *et seq.* (Supp. 1983).

15. *See, e.g.*, United States v. Karathanos, 531 F. 2d 26, 34 (2d. Cir. 1976), *cert. denied*, 428 U.S. 910 (1976); Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 Columbia Law Review 1365, 1403 (1983).

16. *See also* Ball, *Good Faith and the Fourth Amendment*, 69 J. Crim. L. & Criminology, 635, 653 (1978); Kaplan, *The Limits of the Exclusionary Rule*, 26 Stanford Law Review 1027, 1045 (1974).

17. *Cf.* S. MELNICOE, A. SCHMIDT, L. MCKAY, & C. MARTORANA, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982); *See also* Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 American Bar Foundation Research Journal 611 (1983).

18. *See, e.g.*, Stewart, *supra* note 15, at 1403.

19. LAFAVE, A TREATISE ON THE FOURTH AMENDMENT, § 4.5 (1978).

20. Franks v. Delaware, 438 U.S. 154 (1978).

CHAPTER SIX

# The Search Warrant Process From the Perspective of the Judge and the Prosecutor

The review process and the protections it affords are influenced by the judge's and prosecutor's view of their respective roles. Project staff interviewed misdemeanor and felony court judges and assistant prosecutors in each site. These interviews touched upon the purpose, objectivity and thoroughness of magisterial review; the purpose and effect of prosecutorial screening of warrant applications; common deficiencies found in search warrant applications; the use of confidential informants; and the effect on a prosecution of the presence of a search warrant.

## Purpose of Magisterial Review

The judges with whom we spoke characterized the search warrant process in different ways. A Mountain City judge summarized the magistrate's role as that of a "referee":

> There are certain standards, minimum standards, which must be met as to probable cause and the other statutory requirements, and I think the magistrate's role is just simply . . . to see that those things are met. If they are, then the warrant can be issued; if they are not, then . . . [the judge's] obligation is not to issue it.

A Hill City judge offered a different description:

> I decide it on . . . a gut reaction. I put myself in the shoes of the person who has law enforcement come upon him, with the information that law enforcement has at the time . . . [and ask] is that cop rousting somebody?

> If he is rousting somebody, Mister, he ain't going to prevail on me. . . unless he's tripped over somebody big.

A third view was presented by a River City judge who stated that it was not proper for magistrates to substitute their judgment for that of a police officer with firsthand knowledge. This judge maintained that police should be given a certain amount of latitude at this initial point in the investigation because justice can be ensured at a later stage, such as the preliminary hearing, when additional evidence is made available for a full factual determination of probable cause. The judge observed, furthermore, that a magistrate who turns down a significant number of warrant applications would not last long on the bench.

Most of the judges with whom we spoke would align themselves more closely with the first judge quoted. However, the variation suggested by police officers and prosecutors and acknowledged by several judges is evident.[1]

Almost universally, judges told us that they explain to applicants what, if any, information is lacking in a search warrant application. A Mountain City judge stated: "I believe that a judge has an educative role as well as a judicial role. . . . I generally will explain to the police officer or prosecutor what is missing in the affidavit that constitutes probable cause and if they can go back and find those additional facts and present them to me, then fine." The judge added that, in most instances, the applications are returned with the necessary information.

There were differences of opinion concerning how much advice was proper to give. A River City magistrate sometimes points out areas for which more evidence is needed to build a tighter case. A Border City judge, on the other hand, stated: "Never instruct. I simply tell them the warrant is insufficient in my judgment because of what there is missing, and they go on their merry way and get the information and come back. I don't clue them in as to what it is I want. That's their job."

As related in earlier chapters, we found prosecutors playing two distinctly different roles in the warrant application process. In River City and Harbor City, they serve as consultants. They respond when an individual officer with whom they are acquainted has a question in preparing a particular affidavit, but generally play no role in the process until the warrant has been executed, an arrest made, and the case filed by the police. In the other five cities we visited, prosecutors directly participate in the application process for the bulk of the search warrants filed, by reviewing the written affidavit or an oral summary of the facts (Forest City, Hill City, and Plains City), by asking the officer guiding

questions during a telephone application (Border City), or by actually writing or dictating the text of the application package (Mountain City and occasionally in other cities).

Not surprisingly, each of the prosecutors with whom we spoke felt that theirs was the appropriate system. Assistant River City prosecutors told us that prescreening would not make much difference because most officers do not need a lot of assistance. Both River and Harbor City prosecutors stated that very few cases are dismissed by the prosecutor after the complaint is filed because of a faulty search warrant.[2] Their counterparts in Hill, Plains, and Forest Cities assured us that their active involvement has improved the quality of warrant applications and estimated that they either request additional information or reject entirely somewhere between 10 and 50 percent of the warrants they review.

With regard to the degree of prosecutorial involvement, a Hill City prosecutor suggested that if the prosecutor's office provides adequate training to police officers, it is unnecessary to have a prosecutor actually draft routine warrant applications. A Mountain City assistant prosecutor disagreed:

> The fact that the warrants are prepared by lawyers gives the judges considerably more confidence that the information is going to be good, than otherwise would be if police officers were drafting [them]. Certainly with respect to the confidential informant kinds of situations where you have to comply with the Aguilar and Spinelli requirements, those are sometimes technically artful and the judges, I'm certain, feel more confident when. . .[they] have been examined by a lawyer first.

To determine whether early screening by prosecutors makes a difference, we checked the perceptions of the other major participants in the system and examined the data collected from our sample of warrants. The views of the police officers we spoke with varied. Detectives in most of the cities studied welcomed the availability of prosecutors as consultants to help them determine whether there was sufficient information to establish probable cause. As a police lieutenant in Harbor City lamented, officers are supposed to understand all the nuances of legal language and have their actions reviewed by lawyers even though they, themselves, are not legally trained. Where strictly routine warrants are concerned, however, prosecutorial approval is viewed more as an administrative hurdle than as assistance.

The judges differed in their assessment of the effect of prosecutorial screening. Several Forest City felony and misdemeanor court judges saw little effect, although as noted earlier, one judge commented that

prosecutorial review standards were more stringent than those of the court. A Forest City municipal court judge, who told us that few of the applications presented to that court were prescreened, saw prosecutorial screening as an important safeguard, particularly in the narcotics area, where officers are often "crusaders" seeing themselves as a "thin blue line" against crime.

In Plains, Mountain, and Border Cities, the judges attributed the low search warrant rejection rate to the fact that the prosecutors in their jurisdiction prescreen search warrant affidavits for probable cause. It was assumed that the prosecutors reject a high percentage of search warrant applications at the prescreening stage. As a Border City magistrate put it, "the bad stuff never gets to me." This judge added, however, that pre-judicial screening "doesn't make my job easier, because I still have to look for all the necessary factors." Similarly, several Plains City judges indicated that prior prosecutorial screening was helpful, with one judge observing that even though the prescreening has greatly improved the quality of affidavits, he or she nevertheless continues to review affidavits carefully for probable cause. A Mountain City judge felt "comfortable" knowing prosecutors prescreen warrants and admitted beginning the review with the assumption that the affidavit will contain probable cause. Another judge agreed that prosecutorial prescreening is an important function, but cautioned that its usefulness depends upon the quality of the prosecutors.

On the other hand, judges in River City and Harbor City, where prosecutorial prescreening is rare, generally agreed that it would be of little assistance, since they would still be responsible for making the probable cause determination. It was, however, the nearly universal perception among police officers, prosecutors, and judges in all of our cities that very few applications are turned down by magistrates, regardless of the presence or nature of screening procedures.

Our analysis of sample warrants suggested that prosecutorial screening might be significant in three ways: the percentage of warrants resulting in seizures in general and of the items sought in particular; the percentage of warrants resulting in the filing of a case; and the percentage of cases in which items seized were suppressed pursuant to warrant. With regard to the rate of seizures, the two jurisdictions without prosecutorial screening show a somewhat lower rate of success in terms of the percentage of warrants in which at least some item was seized. The mean percentage for the jurisdictions with prosecutorial screening is 94 percent; for those without, the mean percentage is 86 percent.

## Table 29

Seizures Made in Executed and Returned Warrants

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City |
|---|---|---|---|---|---|---|---|
| Some seizure made | 88% | 84% | 91% | 96% | 97% | 93% | 91% |
| All or most items seized | 64 | 65 | 73 | 80 | 82 | 82 | 76 |

*Note:* No routine prosecutorial screening of search warrants takes place in River City and Harbor City.

There is a more significant distinction in terms of the percentage of searches in which most or all of the listed items were seized. The mean percentage of successful seizures in River City and Harbor City is 64.5 percent versus a mean of 79.0 percent in the other jurisdictions. This difference is particularly significant in the case of River City, where returns apparently were not filed for almost half of the approved warrants.

The percentage of approved warrants resulting in cases filed in the felony court is inconclusive, with Harbor City showing the lowest and River City the highest rate.[3]

A motion to suppress evidence seized pursuant to a warrant was filed regarding 132 of the warrants in our sample. Only 17 of those motions were granted: 11 in River City, 2 each in Border and Mountain Cities, and one each in Harbor and Hill Cities. Given the low number of successful motions to suppress, it is difficult to draw any firm conclusion, but it does not appear that the absence of prosecutorial prescreening increases the number of instances in which evidence is suppressed because of a bad warrant. [See Table 25, page 43.]

Hence, we are able to draw only a tentative conclusion as to whether prosecutorial screening of search warrant applications benefits or hinders the search warrant process. Perhaps a study focused on this question would yield more definitive results.

## Common Deficiencies in Warrant Applications

The deficiency in warrant applications most frequently cited was the failure of the affiant to establish a link between the object sought and

**Table 30**
Approved Warrants Resulting in at Least One Case Filed

| | River City | Harbor City | Plains City | Forest City | Hill City | Mountain City | Border City |
|---|---|---|---|---|---|---|---|
| Approved warrants | 458 | 75 | 75 | 75 | 75 | 65 | 74 |
| Percent of cases in which at least one case was filed | 43% | 23% | 41% | 36% | 37% | 39% | 31% |

*Note:* No routine prosecutorial screening of search warrants takes place in River City and Harbor City. The low percentage shown in Harbor City may be attributable, in part, to the inaccessibility of misdemeanor court records to research staff.

either a crime or the place to be searched. Prosecutors in several cities mentioned that they check to make sure that there is support in the affidavit for each item sought when they screen an application. According to a Forest City judge, affidavits commonly state that a white powder was seen, and make a presumption that the powder was heroin or cocaine without any more substantiation, such as the way it was packaged, representations of the people in the car or house, or observation of activity consistent with narcotics distribution.

Another frequently mentioned deficiency was the lack of a sufficiently detailed description of the items to be seized. Prosecutors noted that in many instances, the officer has additional information but fails to include it in the affidavit or chooses not to. Judges suggested that lack of a sufficient description is particularly a problem in stolen property cases and in rape or murder cases in which the evidence frequently consists of items such as unidentified weapons, clothing, or bedsheets.

## The Use of Confidential Informants

Some judges were clearly uncomfortable with search warrant applications based on statements of confidential informants. This unease appeared to have two distinct causes. The first was distrust of informants. A Hill City judge exclaimed:

> Some confidential reliable informants! They are dope dealers who have been caught dealing dope; they are thieves who have been caught stealing;

> and they have a habit. So you get one of those pigeons; he blabs on everybody; and they say we have corroborated his testimony because he said he stole from this and we've a loss at that time. This confidential reliable informant stuff is a bunch of crap!

Several River City judges considered reliance on "snitches" to be "a despicable practice," citing use of undercover officers as a preferred alternative. A Mountain City judge advised:

> My general question to the individual that brings me a search warrant is: "When you've given me all this information, isn't the person. . . [whose] dwelling you're going to search going to know right off what the basis for the information was?" And, if so, "Why don't you name the individual. . .?" Yes, snitches give me some problems because I'm not sure if they're always reliable.

The other reason for mistrusting the confidentially obtained information was the opportunity it provided for "manufacturing evidence." We were told by another Mountain City judge:

> [The confidential informant issue] troubles me very greatly, because that is one way a policeman can manufacture evidence and not get caught very often. They don't have to name the confidential informant and they simply have to make blunt statements about his reliability and his use in other cases and all those things. They don't have to name him, so he is not available for the judge to question. . . .[I]t is very dangerous, in my opinion, to use confidential informants except under the most extreme of circumstances. It would be very easy for a confidential informant to say, "I was the bag man on the trial and I did, indeed, buy heroin at John Doe's house at 24 K Street," and thereby, perhaps, produce probable cause for a search of the home. Probably the easiest way for the police to manufacture probable cause that isn't there is through the use of affidavits involving confidential informants. I'm very, very opposed to it.

Other judges and most prosecutors accepted the use of confidential informants with less apprehension. For example, two Plains City judges considered warrants based on statements by confidential informants to be "routine" and of no particular concern. Some, although aware of the potential problem, were confident it would not occur in their jurisdiction because of the risk to the integrity of law enforcement officers. Said one: "The likelihood that an officer would pull a phony is probably somewhere between slim and none because having once been found out, the damage it would do to the whole program would be enormous and in all likelihood an officer would get fired."

A Hill City prosecutor advised us of an understanding between that city's prosecutor's office and the police department that prosecutors

would do their utmost to protect the identity of informants, but that if it became necessary, the police would produce the informant for a court appearance. The prosecutor added that this is "a good understanding to have out in the open."

Finally, several judges stated they were obligated to accept at face value the information provided. The rationale for this assumption, we were told, was that "otherwise, law enforcement officers would spend more time checking out the truth of the informant than checking out the crime."[4]

## Effect of the Search Warrant Requirement

In many prosecutor's offices, search warrants are viewed as sufficiently important to justify the allocation of significant time and resources to ensure their preparation in accordance with the prescribed requirements. We asked the prosecutors with whom we spoke whether having a search conducted pursuant to a warrant helped to strengthen a case, particularly when a motion to suppress is filed and during plea bargaining. Overall, the view was that the use of search warrants does strengthen the prosecutor's hand. As one Hill City prosecutor put it: "If you can get a search warrant, do it." The greatest difficulty occurs when the connection between the items seized and the defendant is not clear, e.g., when several people are in the room where narcotics are seized. This problem, of course, is not limited to searches conducted pursuant to a warrant. It can as easily occur if the seizure is made during a consent search of a room or a search of an automobile in which several persons are riding.

With regard to plea bargaining, which was extensive in all the sites, prosecutors in most of the cities did not believe the presence of a warrant had much effect in negotiations. As for motions to suppress, many cited the presumption of validity accorded a warrant as a significant advantage in both deterring such motions and defeating them when they are made. The Hill City prosecutor, quoted earlier, commented that rather than undermine the presumption of validity accorded to search warrants generally, cases are dropped when there is a significant question about the conduct of the executing officer, even when that behavior is not directly related to the information in the affidavit or the manner in which the search was conducted.[5] On the other hand, a case based on a questionable warrant may be saved by plea bargaining; in this way the

prosecutor secures a conviction on a reduced charge and the defendant avoids the risk of losing the motion to suppress and being convicted of the original charge.

We also asked judges what the overall effect of the search warrant requirement was in their jurisdiction. Many suggested that the warrant requirement assisted law enforcement by increasing the quantity and quality of the evidence presented. A Harbor City judge commented that it improves police work by making officers "stop and think." Others, including a Border City judge, stated that it provides an important safeguard to citizens by slowing down the process a little. The judge noted: "[O]f course it's a hindrance, but it's meant to be a hindrance, and it's only a small hindrance at best. They [the police] have to go to the judicial branch of government to show cause why entry into a person's residence is necessary."

But even these judges acknowledged that the warrant requirement cannot stop the "unscrupulous officer." However, most, though not all, were confident that such officers were few and that other factors, such as departmental standards, the vigilance of other officers, education, or the prospect of losing the case, operate to prevent abuse.

# Notes to Chapter Six

1. For a more detailed discussion of this topic, see chapter 3.

2. As noted previously, data derived from the recent National Institute of Justice Study of California prosecutorial decisions indicated that less than eight-tenths of one percent of all felony cases were rejected by the district attorney because of a search-and-seizure problem. S. MELNICOE, A. SCHMIDT, L. MCKAY, & C. MARTORANA. THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982). *See also* Comptroller General Report No. GGD-79-45, Impact of the Exclusionary Rule on Federal Prosecutors, 11, 13, 14 (1979); Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 American Bar Foundation Research Journal 611 (1983). Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 American Bar Foundation Research Journal 585 (1983).

3. The low percentage in Harbor City may be attributable to our inability to check case records in the city's scattered misdemeanor courts. See chapter 1.

4. It should be noted that Franks v. Delaware, 438 U.S. 154 (1978) expressly leaves open the question of defense challenges to statements of a confidential informant if a prima facie showing of perjury is presented, but in no way precludes inquiry by the reviewing magistrate. 438 U.S., at 170. Indeed, Illinois v. Gates, 462 U.S. 213 (1983) requires magistrates to make "conscientious assessments" of the basis for crediting a tip by a confidential informant and leaves them "perfectly free to exact such assurances as they deem necessary...in making probable cause determinations." 462 U.S. at 239.

5. Examples included instances when officers were discovered to be selling drugs or using money intended for controlled buys of narcotics to purchase alcoholic beverages for personal use.

CHAPTER SEVEN

# Conclusions and Recommendations

In the Introduction, several points raised in earlier studies regarding search warrant practices were listed. A quick summary of these points, together with the support or lack thereof we found for these assumptions in our research, seems appropriate.

1. Search warrants are sought in relatively few cases. *True.* Although the numbers vary from city to city, search warrants figure in a very small percentage of police investigations.
2. Search warrants are sought in a limited array of cases. *False.* Drug and property crimes predominated in most of the cities we studied (a mean percentage of 38 percent and 29 percent respectively), but there were significant percentages of violent crimes (a mean percentage of 21 percent) in the samples of search warrants that were examined. (See Table 8, page 27.)
3. Search warrants are rejected infrequently. *True.* However, the prescreening procedures employed in many cities help to ensure that affidavits contain the information necessary to support a finding of probable cause.
4. Magistrates are not "neutral and detached." Many are, some are not. As discussed at length in earlier chapters, attitudes vary considerably among magistrates; furthermore, an individual magistrate's neutrality and detachment may vary depending on the crime and circumstances.
5. Judge-shopping is practiced by search warrant applicants. *True.* Again, the extent of the problem varies, but when the procedures

permit selection of the magistrate who will review a warrant, judge-shopping occurs.

6. Magistrates are not adequately trained. A one-word answer cannot be given. We did not speak directly with any magistrates who were unaware of their responsibility with regard to search warrants, although we heard references to others who may not have fully understood their relationship to law enforcement. However, the sharp variation in the intensity with which different judges examined affidavits and the striking differences in "the minimum information necessary" among cities, suggests that there is a need for further training in order to achieve a greater degree of consistency within and among jurisdictions.
7. Search warrant applications are often based on unsworn hearsay from anonymous informants. *True.* As discussed in chapter 2, a confidential informant was the primary source in a mean percentage of 37 percent of all the warrant applications examined and in a mean percentage of 75 percent of applications in drug-related cases. (See Table 13, page 33.) In an average of three out of ten of the applications relying on confidential informant tips, no corroborative evidence was offered (ranging from 7 percent in one city to 88 percent in another). (See Table 16, page 34.)
8. Search warrants broaden the area that may be lawfully searched. *True.* Few of the search warrants we examined limited the search of a residence to specific rooms or areas. Moreover, the inclusion in most of the cities of boilerplate language permitting officers to search for documents, keys, photographs, letters, and other items indicating dominion and control gave almost unlimited authority to search drawers, desks, and other private areas, regardless of the type of evidence, contraband, or stolen property being sought.
9. The delay involved in obtaining a search warrant often prevents officers from seizing the items being sought. *False.* The data we collected from records and from interviews indicated that few officers executing a search warrant come out empty-handed. Most or all of the items sought are seized in an average of nearly three out of every four warrants served. (See Table 22, page 39.) It is true, however, that opportunity costs are incurred while one or more officers prepare the application and obtain the necessary reviews and signatures, and another officer or officers keep watch over the site of the proposed search.
10. Obtaining a search warrant can be a time-consuming and frustrating

process. *True.* Unfortunately, much of the intended effect of the Fourth Amendment is lost because of the administrative impediments to obtaining a search warrant and the consequent attractiveness of alternatives which, while legally authorized in most instances, do not offer the same level of protection against unreasonable searches and seizures. As some of the jurisdictions we studied have demonstrated, these impediments can be overcome with relatively little difficulty.

11. Search warrants are routinely the target of motions to suppress. *False.* Motions to suppress were filed in an average of only 39 percent of the cases filed following execution of a search warrant. Few of these motions were actually heard, and in only 5 percent of the filed cases were motions to suppress granted. Of the cases in which a motion to suppress was granted, more than 70 percent still resulted in at least one conviction. (See Table 25, page 43, and accompanying text.)[1]

Having said all this, do search warrants accomplish their objective of protecting citizens from unreasonable searches and seizures? It is impossible to draw hard and fast conclusions about the warrant review process and the significance of the warrant requirement, because our observations were consistent with some radically different, even contradictory, characterizations of the process. Clearly, many of the shortcomings of the search warrant process vary significantly depending on the state, the setting (urban or rural), the judge, the prosecutor, and the law enforcement officer involved. On the one hand, we witnessed occasions when the requirement operated much as it was intended. Insofar as it causes officers to contemplate the probable cause standard before they act, the process does appear to inhibit the "impulsive" search by police. We are persuaded that this reflection, coupled with the realization by police officers that evidence seized in disregard of the standard may be excluded from any subsequent criminal proceedings, induces a higher standard of care by many police officers than would otherwise be the case.

Further, to the extent that officers elect to seek a search warrant, the requirement does appear to produce a multi-layered review that decreases the likelihood of a search in the absence of probable cause. This is true, in part, because each stage of review seems to add to rather than delete the amount of information on which the eventual issuance of the warrant is based.

Finally, the warrant requirement provides, in most instances, a clear and tangible record that facilitates post hoc evaluation of the original

search. The affidavit and related documentation that must be offered in support of an application for a warrant clearly articulate, before a search for incriminating evidence, precisely what is being sought and the basis for the belief that it will be found at the time and place of the search.

It is a serious overstatement, on the other hand, to say that the warrant review process routinely operates as it was intended. For example, it was clear in many cases that the review process was largely perfunctory. We were told of judges—and spoke with some—who regarded themselves more as law enforcement officials than as independent reviewers of evidence.

Of equal importance, we witnessed infrequent but significant evidence of efforts that undermined, and sometimes entirely defeated, the integrity of the review process. Understandably but unfortunately, many police officers—frustrated by what they see as an unnecessary obstacle to the already difficult task of interdicting criminal activity—simply go through the motions of the "warrant game" when they have no other choice. It is generally clear to them what the minimum necessary to sustain a warrant request is. It is equally clear to most officers that judges tend not to scrutinize closely certain kinds of information that is critical to the demonstration of probable cause, such as information provided by confidential informants. These realities make the process extremely susceptible to abuse by those few who are willing to risk the consequences.

The most striking and significant—and perhaps the most troubling—discovery regarding the operation of the search warrant review process, however, is not so much how that process occurs as the fact that it is so rarely invoked. For a host of reasons, police officers—and even some judges—eschew the process. It is burdensome, time-consuming, intimidating, and confusing, and there are many easier ways to get the evidence under exceptions to the warrant requirement. It is not surprising, therefore, that many officers tend to regard the warrant option as a last resort.

Yet, significant improvement cannot and will not spring simply from making it easier for police to rely on search warrants. Therein lies a critical and troublesome irony that underlies the recommendations we feel compelled to offer in closing this report. Unless the nature and integrity of the review process, itself, is substantially improved, it would be disingenuous for us to suggest that increased reliance on search warrants per se is likely to produce the kind of protection against unreasonable search and seizure that is contemplated in the Fourth Amendment.

Therefore, our conclusions, as well as the recommendations that flow from them, address two independent concerns: the infrequency with which search warrants are sought; and the adequacy of the review process. One additional problem area is addressed—the inadequacy of current systems for maintaining search warrant records, and the failure to use the information available.

## Increasing the Frequency With Which Search Warrants Are Sought

Because search warrants can provide an effective means of obtaining evidence in criminal cases while setting some valuable boundaries on police conduct, promoting the use of a higher standard of care, and establishing a clear record of the basis for and results of a search, every effort should be made to encourage their use. Two problems will have to be addressed to accomplish this goal: reducing "the hassle" of obtaining a search warrant, and increasing the incentives for obtaining one.

### *Reducing the Hassle*

The effort and time required were cited by many law enforcement officers as the most troublesome disencentives to obtaining a search warrant. Clearly, police officers should not be discouraged from seeking a warrant by unnecessary delays, judges or prosecutors unwilling to review an application, or the lack of clerical assistance. A number of practices we observed appeared to help reduce the time and effort required to obtain a search warrant.

*Telephone applications.* The first of these is an effective telephonic application process. This process in Border City cut the application time there in half. Several elements of the procedures used in Border City and described in chapter 5 appear critical to overcoming the practical problems and concerns that have inhibited the use of telephone applications in the other cities in which they are legally possible. The foremost of these is the use of a central switchboard to make the connections and record the application conversation. As noted earlier, attempts to implement a telephone application procedure in the other cities we visited apparently foundered because of the expense of equipping each judge's home telephone with recording equipment—either permanently or temporarily in accordance with rotation procedures—and the difficulty encountered in using that equipment on an occasional basis. Use of a central switchboard can reduce the cost of

implementing the system, allows applications to be made during the day as well as at night, facilitates use of an alternative reviewer when the judge or prosecutor on warrant duty is not available, and assures the technically competent recording of the application.

A second important practice in Border City is the affiant's use of a field sheet. This helps the applying officer and screening prosecutor organize the facts, list the items to be sought, and ensure that all the necessary information is presented.

The third practice is the use of a three-way conversation between the officer, prosecutor, and magistrate. One danger of the telephonic procedure is that a necessary element might be inadvertently omitted and that this omission would not be detected until after the seizure had been made. Casting the application as a colloquy between the prosecutor and the officer limits the risk of inadvertent omissions and further helps to organize the material for the magistrate.

*Judicial and prosecutorial availability.* In jurisdictions in which telephone applications are not legislatively authorized, procedures should be instituted to ensure the availability of a reviewing magistrate. Our data suggest that although the 2:00 A.M. visit is a relatively rare occurrence, many warrants are sought after hours between 4:00 P.M. and 11:00 P.M. (See Table 28, page 60.) In River City, a magistrate is at the courthouse twenty-four hours a day, seven days a week, to hold misdemeanor nonjury trials, review warrants, and hold bail hearings. It is notable that we heard no complaints regarding the difficulty of finding a magistrate from the River City police officers whom we interviewed. In Forest City, municipal court judges, shortly before our data-collection visit, began to conduct criminal, civil, and traffic trials several evenings a week, and are available to officers for warrant reviews.

Of course, the current number of search warrant applications is not sufficient, by itself, to justify extra judicial hours. Where there are evening and weekend court sessions already in place that are not being used for warrant reviews, police officers should be apprised of them and the judges should be advised to be receptive to requests to review warrant applications. In cities that do not currently hold such court sessions, local court, prosecutorial, and police officials should review the pattern and volume of applications for search warrants, arrest warrants, and bail, and consider the possibility of conducting at least some traffic and civil cases in nontraditional work hours. Such a program may have substantial advantages for the public beyond facilitating search warrant applications. The weeknight sessions have not only been a convenience for the police

but have proven to be popular with litigants who are able to have their "day" in court without missing work.

Where extended hours are not possible and to accommodate requests during periods not covered by extended court hours, a clear and effective system should be established for designating the judge and an alternate who are responsible for reviewing warrant applications during non-court hours. This duty should be rotated among all the judges on the misdemeanor court bench. Although it should go without saying, the magistrates in the after-hours rotation should be made aware that warrant application reviews are an essential part of their judicial duties. As a Border City judge stated during an acerbic reference to the difference between "anointed" and "appointed" judges:

> [W]hen judges refuse to be awakened at two o'clock in the morning for a...search warrant, then you get a bad situation, because it means, first...officers have to sit...until the judge comes to work. That's ridiculous....In addition, you may have people who are being held in their homes until the search warrant's issued, effectively detained and in custody because a cop can't let them go for fear that they will destroy the evidence....

The need for accessibility applies during the day as well. Although the difficulty of finding an available judge or prosecutor is less, it nonetheless occurs. Even when a particular judge is delegated the warrant review responsibilities—e.g., the judge assigned to arraignment duty or the administrative judge—situations can arise that make it impossible to take the short recess normally required to review a warrant application. In such situations, the bailiff or the judge's secretary should be instructed to help the applicant find a judge who is able to review the application without a lengthy delay. No one is well served when officers are forced to cool their heels all afternoon in an anteroom or to trudge from courtroom to courtroom.

At the same time, however, efforts to facilitate judicial accessibility must be undertaken in such a way as to minimize the possibility of judge-shopping, a practice that underlies many of the problems discussed in this report. We are persuaded that in at least some cases, judge-shopping undermines the standard of review contemplated by the Fourth Amendment. It would be a relatively simple matter for the administrative judge or court clerk to monitor the review process to detect—and explore possible reasons for—any grossly disproportionate distribution of the warrant review workload, as well as to design acceptable methods for alleviating the problem.

The foregoing discussion concentrated on judges. But in those jurisdictions in which prosecutors are involved in the search warrants review process, the same need for ready access applies. The availability of a judge is of little help if the screening prosecutor or an alternate is unreachable.

*Clerical assistance.* One frequently cited factor that makes the search warrant process more difficult after normal work hours is the absence of clerical help. The overwhelming majority of the search warrant applications we examined were typed, presumably because of the reluctance of at least some magistrates to review handwritten affidavits. After five o'clock, the applying officers are usually required to type the documents themselves, adding to the time required and to the reluctance to include more than the minimum amount of information necessary. Permitting officers to submit legible, handwritten search warrant applications would help, along with the establishment of telephone application procedures, to reduce this burden and to shorten the preparation time in many instances by obviating the need for a trip to the stationhouse. Another way of addressing this problem, especially in those police departments in which the bulk of the search warrant applications are prepared at headquarters rather than at outlying stations, is to change the usual duty hours of one or more clerk-typists to an evening shift (e.g., three to eleven) or to hire a number of part-time clerk typists to cover the evening shift and peak weekend hours. Obviously, such clerk-typists will not be working on search-and-arrest warrant applications on a full-time basis each night, but there is usually more than enough other paperwork to keep them occupied.[2]

## Establishing Departmental Incentives to Obtain Warrants

The adoption of these recommended actions will not in itself be sufficient to increase significantly the use of search warrants. As seen in chapter 5 and in studies of police officer behavior, the norms and procedures within a police department are often prime determinants of how law enforcement personnel carry out their duties. Accordingly, law enforcement executives must recognize and communicate to the rank and file the importance of submitting their judgment to independent review by judicial authority prior to the execution of a search. Leadership and training must play a critical role. Unless the department leadership itself provides the training that instills in officers the importance of obtaining a

warrant before a search and creates the necessary procedures and incentives to ensure that these practices are followed, the Fourth Amendment will continue, for some officers, to be little more than something, as one officer put it, "to be winked at." That action from above is effective was demonstrated in Plains City by the increased use of search warrants in one police division after its commander began counting the number of applications filed by each detective and including that number as one of the factors used in evaluating performance.

## Improving the Review Process

As stated earlier, efforts to increase the number of search warrant applications cannot be undertaken without at the same time taking steps designed to ensure that the review of warrant applications meets the standard of care envisioned by the Constitution. These steps include the routine screening of search warrant applications by police supervisors or prosecutors before the application is presented to a magistrate for review; the clarification of precisely what the Constitution requires for approval of a warrant application; improved training for police officers, prosecutors, and judges; and procedures to inhibit judge-shopping.

### *Pre-review Screening*

When an officer is required to have a search warrant application pass muster with a member of the prosecutor's office or, as in some jurisdictions or departments, to win prior approval of a field supervisor before it can be presented to a magistrate for review, we are convinced that a higher standard of care prevails. The prime motivation of police departments for instituting in-house prescreening procedures in the jurisdictions studied was to prevent bad affidavits from reaching the magistrate so as to avoid embarrassing or impairing the credibility of the department, as well as to avoid problems in the prosecution should the warrant happen to be signed. This screening often resulted, we were told, in officers' adding information to the affidavit. In addition, in-house prescreening imposes an added degree of accountability on the part of the warrant-seeking officer, who may actually be more fearful of the disapproval of his or her superior than of a reviewing magistrate.

Preferable to departmental review is the practice of prosecutorial review, which was standard procedure in several of the jurisdictions we studied. For a host of reasons, the prosecutor brings a particularly high standard to the assessment of the sufficiency of a warrant. Not the least of

these reasons is that the prosecutor may eventually have to defend the warrant in court. Most prosecutors will not jeopardize their chance of gaining a conviction by passing a marginal warrant on to a magistrate. Indeed, as some who had held both positions informed us, the prosecutor's review is often more stringent than that of the magistrate.

There does not appear to be any particular benefit to having both departmental and prosecutorial review. While each additional level of review improves the quality of the final product, we are not persuaded that the marginal benefit of a second level of review—at either the departmental or the prosecutorial level—justifies the considerable inconvenience it would require. Whether the screening is performed by law enforcement or prosecutorial personnel, however, the prescreeners should be carefully selected and receive special training to ensure that they are conversant with state and federal caselaw and state statutes governing search warrants and understand the policies that underlie them. In particular, this is not a task that should automatically be assigned to the least experienced member of the prosecution staff.

***Clarification of Requirements for Search Warrants***

In our research, we were struck not so much by any insuperable difficulty in understanding the Fourth Amendment caselaw itself as we were by the varying interpretations that search-and-seizure caselaw seems to have generated among criminal magistrates. In every jurisdiction except Plains City, we were told of considerable variation among local judges in the amount of information each required and in the standards each imposed during warrant application reviews. Furthermore, in both Plains and Mountain Cities, we were told of discrepancies between urban and non-urban areas of the state. Finally, we found substantial differences in the working standard of probable cause applied in the seven cities studied, two of which were in the same state.

We were told by police lieutenants in both Forest and Harbor Cities that their respective state supreme courts are very conscientious about protecting individual rights and that both departments closely follow state and federal court decisions. Yet, as noted earlier, the typical drug-related affidavit in Forest City is two to three paragraphs of highly standardized language, usually based solely on the statement of a previously reliable informant and sometimes a check of the suspect's record. The counterpart affidavit in Harbor City covers two or three pages and contains the informant's description of the items seen, the suspect and/or the location, and some combination of direct observa-

tions by the affiant, controlled purchases, and checks by the affiant of the utilities records of the proposed site of the search to determine who lives in or controls the site. Standard format and sets of standard phrases or "magic words" were used in Harbor City, but the amount of information on which a magistrate was asked to make the probable cause decision was substantially greater than in Forest City.

Given the renewed emphasis by the Supreme Court in the *Gates* decision on the factual content of affidavits[3] and the myriad fact situations presented to the courts in search warrant cases, it is unlikely that the current confusion will be resolved through appellate decisions. A possible alternative would be the development of a set of guidelines addressing, in some detail, the major issues presented to magistrates. These issues include the amount and type of information needed to support the statement of a confidential informant, the materiality of past criminal activity by a suspect or prior criminal conduct at the suspected location, the permissible scope of a search for materials demonstrating dominion and control, and the scope of the materials that may be seized without securing a second warrant. In addition, the guidelines could address the procedures for obtaining a truly voluntary consent to search.

The guidelines could be developed by a task force of judges, prosecutors, defense attorneys, police officers, and legal scholars. They should be based on a close examination of existing law and practice and should be designed for adoption by police departments and state supreme courts as administrative rules or rules of procedure. Adoption would have to be followed by practical training of police officers; misdemeanor, felony and appellate court judges; and attorneys throughout the state regarding the philosophical and legal basis of the guidelines and the standards and procedures contained in them. Some differences would inevitably remain within and among states, and guidelines would, without doubt, be strenuously tested constitutionally and practically. The end results, however, would likely be a clearer understanding by the police, the courts, and the public of the rules of the game and less frustration caused by idiosyncratic interpretations of the law.

### *Inhibiting Judge-Shopping*

For the reasons discussed above, judge-shopping can seriously undermine the integrity of the warrant review process. One approach in use in several jurisdictions to distribute the responsibility for reviewing search warrant applications is the assignment of a "duty magistrate," who is responsible for reviewing all warrant applications for an extended

period. The duration of the duty period depends on the number of magistrates on the bench. As each magistrate rotates through the cycle, officers are supposed to take their warrant requests, first, to the duty judge. Only if the duty judge is unavailable is an officer to take the application to another magistrate.

Although fine in design, the systems we saw were not enforceable, or at least were not enforced. Officers readily conceded to us that if they did not like the duty judge, they would simply consult the individual they preferred. Non-duty judges, it seems, seldom inquired into whether a bona fide effort had been made to locate the assigned judge. As a result, in one of the study sites that used this approach, fully half of the reviews in our sample had been conducted by only two of seven magistrates on the bench, a revelation that both surprised and concerned the administrative judge responsible for making the assignments.

Several solutions to the problem commend themselves. First, in jurisdictions that use the "duty" system, the administrative judge should monitor the workload of warrant reviews and address the issue in regular judicial meetings. Second, in place of a rotating assignment system, a jurisdiction might opt to assign the responsibility of warrant review for a protracted period to a single individual, e.g., the administrative judge, with a backup system in the event that person is unavailable. Third, in jurisdictions where telephone applications are authorized by law, calls from police officers seeking review of a search warrant should be routed through a central switchboard. The assignment of responsibility for telephone reviews can be quite equitable (even random) using this technology, since a disinterested intermediary is actually responsible for linking the police officer with the magistrate. Thus, rectification of the problem of judge-shopping is practically and logistically possible.

## Maintenance and Use of Records

The third set of problems is related to, but narrower than, those just discussed. It has to do with the maintenance and use of the records generated during the search warrant process.

### *Improving Records Systems*

Cases should not have to be dismissed because of inability to locate the original search warrant affidavit, or at least a legible copy; yet this occurs, on occasion, in River City. Although the other jurisdictions we visited did not reach this extreme, all are faced by the same basic problem:

how to integrate a set of documents, usually created before a case has been filed and a case number assigned to it, into the case jacket into which all other case-related materials are placed. River City and Hill City attempted to accomplish this task by assigning a single clerk to match the names, addresses, or other identifying information indicated on the warrant with those of subsequently filed criminal cases. This task is hardly a simple one. The affidavit often contains nicknames or aliases, the site of the search may not be the suspect's residence, additional persons may have been arrested in connection with the search, the person named in the warrant may never be charged, and the list of items sought may be in statutory or standardized language that does not match the list of items seized. When, as frequently occurred in River City, no identification number is placed on the warrant package—making it difficult even to match the warrant return to the court copy of the warrant and affidavit—extraordinary diligence is required to establish any links at all between the warrant and any subsequent criminal case materials.

The other sites did not attempt to match warrant and case files. As described earlier, search warrants were kept chronologically in boxes or envelopes. A copy found its way into the criminal case file only as the result of a motion challenging the search or an attempt by the defense to impeach the investigating officer's testimony. These "case file" copies were usually reproductions of the copy in the prosecutor's file, obtained by the defense through discovery or delivered to the defendant at the time the warrant was served.

Although the boxes of search warrants were very useful to us as researchers, they are a useless storage burden to many of the courts. If search warrants could be easily integrated into case files, the need to maintain duplicate sets of records would be reduced—the problem cannot be eliminated entirely because cases do not result from all executed search warrants. More important, integration of warrant-related papers into the case file would decrease the risk of losing the case because a challenged warrant could not be found.

We do not have a total solution to this annoying problem. As a start, however, a sequential identification number should be placed on each part of the warrant package so that at least the return can be easily matched with the affidavit and warrant. In addition, space should be provided on the return for the name of each person arrested at the time the warrant is served and for the number that the police use to identify those arrests in their own files. This will facilitate cross-checking between police and court records for those persons arrested on the scene and will

help in linking the warrant records to a case file. We have no suggestions for linking search warrants to the cases of those persons arrested after the return of the warrant. It is a problem requiring further research or the offer of an innovative technique already in use in some other jurisdiction.

***Using Search Warrant Records More Effectively***

The ability to link warrant applications to information about eventual case dispositions will make possible some important new uses for search warrant applications. It seems axiomatic that criminal justice data, with an apparent shelf life of decades, are destined to be forgotten quickly after they are collected and filed. We found the archival warrant application records to be rich with information of administrative, legal, and theoretical significance, yet these records are seldom used as anything more than tangible evidence of the level of suspicion that preceded the particular search to which they refer.

As a result of our review of warrant application archives, we are persuaded that much can be learned from the routine monitoring of these records. Important information about the frequency of warrant use by law enforcement (including details about specific divisions or officers) and the extent of judge-shopping, in addition to the extent to which judges and prosecutors share the responsibility of reviewing applications equally, can be gleaned from even a perfunctory review of these records. A more systematic exploration of the records can reveal other valuable information, such as the types of criminal cases for which warrants are most frequently sought, times of the day and week applications are reviewed, the kinds of contraband being sought and seized, the evidentiary basis for most warrants and how that basis varies by the type of crime under investigation, and so on.

If this kind of information were coupled with some additional analysis of criminal case outcomes, it would be possible to monitor the frequency with which cases initiated with warrants resulted in dismissal, conviction, and appeal. Comparable data collected for search-related cases that did not involve a warrant would also allow some relevant comparisons. It would be possible to assess, more directly than was possible in this study, the effect of a search warrant on the making of a solid criminal case.[4] Furthermore, examination of these data could also yield information on discrepancies in practice and interpretation both across and within jurisdictions.

Ideally, such a review of search warrant practices could be conducted on a routine basis, by a panel of current and retired judges,

members of the bar, law enforcement officials, and scholars. By apprising the criminal justice professionals of differences in practice and problems, and incorporating the results of the review in training and evaluation programs, much could be done to improve current practices and eliminate unjustified disparities. However, since our legal system relies on the adversary process as a control rather than on self-regulation, prosecutors and the organized defense bar should become more familiar with the information available in their jurisdictions and how it can be used to further the interests which they represent. For the prosecutors, this would include improved screening practices and liaison activities with law enforcement departments, as well as in-court representation. For the defense bar, this would include obtaining a better picture of systemic weaknesses in search warrant procedures.

As for the courts, at a minimum, data on the number of search warrant applications reviewed and granted should be included in court statistical summaries and internal caseload performance reports. This information could then be used to assess the burden imposed by search warrant application reviews and the extent to which this burden is shared among the members of the bench.

Resolving other questions involving the integrity of the search warrant review process will require additional information to be collected. In the course of our research, for example, we were disappointed to discover that not a single jurisdiction we contacted had any record of warrant applications that were rejected as inadequate by magistrates. Systematic collection of these data, which could be accomplished by simply requiring officers to provide a copy of any application brought for review, could yield valuable information.

Such records could be used, for example, to determine precisely how frequently judges deny officers' requests for warrants. This might provide more direct evidence regarding the nature, extent, and immediate consequences of judge-shopping, and might be suggestive—though not conclusive—of the rigor of review by different magistrates. Such records could also allow study of the reasons applications are rejected, information that could be very useful to officer training. More systematic examination of such records could also yield valuable information about the specific cases most likely to result in the rejection of an application—specifically, what officers or police divisions produce the highest rate of rejected applications; what specific kinds of crimes they relate to; what kinds of evidence they seek to obtain; and on what kinds of information

or supporting documentation (e.g., statement by confidential informant, personal observation by the affiant) they are based.

Finally, these data could be used to explore the short- and long-range consequences of rejection of a warrant application. Is the application simply taken, unmodified, to another judge for a "second opinion?" Is the application returned to the original (or a second judge) for review after corrective modifications are made? Do required modifications generally necessitate additional investigation or merely better drafting? Does a search of the suspected individual or premises appear to be conducted anyway, absent a warrant, on "exigent" or other grounds?

Such questions are central to our concerns about the operation and consequences of the search warrant process. Their answers could work directly to improve officer training in the preparation and use of search warrants and eventually, perhaps, to enhance the quality of the review itself.

## Conclusion

Ultimately, the rigor with which the Fourth Amendment mandate will be enforced will turn, in large part, on public demand. As some legal scholars have noted, the Fourth Amendment mandate, coupled with the corollary exclusionary rule, enjoys an extremely poor reputation as public policy, since the apparent effect of the docrine is to free the clearly guilty.[5] Most rights, argues Kamisar, operate prospectively, in a manner that precludes the discovery of possibly incriminating evidence—e.g., the attorney-client privilege.[6] In sharp and often troubling contrast, the exclusionary rule as it applies to the law of search and seizure, "works *after the fact*, and by then, we know who the criminal is and what the evidence is against him."

> If there were some other way to make the police obey *in advance* the commands of the Fourth Amendment, the government would lose as many cases as it does now [due to the *ex post facto* operation of the exclusionary rule], but we would not know what evidence the police *might have obtained* in violation of the Fourth Amendment.[7]

Our research suggests that a properly administered and supervised search warrant review process can protect privacy and property rights without significantly interfering with the ability of police officers to conduct thorough and effective investigations of criminal activity. Moreover, based on the comments of law enforcement officers and

prosecutors whom we interviewed, it was evident to us that the exclusionary rule, though seldom invoked, serves as an incentive for many police officers to follow the limits imposed by the Fourth Amendment as defined in their jurisdiction. Thus, we conclude that the fears which have arisen concerning the deleterious effects of the warrant requirement and the remedy provided by the exclusionary rule are overstated. New broad exceptions to the warrant requirement and exclusionary rule as applied to search warrants do not appear necessary, particularly if some of the basic improvements to search warrant practice and procedure that are recommended here are implemented. Adoption of these recommendations would, we believe, do much to remove unnecessary impediments to the procurement of a search warrant and to ensure that the magistrate's review achieves the level of diligence and independence envisioned by the Fourth Amendment.

Even if these recommendations are implemented, problems will, of course, remain: some reasonable middleground will have to be found between the use of boilerplate paragraphs and an insistence on original composition; facts will fall into the interstices of even the most carefully drafted guidelines; judges and prosecutors will remain overworked and resentful of interruptions; and police officers faced with the pressures casued by ongoing criminal activity will continue to resent the additional time and effort required to obtain a warrant. But as observed by the Supreme Court in the midst of our field research:

> Whatever practical problems remain...cannot outweigh the constitutional interest at stake. Any warrant requirement impedes to some extent the vigor with which the government can seek to enforce its laws, yet the Fourth Amendment recognized this restraint is necessary in some cases to protect against unreasonable searches and seizures....The additional burden imposed on the police by a warrant requirement is minimal. In contrast, the right protected—that of presumptively innocent people to be secure in their houses from unjustified forcible instrusions by the government—is weighty.[8]

# Notes to Chapter Seven

1. *See also* Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 American Bar Foundation Research Journal 585 (1983); Comptroller General Report No. GGD-79-45, Impact of the Exclusionary Rule on Federal Prosecutors 8-11 (1979).

2. It is recognized that many small jurisdictions do not have the flexibility to rotate personnel in the manner suggested. They also may not have as severe a problem, and, if the observations of our interviewees in Forest and Mountain City are correct, they may have already implemented telephonic application procedures. Nevertheless, in both rural and urban settings, administrative road blocks in the warrant application review process should be removed.

3. Illinois v. Gates, 462 U.S. 213 (1983).

4. There is already strong evidence, for example, that warrant-based searches are significantly less vulnerable to defense attack than warrantless searches.

5. KAMISAR, IN DEFENSE OF THE EXCLUSIONARY RULE, Testimony Before the Attorney General's Task Force on Violent Crime (1981), quoting Professor John Kaplan.

6. *Id.*, at 2-3.

7. *Id.* at 1. [Emphasis in the original.]

8. Steagald v. United States, 451 U.S. 204, 222 (1981).

APPENDIX

# Statutory Analysis

In 1981 and again in 1983, the criminal codes and rules of criminal procedure of each of the 50 states and the District of Columbia were reviewed for the provisions governing the issuance, execution, and return of search warrants. The results of this review are presented in four sets of charts, beginning on page 142, that outline the statutory and formal procedural framework in which law enforcement officers, prosecutors, defense attorneys, and judges operate. It should be noted that several states have additional provisions on search warrants contained in various other portions of their statutes such as the chapters or codes on public health, child abuse and neglect, prevention of cruelty to animals, and liquor control. For the most part, these are not included in this analysis.

The following summary gives the highlights of the varying statutory patterns.

## Search Warrant Application Procedures: Chart I

The first chart (p. 142) covers the requirements and limitations imposed on applications for a search warrant: who may apply, who is authorized to issue a search warrant, the geographic limits of the authority to search, the types of items or persons for which a search warrant may be issued, the situations in which oral statements may supplement or substitute for written affidavits, and special provisions for a telephone application.

***Who may apply for a search warrant?***

Less than half (23) of the jurisdictions surveyed specify who may apply for a search warrant. Of these, nine state statutes provide that "any person" (Florida, Illinois, Iowa, Kansas, Montana, Virginia) or any "credible person" (Kentucky, Louisiana, Michigan) may apply for a warrant, thus leaving open the possibility that a private citizen may apply for a search warrant. Connecticut requires "two credible persons" or a state's attorney. Ten jurisdictions in addition to Connecticut specify that a state attorney general or prosecutor may apply for a warrant, and fourteen jurisdictions allow applications by law enforcement officers either in addition to or in place of prosecutorial personnel. Rhode Island generally limits the law enforcement personnel authorized to seek a warrant to police lieutenants or captains, but permits a person with a right to possession of stolen property to obtain a warrant. New York permits search warrants to be obtained by any public servant in the course of his or her official duties.

***Who may issue a search warrant?***

The overwhelming majority of states authorize any state or local judicial officer to issue search warrants. North Dakota authorizes federal as well as state magistrates to issue state search warrants. Connecticut, on the other hand, limits the authority to judges on its superior court bench. The statutes in three states (Massachusetts, North Carolina, and Oklahoma) extend the power to issue a search warrant to court clerks as well. *Shadwick v. City of Tampa*[1] upheld the constitutionality of an arrest warrant issued by the clerk of a municipal court. Serious questions have been raised, however, whether that case covers search warrants.

> Although the Court found that a layman-clerk could assess probable cause for rather simple ordinance violations, it does not inevitably follow that such a person is likewise capable of making the much more sophisticated judgments required for the issuance of search warrants. . . . Also, the need for delegation to a clerk seems relatively slight. . . [since] search warrants are issued with much less frequency than arrest warrants. . . . It would seem, therefore, that the use of court clerks to issue search warrants is constitutionally suspect, at least in the absence of a showing of special circumstances rendering such a delegation of authority necessary.[2]

***Where is the search warrant applicable?***

The statutes of five states (Colorado, Illinois, Maine, Massachusetts, and Wisconsin) permit judges to issue a search warrant that may be executed anywhere in the state.[3] Thus, a law enforcement officer

investigating an urban burglary could go to a judge in the city to obtain a warrant to search a home in a suburban county for the stolen goods. Seventeen states require the police officer to go to a local judge, and six others (Nebraska, New York, Mississippi, North Carolina, South Carolina, and Virginia) permit their higher courts to issue warrants statewide but restrict the warrants issued by a lower court judge to the territorial jurisdiction of that court. Missouri provides a statutory exception to the local-execution requirement when the person or item sought moves or is taken from the territorial jurisdiction of the court after the application has been filed. Twenty-two states do not address this issue specifically in their statutes, but it may be covered in the provisions defining the jurisdiction of the courts authorized to issue search warrants.

Both statewide and limited issuing authority have advantages and disadvantages. Local judges are more likely to be able to detect incorrect or incomplete addresses and therefore to prevent mistakes in execution. On the other hand, in multi-jurisdictional metropolitan areas, the added difficulty of learning and using each local procedure can discourage the use of warrants and, in extreme cases, affect the investigation itself.

***Property and persons subject to seizure***

The search warrant provisions of most state codes permit the seizure of some combination of the following categories of property: items that are allegedly stolen, embezzled, or the fruit of a crime (48 jurisdictions); evidence of a crime (41 jurisdictions); items designed or intended for use in a crime (32 jurisdictions); items used in a crime or public offense (36 jurisdictions); or items possessed unlawfully (35 jurisdictions). A few states limit the property subject to seizure to that used in a felony rather than in a misdemeanor or violation (Alabama, California, Idaho, Missouri, Oklahoma, and Utah) or to that which is evidence of a felony (California). Others include additional categories such as kidnapped persons (Georgia, Illinois, Kansas, Maine, Missouri, Montana, Oregon, and Vermont), bodies or fetuses (Georgia, Illinois, Indiana, Kansas, Massachusetts, Michigan, Missouri, and Vermont), property designed to conceal a crime (Delaware, District of Columbia, Iowa, Massachusetts, New York, North Carolina, and Oregon), or specify special categories of unlawfully possessed property—e.g. health hazards, forged instruments, counterfeit coins, arms for riots, gambling equipment, narcotics, obscene materials, or machine guns.

Surprisingly, only seven states (Arizona, Kansas, Maine, Massachusetts, Oregon, Utah and Vermont) include a person wanted for a crime as a search warrant category. One other (Texas) simply lists persons as one

of the categories for issuing a search warrant. In light of the recent decision in *Steagald v. United States*, more states may decide to include wanted persons in their search warrant provisions.[4] It should be noted that these broad categories simply set the outer limits for search warrants and do not affect the requirement that the item sought be described in detail in the application for a search warrant.

***Use of sworn oral statements***

Every U.S. jurisdiction requires some form of sworn statement to accompany an application for a search warrant. Almost half (24) permit a sworn oral statement by the applicant to supplement or replace a written affidavit. Specifically, 14 states (California, Florida, Iowa, Maine, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Vermont and Washington) allow a magistrate to "hear evidence under oath or affirmation,"[5] or to "examine under oath the affiant and any witnesses he [or she] may produce."[6] Virginia apparently permits submission of an audio or videotaped affidavit and twelve states (Arizona, Arkansas, Colorado, Idaho, Kansas, Nebraska, Nevada, New Jersey, North Dakota, Oklahoma, Utah, and Wisconsin) permit the magistrate to take an "oral statement under oath. . .[i]n lieu of, or in addition to, a written affidavit or affidavits."[7] The statutes of the remaining jurisdictions, with two exceptions, do not mention oral statements; Missouri and Pennsylvania expressly forbid oral statements to support issuance of a search warrant.[8]

Expressly permitting the magistrate to obtain oral clarification of a written affidavit encourages development of a more complete record, since in many instances the applicant has more information than is included in the affidavit. Oral explanations can often be provided without time-consuming and aggravating rewrites of the affidavit or the addition of cryptic marginal notations. Substituting recorded sworn oral statements for written affidavits can lessen the time required and the difficulty many officers have in preparing a typed statement, particularly after normal work hours when secretarial help is unavailable. On the other hand, it can be more difficult for both the applicant and the reviewing magistrate to determine whether an oral statement is sufficient. Furthermore, using an oral statement to substitute for or supplementing a written affidavit requires a means for recording the statement accurately, either mechanically or by a court reporter.[9]

Twelve states (Arizona, California, Montana, Nebraska, Nevada, New York, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wisconsin) do not require the applicant to appear in person before the

magistrate. In these jurisdictions, a search warrant may be requested by telephone. The typical provision requires that the applicant must read the contents of the warrant to the magistrate, who may make specific modifications. The conversation must be recorded and transcribed, and the transcription must be certified to be accurate by the issuing magistrate and filed with the court. If the warrant is approved, the applicant is directed to sign the magistrate's name on a duplicate original which is served when the warrant is executed. The magistrate signs the original search warrant, entering the time and date of issuance.[10] In some states, (e.g., Montana, Nebraska, and Utah) a law enforcement officer seeking to obtain a search warrant by telephone must first contact the prosecutor. If the prosecutor "is convinced that"

> a warrant is justified and that the circumstances require its immediate issuance, he [or she] shall telephone the judge and state that he [or she] is convinced the warrant should be issued by telephone. The judge shall then telephone the officer at the number provided by the [prosecutor]. . . .[11]

Such telephonic application procedures, if properly followed, provide an alternative that can significantly reduce the time required to obtain a search warrant in both urban and rural areas, without diminishing the protections offered by a warrant.

## Form of Applications and Warrants: Chart II

Chart II (p. 160) summarizes the information and recitations expressly required by state statutes and rules of criminal procedure to be included in applications and in the warrants themselves. The failure of a statute to require a particular bit of information does not necessarily mean that the item is or can be routinely omitted from an application or warrant. For example, whether or not the information is explicitly called for by the governing statute or rule, search warrant applications or supporting affidavits must describe the items to be sought and the proposed site of the search in order for the search warrant to comply with constitutional standards.

### *Contents of search warrant applications*

In order to ensure compliance with the Fourth Amendment mandate that "no warrant shall issue, but upon probable cause, supported by oath or affirmation. . .," the codes of all states and the District of Columbia require that applications for search warrants

include an affidavit or sworn oral statement. The overwhelming majority of the statutes require that the application or affidavit describe the person or property to be searched (39 jurisdictions), specify the items or persons sought (40 jurisdictions), and recite that there is probable cause to believe that the specified items fit into one of the classes of property or persons subject to seizure and that they are located at the described location (40 jurisdictions). Most of the remaining statutes or rules include only a general requirement that the application or affidavit must establish "the grounds for issuing the warrant."[12]

***Contents of the search warrants***

Every U.S. jurisdiction has some provision governing the content of search warrants used during investigations of criminal offenses. Twenty-one states set forth an actual search warrant form in their statutes or rules. Another directs the state attorney general to prescribe a form.[13] All but one of the provisions examined echo the command of the Fourth Amendment that the place to be searched and the persons or things to be seized be particularly described. Thirty-one jurisdictions also require that search warrants include a recitation of probable cause.

Beyond these basic points, the requirements vary. About half the statutes expressly require that the warrant include the date of issuance. Although at first glance it may seem to be a minor technicality, including the date of issuance can be of great significance, since the time limit for executing a warrant usually runs from the date of issuance (see Chart III).

In those jurisdictions in which the execution period is measured in hours, notation of the time at which the magistrate signed the warrant is equally important. Nineteen require notation of the time of issuance as well, although in seven jurisdictions (Arizona, California, Nebraska, New York, Oregon, South Dakota, and Utah) this is limited to search warrants obtained by telephone.

Over half of the states require the search warrant to disclose the name of the affiant, the name of the applicant, or both, or to have a copy of the affidavit attached. Specifically, the codes of sixteen states direct that the name of the affiant be disclosed; those of two states (Maryland and Mississippi) require that the name of the applicant appear in the warrant; and the rules or statutes of eight states (Arizona, Indiana, Minnesota, Nebraska, New Hampshire, North Carolina, Oklahoma, and Wisconsin) stipulate that both the applicant's and the affiant's name must be stated in the warrant. (In practice the applicant and affiant are usually the same person, the investigating officer.) Five states (Delaware,

Indiana, New Mexico, Pennsylvania, and Virginia) require that the affidavit be attached to the warrant unless it is issued pursuant to a telephone application, and Michigan provides for a choice between attaching the affidavit or explicating the grounds for issuance in the warrant.[14]

Attaching the affidavit to the warrant has some significant consequences—both good and bad—in those jurisdictions in which a copy of the warrant is given to the person in control of the area being searched (see Chart III). For defendants, it can provide a description of the basis of the charges at a very early stage of the proceedings and a protection against false and malicious affidavits. For law enforcement officials, on the other hand, particularly those who rely on confidential informants, it is sometimes considered a threat to their ability to obtain timely information, since informants may be reluctant "to snitch" when even a circumscribed description of their contact with the person to be searched will be disclosed soon after the actual event.[15] It should be noted that the issue is one of timing rather than disclosure, since the affidavit is eventually disclosed in most cases through the formal or informal discovery process.

Finally, 29 statutes require the issuing magistrate to indicate on the face of the warrant whether the search must be conducted only during the daytime, or may be conducted at any time day or night. In some states a special standard must be met before a nighttime search may be authorized—e.g., "positive" information that items sought are at the specified location (Alabama, Alaska, New Mexico, Oklahoma, and Utah); "reasonable cause" (e.g., Arkansas, Idaho, New York, and South Dakota) or "good cause" (e.g., Arizona, Nevada, and Rhode Island) (see Chart III). In others (e.g., Louisiana, Massachusetts, and Oregon) no special showing is statutorily required. In the states in which no explicit judicial authorization is mandated for a nighttime search, several expressly provide that the search may be conducted "at any time" or "at any reasonable time" (e.g., Colorado, Georgia, and Illinois). Others direct that the search must be conducted "forthwith" (South Carolina, West Virginia, and Wisconsin).

## Search Warrant Execution Requirements: Chart III

Chart III (p. 166) covers the statutory requirements for executing a search warrant, such as how soon the warrant must be served, by whom, whether notice must be given prior to service, how extensive the search may be, whether a receipt and other documents must be left at the scene,

and the penalties for misusing or obstructing the authority provided by a warrant.

***How quickly must a warrant be executed and at what time of day?***

All but six states prescribe a deadline for serving a warrant. This period ranges from 2 days (New Jersey, North Carolina, and Pennsylvania) to 60 days (Arkansas). The most commonly set timespan is 10 days (28 states); only three states (Arkansas, Maryland, and Virginia) set a maximum period of more than 10 days (15 days). Oregon's code sets a 5-day maximum, which may be extended to a total of 10 days by the issuing magistrate.[16] Delaware sets a 10-day limit on daytime searches but requires warrants authorizing a nighttime search of a home to be executed within 3 days.[17]

The purpose of setting a maximum service period is to ensure that the evidence on which a search warrant is based is still germane when it is served. The shorter limits set by such states as New Jersey and North Carolina (2 days), Ohio and Texas (3 days), Illinois and Kansas (4 days) and Arizona and Tennessee (5 days) appear more in keeping with this purpose than the 15- and 60-day limits noted above. Of course, the issuing magistrate may set a time limit within the statutory maximum in which the warrant must be served.[18]

Forty-one jurisdictions have provisions governing the time of day during which a warrant may be served. Some, such as Colorado, Georgia, Illinois, and West Virginia, merely provide that the search may be conducted at any time or any reasonable time day or night. As noted earlier, however, most of the states with a provision on the subject require express authorization from the magistrate before a search (at least of a home) may be conducted at night. The primary reason for this requirement is the added intrusiveness of a search conducted during normal sleeping hours. Yet, the definition of nighttime varies considerably. For example, Maine and Nevada define night as 7:00 P.M. to 7:00 A.M.,[19] while in Arkansas it is 8:00 P.M. to 6:00 A.M.,[20] in California and Oregon it is 10:00 P.M. to 7:00 A.M.,[21] and in Arizona, New Mexico, North Dakota, and Vermont night for these purposes is between 10:00 P.M. and 6:00 A.M.[22] The Florida code requires not only express authorization for a nighttime search but also a special showing for a warrant to be executed on a Sunday.[23]

***Who may execute a search warrant?***

Most states permit a search warrant to be served by any peace officer. The provisions in a few states (e.g., California and Tennessee)

limit execution of a warrant to "the peace officer, or one of them to whom it is directed."[24] However, the forms prescribed appear to interpret these restrictions in terms of particular departments rather than individual officers.[25] A number of states (e.g., Arizona, Arkansas, and Missouri) include a provision permitting executing officers to request the assistance of bystanders to help in serving a warrant.

***Manner of service***

The codes of thirty-one jurisdictions authorize law enforcement officers to make a forced entry into the site of the ordered search under certain conditions. Forced entry is generally permitted under state codes when an officer attempting to serve a search warrant is refused admittance after advising the occupant of the warrant,[26] is liberating a person held hostage,[27] or when the building or area to be searched is unoccupied.[28] Other statutes are not so explicit, simply authorizing the executing officers to use such force "as may be reasonably necessary."[29]

Eleven of these states (Arkansas, California, Illinois, Nebraska, New York, North Carolina, North Dakota, Pennsylvania, South Dakota, Texas, and Utah) go even further, by expressly permitting officers in prescribed circumstances to enter without first giving notice of their presence and intent to the occupants of the search site (no-knock entry). The reasons for limiting the circumstances under which officers may make forced or no-knock entries were summarized by the Illinois Court of Appeals:

> [The] purpose of any knock and announce rule is that dignity and privacy protected by the Fourth Amendment . . . demands certain propriety on the part of policemen . . . . No matter how great probable cause is to believe a man is guilty of a crime or in possession of fruits of a crime, he [or she] must be given a reasonable opportunity to voluntarily surrender his [or her] privacy . . . . Less obvious but equally important . . . is the protection of police and occupants.[30]

No-knock entries are generally permitted if notice would "endanger the success of the search," or because there is reason to believe the persons inside the search site are armed, or the items sought may be easily and quickly destroyed[31] (e.g., flushing illicit drugs down the toilet). Five states (Nebraska, New York, North Dakota, South Dakota, and Utah) statutorily require the issuing magistrate to authorize a "no-knock" entry at the time the search warrant is sought.[32] North Carolina requires the executing officer to have "probable cause" to believe that the circumstances permitting entry without notice exist.[33] Pennsylvania, on the

other hand, authorizes such an entry if the officer determines that it is justified by "exigent circumstances."[34]

***Scope of the search and seizure***

A total of fourteen jurisdictions include special provisions in their codes concerning the scope of a search pursuant to a warrant. In nine jurisdictions (Arizona, District of Columbia, Georgia, Illinois, Iowa, Kansas, Montana, Vermont, and Wisconsin) there is express statutory authorization for the executing officer to detain any person on the property being searched, and to search that individual to prevent attack or to discover the items sought. Connecticut has a similar provision limited to discovery of concealed items listed in the warrant.[35]

Five jurisdictions (Arizona, Arkansas, California, District of Columbia and North Carolina) have codified the "plainview" doctrine, at least in the context of a search warrant, by authorizing executing officers to seize, "any property discovered in the course of a search upon reasonable cause to believe that it is subject to seizure."[36] Finally, Arizona, District of Columbia and Louisiana permit officers to take photographs, measurements, physical or other impressions, and perform chemical, scientific, or other tests.[37]

***What documents must be left at the scene of the search?***

The statutes in three-fourths of the jurisdictions (38) require officers executing a search to give a receipt for the items seized to the person from whom they are taken or to leave the receipt at the scene of the seizure if no one is present. The Ohio provision is typical.

> The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken . . . a receipt for the property taken, or shall leave the copy and receipt at the place from which the property was taken.[38]

Thirty-three states require that a copy of the warrant be given to the person in possession of the property to be searched or left at the scene. In three of these states (North Carolina, Pennsylvania, and South Carolina) the executing officer is required to give or leave a copy of the affidavit as well. In a fourth state (Connecticut), the affidavit must be provided within 48 hours of the search unless the court authorizes an exception to protect a confidential informant, an ongoing investigation, or "confidential information."[39] In only nine states (Delaware, Hawaii, Indiana, Kentucky, Massachusetts, Michigan, Oklahoma, Texas, and Virginia)

were we unable to find a requirement in the rules or statutes to leave either a receipt, a copy of the warrant, or both, with someone or somewhere at the site of the search.

***Special penalties for abuse or obstruction of the search warrant process***

Twenty-seven states prescribe some penalty beyond those set for perjury for misusing the authority granted by a search warrant in a criminal case or for taking an action that may thwart a warrant-authorized search. Specifically, eleven states (Alabama, Alaska, Arizona, Florida, Nevada, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, and Utah) make it a misdemeanor to procure a warrant maliciously and without probable cause. Five states (Florida, North Dakota, Oklahoma, Tennessee, and Utah) also impose penalties on officers who willfully exceed their authority or exercise it "with unnecessary severity."[40] Pennsylvania makes it a misdemeanor to sign an inventory that is not "a true and correct listing of the items seized."[41] South Carolina imposes criminal penalties on judicial officials who fail to keep or who alter warrant records,[42] and Virginia subjects officers who conduct an illegal search and judges who willfully and knowingly issue a general or unsupported warrant to civil liability, including punitive damages, and to forfeiture of office upon a second finding of such malfeasance.[43]

With regard to thwarting the service of a warrant, four states (Maryland, Nebraska, New Jersey, and Wisconsin) have penalties for prematurely disclosing the existence of a search warrant;[44] Florida law makes it a misdemeanor in the first degree to obstruct service or execution of a search warrant;[45] and Missouri law provides for fines to officers who fail to execute or return a search warrant.[46] It is not known how frequently any of these penalty provisions are invoked.

## Search Warrant Return Procedures and Records: Chart IV

The final chart (p. 190) covers the documentation procedures that must be followed after a search warrant has been issued and either the search has been conducted or the time for execution of the warrant has expired. It addresses when and with whom a return must be filed, the contents and distribution of the return documents, the disposition of the property seized, and the provisions governing maintenance of search warrant records.

***When must the search warrant be returned?***

All but eight jurisdictions set a time period within which a return must be filed. Twenty-one states require the return to be filed "promptly," "without unreasonable delay," "as soon as possible," or with "reasonable promptness." Eighteen define the time for filing to be within the period for execution of the warrant. The remainder specify a set number of days ranging from 60 days after issuance for unexecuted search warrants in Arkansas, 10 days after execution (Minnesota and Mississippi),[47] 5 days after execution (Maryland and Oregon), 2 days (Wisconsin), to one day after execution or expiration (District of Columbia).

***Where is the search warrant returned?***

All but three state codes specify where a return must be filed. A majority (29) direct the executing officer to return the warrant to the issuing court or magistrate. Another ten states instruct the issuing magistrate to designate the court or judge to which the return must be taken. The remaining state codes combine one or more of the above options with the alternative of filing the return in any court of competent jurisdiction (Florida, Georgia, Illinois, Vermont, and Washington), or, more narrowly, with any other judge in the circuit (Maryland)[48] or with the nearest available judge (Montana).[49] The strong preference for requiring the return to be filed with the issuing court or magistrate or with a specifically designated judge simplifies the recordkeeping process, particularly the matching of the return with the court's copy of the warrant.

***Documentation when property is seized***

The codes of all but four states (Hawaii, Indiana, Kentucky, and Massachusetts) require the person seizing property pursuant to a warrant to prepare a detailed inventory of the items seized, and all but the codes of those states plus Louisiana and Minnesota require the inventory to be filed with the court as part of the warrant return. These requirements have a threefold purpose: (1) to protect citizens from officers who might be tempted to take advantage of the opportunities provided by the authority of a search warrant; conversely (2), to protect officers against accusations that they have taken but not turned in property from the site of the search; and (3) to document the chain of custody for evidentiary purposes.

Thirty-eight jurisdictions impose procedural requirements on the preparation of the inventory to enhance its ability to achieve these

purposes. Thirty-three jurisdictions require the inventory to be signed by the executing officer. All but three of these jurisdictions (Oregon, South Carolina, and Texas) require that signature be made under oath. A total of twenty-five state codes require the preparation of the inventory to be overseen by at least one witness. Twenty of these states impose the witness requirement in addition to requiring the sworn signature of the executing officer. All twenty-five list the person from whose possession or control the property was seized as an appropriate witness. Who else may attest to the accuracy of an inventory varies from state to state. Fourteen jurisdictions permit the applicant to be listed as a witness. Maine, on the other hand, expressly prohibits the applicant from acting as a witness, presumably because he or she has interests identical to those of the executing officer. Five states (Arizona, California, Idaho, Oklahoma, and Utah) suggest the alternative that the inventory be prepared "publicly"; and fourteen require the inventory to be made in the presence of at least one "credible person."

Finally, thirty-two require the magistrate or clerk to provide a copy of the inventory to the applicant and the person from whom property was seized, if requested to do so.[50] Two states (South Carolina and West Virginia) entitle only the person from whom property was seized to a copy of the inventory.

***Immediate disposition of property seized***

The codes of thirty-six jurisdictions contain instructions as to who is to be responsible for property seized pursuant to a search warrant. Twenty jurisdictions vest this responsibility, at least in some circumstances, with the executing officer or a law enforcement agency. Nine of these states (Arizona, California, Kansas, Massachusetts, Minnesota, Nebraska, New Hampshire, North Carolina, and Texas) specify that the officer's retention of the seized property is subject to the order of the magistrate or another judge. Two states (New York and Wyoming) give the court the option of retaining the property or permitting the officer to retain it. Two other states distinguish between classes of property: Alabama requires that stolen or embezzled property be turned over to the court while other seized property is retained by the executing officer, and Utah requires the opposite.[51] The remaining states in this category (Delaware, Indiana, Iowa, Maryland, Michigan, Nevada, Ohio, Rhode Island, and Wisconsin) give full responsibility to the officer. Thirteen states, in addition to New York and Wyoming, make the judge

individually or the court as an entity responsible for retaining seized property (Alaska, Hawaii, Idaho, Illinois, Louisiana, Montana,[52] New Mexico, Oklahoma, Utah, Vermont, Virginia, Washington, and West Virginia). The District of Columbia and South Dakota codes require only that the property be "safely kept."[53]

***Retention and availability of search warrant records***

The codes or rules of thirty-three jurisdictions include some provision on the retention, location, and availability of search warrant documents. Most of these states require retention of some combination of the affidavit or application, the warrant itself, the return and inventory, and other related documents. The most common provision calls for the warrant, return, inventory and all related papers to be maintained as a court record (Colorado, Iowa, Maine, Maryland, Nebraska, Nevada, North Dakota, Ohio, Rhode Island, South Dakota, and Wyoming). The next most frequently enacted provision requires retention of the affidavit, warrant, return and inventory (Arizona, California, Idaho, Utah). Three states (New Hampshire, New Jersey, and Oklahoma) expressly include among the materials that must be filed the judge's notes or summary, or the transcript of a non-telephonic application proceeding.[54]

Thirty-two codes direct where search warrant records are to be maintained. Three filing sites predominate. Eleven states (Iowa, Maine, Maryland, Nebraska, Nevada, New Jersey, Pennsylvania, Rhode Island, South Dakota, Virginia, and Wyoming) require search warrant papers to be filed with the clerk of the trial court in the county or district in which the seizure took place. Nine others (Arizona, Arkansas, California, Idaho, North Dakota, Oklahoma, Oregon, Tennessee, and Texas) specify that these records are to be filed with the court having jurisdiction over the offense or the clerk thereof. (In most instances, the effect of these two sets of provisions will be the same in practice, since the district in which the search takes place is usually, though not always, the one in which the offense occurred.) In contrast, five jurisdictions (District of Columbia, Missouri, Montana, North Carolina, and Utah) direct that papers be filed with the issuing court regardless of the jurisdiction over the offense. Colorado bridges this gap by providing that the papers are to be filed in the court with jurisdiction over the offense if charges are brought relating to the item seized, and in the issuing court if no prosecution is initiated. The remaining states designate the "court" (Minnesota), the "appro-

priate court" (Mississippi), the "clerk" (Ohio), the court listed in the warrant (New Hampshire and Wisconsin), or the court to which the warrant must be returned (Kentucky).[55]

Finally, the statutes and rules of thirteen states address when and to what extent search warrant records are open to the public. Reflecting a concern for protecting the safety of the officers and success of the search, seven states (Arizona, Iowa, Massachusetts, Nebraska, Oregon, Virginia, and Wisconsin) make search warrant records available for public inspection only after the execution of the warrant. Two others (Minnesota and New Hampshire) specify that the records are available unless otherwise ordered by the court. The Texas Penal Code specifies that at least the affidavit is publicly available after execution of the warrant.[56]

The remaining three states require search warrant records to be kept confidential from all but specifically designated classes of persons. Kansas limits disclosure of the affidavits supporting a warrant to defendants and counsel unless a court has ordered otherwise.[57] New Jersey permits disclosure of the warrant records to defendants and persons claiming to be aggrieved by a search, but requires prior notice to the prosecution with a showing of why access is needed.[58] Maryland requires a court order before the records can be disclosed, even to "persons aggrieved by the search or having an interest in the property."[59]

### *Other provisions*

In addition to the points covered above, the codes of several states include provisions governing other issues related to search warrants. These include the procedures and standards for the return or final disposition of seized property,[60] the procedures for challenging the legality of a search conducted pursuant to a warrant,[61] and the procedures for obtaining a warrant authorizing electronic surveillance.[62] The analysis of these sections was beyond the scope of the current study.

## Conclusion

As is apparent from the preceding narrative and the charts that follow, the statutes and rules covering search warrants address a wide range of substantive and procedural issues. Most provide a readily identifiable framework within which those involved in the search warrant process may operate. Although some uniformity has been introduced with the adoption of rules based on the Federal Rules of Criminal Procedure by an increasing number of states,[63] there is still substantial

variation in both the matters covered and the manner in which certain issues are resolved.

To some extent, the variation is limited and the gaps are filled by state and federal court decisions. In other instances, the variation is simply the result of tailoring procedures to fit local conditions and court structures and has few if any implications for the fairness and effectiveness of the process. In almost every statute however, the answers to at least some significant questions such as who is authorized to request a search warrant, the geographic scope of the warrant, when a search warrant may be executed, how it is to be executed, and what and where records are to be kept, remain unanswered or defined differently depending on the date of enactment and subject of a particular criminal statute. This introduces a level of unnecessary uncertainty and complexity. It is hoped that this analysis will assist states in identifying areas in their rules and statutes in need of clarification and gaps that need to be filled.

# Notes to Statutory Analysis

1. 407 U.S. 345 (1972).

2. W. LAFAVE, 2 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 34-35 (1978); *see* Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 2345, (White, J., concurring).

3. A similar provision is found in DISTRICT OF COLUMBIA CODE § 23-521 (1981).

4. *Steagald v. United States* requires a search warrant to search for a wanted person in the home of another individual. 451 U.S. 204, 222 (1981).

5. MAINE RULES OF CRIMINAL PROCEDURE 41(C).

6. OHIO RULES OF CRIMINAL PROCEDURE 41(C).

7. *E.g.*, ARIZONA REVISED STATUTES ANNOTATED § 13-3914 (1978).

8. MISSOURI ANNOTATED STATUTES § 542.276 (Vernon Cum. Supp. 1982); PENNSYLVANIA RULES OF CRIMINAL PROCEDURE 2003.

9. Most of the state statutues require that the statement be recorded or transcribed. A few provide that the magistrate's notes of the statement are sufficient. *E.g.*, "The judge shall record a summary of any additional evidence...." WASHINGTON RULES OF CRIMINAL PROCEDURE 2.3(c).

10. *See, e.g.*, SOUTH DAKOTA COMPILED LAWS ANNOTATED §§ 23A-35-5 and 23A-35-6 (1980). In New York, the applying officer fills in the warrant form and must read it verbatim to the judge after the judge has determined that there is probable cause.

11. MONTANA REVISED CODES ANNOTATED § 46-5-202(3)(1981).

12. *See, e.g.*, NEVADA REVISED STATUTES, § 179.045(1) (1981); WEST VIRGINIA CODE § 62-1A-3 (1977).

13. SOUTH CAROLINA CODE § 17-13-140 (Cum. Supp. 1982).

14. MICHIGAN COMPILED LAWS ANNOTATED § 780.654 (1982).

15. Service of the affidavit with a search warrant occurred in one of the cities studied. We heard stories of defendants comparing affidavits following their release on bail, but were told of no instance where the practice thwarted an investigation.

16. OREGON REVISED STATUTES § 133.565 (1981).

17. DELAWARE CODE tit. 11, § 2310(b) and (c) (Cum. Supp. 1982).

18. In some jurisdictions this is a frequent occurrence, in others it is not. It is clear that the overwhelming majority of the warrants examined during the study were served within 48 hours of issuance (see chapter 2). Thus, the shorter limits do not appear to impede effective law enforcement.

19. MAINE RULE OF CRIMINAL PROCEDURE 41(c); NEVADA REVISED STATUTES § 179.015 (1981).

20. ARKANSAS RULE OF CRIMINAL PROCEDURE 13.2(c).

21. CALIFORNIA PENAL CODE § 1533 (West 1982); OREGON REVISED STATUTES § 133.565(3) (1981).

22. *E.g.*, NEW MEXICO RULES OF CRIMINAL PROCEDURE—District Court 17(b).

23. FLORIDA STATUTES ANNOTATED §§ 933.10 and 933.101 (West 1973).

24. TENNESSEE RULES OF CRIMINAL PROCEDURE 41(d).

25. *E.g.*, "To the sheriff or any constable of said county," TENNESSEE CODE ANNOTATED § 40-6-106 (1982); "to any sheriff, constable, marshal or policeman in the County of...," CALIFORNIA PENAL CODE § 1529 (West 1982).

26. ARIZONA REVISED STATUTES ANNOTATED § 13-3916 (1978); FLORIDA STATUTES ANNOTATED § 933.09 (West 1973).

27. *E.g.*, IDAHO CODE § 19-4410 (1979); OKLAHOMA STATUTES ANNOTATED tit. 22, § 1229 (West 1958).

28. *E.g.*, IOWA CODE § 808.6 (West 1979).

29. *E.g.*, KANSAS STATUTES ANNOTATED § 22-2508 (Vernon 1981).

30. People v. Ouellette, 57 Ill. App. 3d 249, 373 N.E. 2d 114, aff'd 78 Ill. 2d 511, 401 N.E. 2d 507 (1978).

31. ARKANSAS RULES OF CRIMINAL PROCEDURE 13.3.

32. *E.g.*, NEBRASKA REVISED STATUTES § 29-411 (1979); UTAH CODE ANNOTATED § 77-54-9 (1982).

33. NORTH CAROLINA GENERAL STATUTES § 15A-251 (1978).

34. PENNSYLVANIA RULES OF CRIMINAL PROCEDURE 2008.

35. CONNECTICUT GENERAL STATUTES ANNOTATED, § 54-33(b) (West 1960).

36. *E.g.*, ARIZONA REVISED STATUTES ANNOTATED, § 13-3916 (1978).

37. *E.g.*, DISTRICT OF COLUMBIA CODE § 23-524 (1981).

38. OHIO RULES OF CRIMINAL PROCEDURE 41(D).

39. CONNECTICUT GENERAL STATUTES § 54-33c (West 1960).

40. *E.g.*, NORTH DAKOTA CENTURY CODE § 29-29-19 (1974).

41. PENNSYLVANIA RULES OF CRIMINAL PROCEDURE 2009; 18 PENNSYLVANIA CONSOLIDATED STATUTES § 4904(b) (1973).

42. SOUTH CAROLINA CODE § 17-13-141 (1971).

43. VIRGINIA CODE §§ 19.2-55 (1983).

44. *E.g.*, NEW JERSEY RULE OF CRIMINAL PROCEDURE 3.5-4.

45. FLORIDA STATUTES ANNOTATED § 933.15 (West 1973).

46. MISSOURI ANNOTATED STATUTES § 109.060 (Vernon Cum. Supp. 1982).

47. Controlled Substance Law only, MISSISSIPPI CODE ANNOTATED § 41-29-157 (1981).

48. MARYLAND RULES OF PROCEDURE 707(c).

49. MONTANA REVISED CODES ANNOTATED § 46-5-301 (1981).

50. This is in addition, in most instances, to the requirement for leaving a receipt at the site of the search. See Chart III.

51. ALABAMA CODE § 15-5-15 (1982); UTAH CODE ANNOTATED §§ 77-55-1 and 2 (1982).

52. Only if an arrest has been made. If there has not been an arrest, the items may be referred by the executing officer "for a time sufficient for investigation of the supposed crime, after which they must be delivered to the proper judge for disposition...." MONTANA REVISED CODES ANNOTATED § 46-5-401(3) (1981).

53. DISTRICT OF COLUMBIA CODE § 23-525 (1981); SOUTH DAKOTA COMPILED LAWS ANNOTATED § 23A-37-2 (1980).

54. For the record requirements for telephonic applications, see Chart I.

55. MINNESOTA RULES OF CRIMINAL PROCEDURE, 33.04; MISSISSIPPI CODE ANNOTATED § 41-29-157(4) (1981) (Controlled Substance Act); OHIO RULE OF CRIMINAL PROCEDURE 41(E); NEW HAMPSHIRE REVISED STATUTES ANNOTATED § 595-A:5 (1974); WISCONSIN STATUTES ANNOTATED, § 968.17 (West 1981); KENTUCKY RULES OF CRIMINAL PROCEDURE 13.10 (2).

56. TEXAS CODE OF CRIMINAL PROCEDURE ANNOTATED, Art. 18.01 (Vernon Cum. Supp. 1982).

57. KANSAS STATUTES ANNOTATED § 22-2502(2)(c) (Vernon 1981).

58. NEW JERSEY RULES OF CRIMINAL PRACTICE 3:5-6.

59. MARYLAND RULES OF PROCEDURE 707(e) and (f).

60. *See, e.g.*, MISSOURI ANNOTATED STATUTES § 542.301 (Vernon 1981); OREGON REVISED STATUTES § 133.643 (1981).

61. *See, e.g.*, CALIFORNIA PENAL CODE § 1538.5 (West 1982).

62. *See, e.g.*, WISCONSIN STATUTES ANNOTATED §§ 968.27 et. seq. (West 1979).

63. FEDERAL RULE OF CRIMINAL PROCEDURE 41.

# Statutes and Rules Used in Preparing the Charts

Code of Alabama § 15-1-1 (1982).
Alaska Statutes §§ 12.35.01 *et seq.* (1972); Alaska Rules of Criminal Procedure 37.
Arizona Revised Statutes Annotated §§ 13-3911 *et seq.* (1978 and Cum. Supp. 1982-1983).
Arkansas Statutes Annotated §§ 43-201 *et seq.* (1977); Arkansas Rules of Criminal Procedure 13.1 *et seq.*
California Penal Code §§ 1523 *et seq.* (West 1982).
Colorado Revised Statutes §§ 16-3-301 *et seq.* (1978); Colorado Rules of Criminal Procedure 41.
Connecticut General Statutes Annotated §§ 54-33a through 54-33j (West 1960 and Cum. Supp. 1982).
Delaware Code tit. 11, §§ 2304 *et seq.* (1979 and Cum. Supp. 1982).
District of Columbia Code §§ 23-521 *et seq.* (1981).
Florida Statutes Annotated § 933.01 *et seq.* and Form 422 (West 1973 and Cum. Supp. 1983).
Code of Georgia Annotated §§ 17-5-20 *et seq.* (Michie 1982).
Hawaii Revised Statutes §§ 803-31 *et seq.* (1976).
Idaho Code §§ 19-4401 *et seq.* (1979); Idaho Rules of Criminal Procedure 41.
Illinois Annotated Statutes ch. 38, §§ 108-3 *et seq.* (Smith-Hurd 1980).
Indiana Code Annotated §§ 35-1-6-1 *et seq.* (Burns 1975).
Iowa Code Annotated §§ 808.1 *et seq.* (West 1979).
Kansas Statutes Annotated §§ 22-2501 *et seq.* (Vernon 1981).
Kentucky Constitution, Bill of Rights § 10; Kentucky Rules of Criminal Procedure 13.10.
Louisiana Code of Criminal Procedure Annotated, art. 161-art. 167 (West 1967).
Maine Revised Statutes tit. 15, § 55 (1980); Maine Rules of Criminal Procedure 41.
Annotated Code of Maryland art. 27, § 551 (1982 and Cum. Supp. 1983); Maryland Rules of Criminal Procedure 707.
Massachusetts General Laws Annotated ch. 276, §§ 1 *et seq.* (West 1972 and Cum. Supp. 1983).
Michigan Compiled Laws Annotated §§ 780.651 *et seq.* (1982).
Minnesota Statutes Annotated §§ 626.04 *et seq.* (West 1983); Minnesota Rules of Criminal Procedure 33.04.
Mississippi Code Annotated §§ 41-29-57, 99-15-11, 99-25-15, 99-25-17 (1981).
Missouri Annotated Statutes §§ 542.266 *et seq.* (Vernon Cum. Supp. 1982); Missouri Supreme Court Rules, Forms 37-39B.
Montana Revised Codes Annotated, §§ 46-5-201 through 46-5-305 (1981).
Nebraska Revised Statutes §§ 29-812 *et seq.* and 29-814.01 *et seq.* (1979).
Nevada Revised Statutes §§ 179.015 *et seq.* (1981).
New Hampshire Revised Statutes Annotated §§ 595-A:1 *et seq.* (1974 and Supp. 1981).
New Jersey Rules of Criminal Procedure 3:5.
New Mexico Rules of Criminal Procedure, District Court 17 and Magistrate Court 13.
New York Criminal Procedure Law §§ 690.10 *et seq.* (McKinney 1971 and Cum. Supp. 1982).
General Statutes of North Carolina §§ 15A-241 *et seq.* (1978).
North Dakota Century Code §§ 29-29-01 *et seq.* (1974); North Dakota Rules of Criminal Procedure 41.
Ohio Revised Code Annotated §§ 2933.21 *et seq.* (Page 1974); Ohio Rules of Criminal Procedure 41.
Oklahoma Statutes Annotated tit. 22, §§ 1221 *et seq.* (West 1958 and Cum. Supp. 1982).
Oregon Revised Statutes §§ 133.525 *et seq.* (1981).
Pennsylvania Rules of Criminal Procedure 2002-2010.
General Laws of Rhode Island §§ 12-5-1 *et seq.* (1981); Rhode Island Rules of Criminal Procedure 41.
Code of Laws of South Carolina §§ 17-13-140 *et seq.* (1971 and Cum. Supp. 1982).
South Dakota Compiled Laws Annotated §

23A-35-1 *et seq.* (1980).

Tennessee Code Annotated §§ 40-6-101 *et seq.* (1982); Tennessee Rules of Criminal Procedure 41.

Texas Code of Criminal Procedure Annotated art. 9.51 and arts. 18.01 *et seq.* (Vernon 1977 and Cum. Supp. 1982).

Utah Code Annotated §§ 77-54-1 *et seq.* (1982).

Vermont Statutes Annotated tit. 55, §§ 4801 *et seq.* (1974); Vermont Rules of Criminal Procedure 41.

Code of Virginia §§ 19.2-52 *et seq.* (1983).

Revised Code of Washington Annotated §§ 10.79.010 *et seq.* (1980); Criminal Rules for the Superior Court 2.3.

West Virginia Code §§ 62-1A-1 *et seq.* (1977).

Wisconsin Statutes Annotated §§ 968.12 *et seq.* (West 1971 and Supp. 1983).

Wyoming Statutes §§ 7-7-101 *et seq.* (1977); Wyoming Rules of Criminal Procedures 40.

## **Chart I.** Search Warrant Application Procedures

| State | Who May Apply For a Search Warrant | Who May Issue a Search Warrant | Where Is the Search Warrant Applicable |
|---|---|---|---|
| **Alabama** | | • judge or magistrate | • within the court's territorial jurisdiction |
| **Alaska** | | • judicial officer | |
| **Arizona** | | • magistrate | |
| **Arkansas** | | • a judicial officer | |
| **California** | | • magistrate | • in county of issue<br>• outside county if pursuit begins within county or if offense occurred within county |
| **Colorado** | | • judge of any court of record<br>• judge of any municipal court | • statewide |

*Special procedures apply when documentary evidence is sought that is in possession of a lawyer, physician, clergyman, or psychotherapist. California Penal Code § 1524 (c)1-(f) (West 1982).

| Property and Persons Subject to Seizure | Sworn Oral Testimony Permitted in Lieu of or in Addition to Affidavit | Special Provision for a Telephone Warrant |
|---|---|---|
| • stolen or embezzled<br>• used in a felony<br>• in possession of one with intent to use it in a public offense<br>• in possession of one to whom it may have been delivered for concealment or preventing discovery | | |
| • stolen or embezzled<br>• used in a crime<br>• possessed with intent to use it in a crime<br>• delivered to another with intent to conceal<br>• evidence of a crime | | |
| • stolen or embezzled<br>• used in a public offense<br>• in possession of one with the intent to use it in a public offense or in possession of another for concealment or prevention of discovery<br>• evidence of a crime or participation in a crime<br>• person subject to an outstanding arrest warrant | • either in lieu of or in addition to the affidavit if recorded | • The sworn statement must be transcribed and certified by the magistrate and filed with the court.<br>• The magistrate signs the original and enters the date and time of issuance. The applicant signs the magistrate's name on a duplicate original. |
| • stolen or embezzled<br>• to be used in a crime<br>• possessed unlawfully<br>• evidence of a crime | • either in lieu of or in addition to the affidavit if recorded or summarized | |
| • stolen or embezzled<br>• used in a felony<br>• possession with intent to use in a public offense<br>• possession for concealment<br>• evidence of intent to commit or commission of a felony*<br>• evidence of sexual exploitation of a child | • either in lieu of or may supplement affidavit if reduced to writing | • The warrant may be based on a telephone statement, if it is recorded. The oral statement shall be recorded, transcribed and certified by the magistrate.<br>• The magistrate signs the original. The applicant signs the magistrate's name on a duplicate original warrant. |
| • stolen or embezzled<br>• designed or intended for use in a crime<br>• used in a crime<br>• possessed unlawfully<br>• material evidence of a crime<br>• stored, transported or dispensed in violation of a statute in circumstances posing a threat to public safety, order or health | • may supplement affidavit if reduced to writing | |

## **Chart I.** Search Warrant Application Procedures

| State | Who May Apply For a Search Warrant | Who May Issue a Search Warrant | Where Is the Search Warrant Applicable |
|---|---|---|---|
| **Connecticut** | • a state's attorney or assistant state's attorney<br>• any two credible persons | • any judge of the superior court | |
| **Delaware** | | • any justice of the peace<br>• any magistrate<br>• any judge of the superior court, court of common pleas or municipal court | • within issuer's territorial jurisdiction |
| **District of Columbia** | • a law enforcement officer<br>• prosecutor | • a judicial officer | • anywhere in District of Columbia |
| **Florida** | • some person | • any judge, including a committing magistrate | • within issuer's territorial jurisdiction |
| **Georgia** | • a law enforcement officer | • any judicial officer | |

*Special provision limits searches and seizures of anything in the custody or control of a journalist or news organization. Connecticut General Statutes §§ 54-33i and j (Cum Supp. 1982).

† Additional property subject to seizure includes obscene prints and literature, property in violation of laws with regard to the manufacture, sale, and transportation of intoxicating liquors, property connected with gambling, property in violation of food and drug laws, property involved in cruelty to animals, and property in violation of fish and game laws.

**Property is defined as any instruments, articles, or things, including the private papers of any person.

| Property and Persons Subject to Seizure | Sworn Oral Testimony Permitted in Lieu of or in Addition to Affidavit | Special Provision for a Telephone Warrant |
|---|---|---|
| • stolen or embezzled<br>• possessed, controlled, designed, used or to be used in a crime<br>• evidence of a crime* | | |
| • instrument of or used in crime, escape therefrom or concealment thereof<br>• fruits of crime<br>• designed for use in crime and not reasonably calculated for another purpose<br>• possessed unlawfully<br>• evidence of a crime | | |
| • stolen or embezzled<br>• contraband, fruits of a crime, or property possessed unlawfully<br>• designed or intended for use in or used in a crime<br>• evidence of crime or participation in a crime | | |
| • stolen or embezzled<br>• used in a crime<br>• any papers/documents used in an offense<br>• evidence of a felony<br>• other† | • may supplement the affidavit | |
| • stolen or embezzled<br>• designed or intended for use in, or used in a crime**<br>• possessed unlawfully<br>• evidence of a crime (except for private papers<br>• kidnapped person concealed in the state<br>• human fetus or human corpse | | |

## **Chart I.** Search Warrant Application Procedures

| State | Who May Apply For a Search Warrant | Who May Issue a Search Warrant | Where Is the Search Warrant Applicable |
|---|---|---|---|
| **Hawaii** | | • magistrate | |
| **Idaho** | • a law enforcement officer<br>• attorney for the state | • district judge or magistrate | • within issuer's territorial jurisdiction |
| **Illinois** | • any person | • any judge | • statewide |
| **Indiana** | | • justices of the peace<br>• judge of any court of record<br>• judge of any city court, town court, or magistrates court | • anywhere within the county<br>• district where property is located |
| **Iowa** | • any person | • magistrate | • statewide |
| **Kansas** | • any person | • magistrate | • within judicial district in which issuing magistrate resides or to which said judge is assigned |

*A search warrant may not be issued for property in the possession or control of a member of the print or broadcast press unless, in addition to the normal requirements, the judge finds that there is probable cause to believe that person has committed or is committing a crime or that the items to be seized will be destroyed or removed from the state if a warrant is not issued.

| Property and Persons Subject to Seizure | Sworn Oral Testimony Permitted in Lieu of or in Addition to Affidavit | Special Provision for a Telephone Warrant |
|---|---|---|
| • stolen, appropriated fraudulently, or taken under false pretenses<br>• property possessed unlawfully<br>• evidence of a crime or of participation in crime<br>• forged instruments in writing, counterfeit coins to be circulated or materials for their production<br>• arms or munitions for insurrection or riot | | |
| • stolen or embezzled<br>• used in a felony<br>• to be used in a crime<br>• delivered to another for concealment<br>• evidence of a crime | • either in lieu of or in addition to the affidavit if recorded | |
| • used in or evidence of a crime*<br>• any kidnapped person concealed in state<br>• human fetus or human corpse | | |
| • obtained or possessed unlawfully<br>• used or to be used in a crime<br>• concealed to prevent discovery of a crime<br>• evidence of an offense or participation in an offense<br>• abandoned child<br>• human corpse believed to be secreted in a building or place | | |
| • obtained or possessed unlawfully<br>• used in an offense<br>• concealed to prevent discovery of an offense<br>• evidence of a crime | • may supplement the affidavit | |
| • used in a crime<br>• contraband<br>• evidence, fruits or instrumentalities of crime<br>• kidnapped person<br>• persons for whom arrest warrant issued<br>• human corpse or human fetus | • either in lieu of or to supplement the affidavit if recorded | |

## **Chart I.** Search Warrant Application Procedures

| State | Who May Apply For a Search Warrant | Who May Issue a Search Warrant | Where Is the Search Warrant Applicable |
|---|---|---|---|
| **Kentucky** | • an officer<br>• any reputable citizen | • any circuit judge<br>• any district judge<br>• a magistrate<br>• any other officer authorized by statute | |
| **Louisiana** | • credible person | • a judge<br>• a justice of the peace, only in cases specifically provided by law | • within issuer's territorial jurisdiction |
| **Maine** | | • judge of the district<br>• complaint justice | • statewide |
| **Maryland** | | • any judge of district or circuit court or Supreme Bench of Baltimore | • within the issuer's territorial jurisdiction |
| **Massachusetts** | | • court or justice<br>• clerk, assistant clerk, or temporary assistant clerk<br>• justice or special justice | • statewide |
| **Michigan** | | • magistrate | |
| **Minnesota** | | • any court of record<br>• justice of peace in any county having no municipal court other than a probate court with jurisdiction in the area to be searched | • within the issuer's territorial jurisdiction |

| Property and Persons Subject to Seizure | Sworn Oral Testimony Permitted in Lieu of or in Addition to Affidavit | Special Provision for a Telephone Warrant |
|---|---|---|
| • illegal alcoholic beverages<br>• abused or neglected children | | |
| • stolen<br>• used or to be used in a crime<br>• evidence of an offense | | |
| • evidence of a crime<br>• contraband, fruits of a crime, or possessed unlawfully<br>• designed for use or used in a crime<br>• person for whose arrest there is probable cause or who is restrained unlawfully | • may supplement the affidavit | |
| • all property liable to seizure under the laws of the state | | |
| • property obtained in a crime<br>• stolen, embezzled or obtained by false pretenses<br>• intended for, used in, or in concealment of a crime<br>• possessed or controlled for unlawful purpose<br>• person for whom an arrest warrant has been issued<br>• human corpse | | |
| • stolen or embezzled<br>• designed for use or used in a crime<br>• possessed, controlled or used unlawfully<br>• evidence of a crime or participation in a crime<br>• contraband<br>• human or animal corpse which may be the victim of a crime | | |
| • stolen or embezzled<br>• used in a crime<br>• possessed unlawfully<br>• in possession of one with the intent to use in a crime<br>• evidence of a crime or participation in a crime<br>• in possession of one to whom it was delivered for concealment | | |

## **Chart I.** Search Warrant Application Procedures

| State | Who May Apply For a Search Warrant | Who May Issue a Search Warrant | Where Is the Search Warrant Applicable |
|---|---|---|---|
| **Mississippi** | • credible person | • judges of the Supreme, Circuit and Chancery Courts<br>• justice court judge<br>• county court judge | • statewide<br>• within the issuer's territorial jurisdiction |
| **Missouri** | • peace officer<br>• prosecuting attorney | • appellate judge<br>• any judge of a court of original jurisdiction | • in territorial jurisdiction of issuing court<br>• statewide if item or person sought moves from issuing jurisdiction |
| **Montana** | • any person | • any judge | |
| **Nebraska** | | • supreme court judge, district court judge<br>• county judge<br>• municipal court judge or associate county judge | • statewide<br>• within the district<br>• within county in which property sought is located |
| **Nevada** | | • any magistrate | • in county specified in warrant |

*Property subject to seizure includes leased telephone equipment only if not removed following notice by law enforcement that it is being used in the commission of an offense, and any raw materials or instrument to manufacture an unlawful item. Private papers and business records are excepted from the "property subject to seizure" category.

† No warrant shall be issued for property in the possession of the news media unless probable cause is manifest that such person is committing or has committed a crime.

| Property and Persons Subject to Seizure | Sworn Oral Testimony Permitted in Lieu of or in Addition to Affidavit | Special Provision for a Telephone Warrant |
|---|---|---|
| • stolen or embezzled<br>• illegally manufactured intoxicating liquor<br>• controlled substances | | |
| • stolen<br>• possessed unlawfully<br>• weapon or tool device used in a felony<br>• kidnapped person<br>• deceased human fetus or corpse, or part thereof<br>• obscene matter<br>• other* | • oral testimony expressly prohibited | |
| • contraband<br>• fruits of a crime<br>• used in a crime | | • Prior approval for seeking the warrant telephonically must be obtained from the prosecutor.<br>• The sworn or affirmed telephonic testimony must be recorded electronically by the judge. The recording must be retained in the court records and transcribed verbatim. |
| • stolen, embezzled, or obtained under false pretenses<br>• designed for use in a crime<br>• the possession, design, control or use of which is a criminal offense<br>• evidence of a crime† | • either in lieu of or in addition to the affidavit | • A warrant may issue pursuant to a telephonic statement. Prior approval to seek a warrant telephonically must be obtained from prosecutor. Statement must be transcribed and Magistrate must certify the accuracy of the transcription. The Magistrate shall complete and sign the original warrant.<br>• Duplicate original warrant must be signed by the executing officer. |
| • stolen or embezzled<br>• used or to be used in a crime<br>• evidence of a crime | • in lieu of the affidavit if recorded, transcribed and certified | • Magistrate may orally authorize officer to sign magistrate's name to a duplicate original warrant.<br>• Oral statements must be recorded in presence of magistrate, certified and filed with the clerk. |

## **Chart I.** Search Warrant Application Procedures

| State | Who May Apply For a Search Warrant | Who May Issue a Search Warrant | Where Is the Search Warrant Applicable |
|---|---|---|---|
| **New Hampshire** | | • any justice, associate justice or special justice of the municipal, district or superior courts | |
| **New Jersey** | | • any magistrate judge of any court with jurisdiction where property located | |
| **New Mexico** | | • district court<br>• magistrate court | |
| **New York** | • police officer<br>• district attorney<br>• public servant acting in course of official duties | • judge sitting as a local criminal court | • statewide if issued by a district court, the New York City criminal court, or a superior court judge sitting as a local criminal court<br>• county of issuance or adjoining county, when the warrant is issued by a city court, a town court, or a village court |
| **North Carolina** | | • justice of supreme court<br>• judge of court of appeals<br>• judge of superior court<br>• judge of district court<br>• clerk<br>• magistrate | • statewide<br>• districtwide<br>• countywide |
| **North Dakota** | | • state or federal magistrate | |
| **Ohio** | • prosecuting attorney<br>• law enforcement officer | • judge of court of record | • within the issuer's territorial jurisdiction |

| Property and Persons Subject to Seizure | Sworn Oral Testimony Permitted in Lieu of or in Addition to Affidavit | Special Provision for a Telephone Warrant |
|---|---|---|
| • stolen, embezzled or obtained fraudulently<br>• designed for use or used in a crime<br>• contraband<br>• evidence of the crime upon which the search warrant is grounded | • may supplement the affadavit; notes or transcript must be made | |
| • obtained in violation of the law<br>• possessed, designed or intended for use or actually used in connection with a violation of the law<br>• evidence of a crime | • either in lieu of or in addition to the affidavit | |
| • obtained or possessed unlawfully<br>• used in a crime<br>• material evidence of a crime | • may supplement the affidavit if reduced to writing | |
| • stolen personal property<br>• personal property possessed unlawfully<br>• used to commit or conceal a crime<br>• evidence of crime or evidence of participation in a crime | • may supplement the affidavit if recorded or summarized | • Applicant and other persons providing information must be identified and placed under oath. The oath and all subsequenr communications must be recorded,and certified written transcription must be filed within 24 hours.<br>• If judge determines to issue a search warrant, the applicant shall prepare it and read it verbatim to the judge. |
| • stolen or embezzled<br>• contraband or possessed unlawfully<br>• used or to be used in a crime or to conceal a crime<br>• evidence of an offense or participation in an offense | • may supplement the affidavit if recorded or summarized | |
| • evidence of a crime<br>• contraband, fruits of crime, or things possessed unlawfully<br>• designed for use in a crime | • either in lieu of or in addition to the affidavit if recorded | |
| • evidence of a crime<br>• contraband, fruits of crime, or property possessed unlawfully<br>• weapons or other things by which a crime has been committed | • may supplement the affidavit if recorded | |

## **Chart I.** Search Warrant Application Procedures

| State | Who May Apply For a Search Warrant | Who May Issue a Search Warrant | Where Is the Search Warrant Applicable |
|---|---|---|---|
| **Oklahoma** | | • magistrate<br>• judge<br>• municipal criminal court of record, through its clerk or judge only for violation of city ordinance | |
| **Oregon** | • district attorney<br>• sheriff<br>• municipal policeman<br>• department of justice investigator | • judge of district or circuit court of appeals, supreme court<br>• justice of peace<br>• municipal judge | |
| **Pennsylvania** | | • justices of the peace<br>• judges of the municipal, common pleas, superior and supreme courts | • within the issuer's territorial jurisdiction |
| **Rhode Island** | • chief or deputy chief of police<br>• police officer*<br>• sheriff or deputy sheriff<br>• state police officer<br>• person with right to possession of stolen property | • district court judge<br>• supreme or superior court justice | |
| **South Carolina** | | • any magistrate, recorder, or city judge with powers of a magistrate<br>• any judge of any court of record | • statewide when issued by a court of record<br>• otherwise within the court's territorial jurisdiction |
| **South Dakota** | • law enforcement officer<br>• prosecuting attorney | • committing magistrate | • within the issuer's territorial jurisdiction |

*Police officers of the rank of captain or above generally are authorized to apply for search warrants, unless specified otherwise by statute: (1) police lieutenants in the town of Westerly; (2) Gloucester police above the rank of patrolman; (3) police lieutenants in the city of Providence; (4) policemen above the rank of sergeant in the town of Coventry; (5) police lieutenants in the town of North Kingstown.

| Property and Persons Subject to Seizure | Sworn Oral Testimony Permitted in Lieu of or in Addition to Affidavit | Special Provision for a Telephone Warrant |
|---|---|---|
| • stolen or embezzled<br>• used in a felony<br>• in possession of one with intent to commit a public offense<br>• evidence of a crime or participation in a crime | • in lieu of or in addition to the affidavit if recorded | • Statement must be recorded electronically, transcribed by the official court reporter, signed by both the reporter and the magistrate, and filed together with the recording. |
| • evidence of a crime<br>• contraband, fruits of a crime, or property possessed unlawfully<br>• used in a crime or in concealment of an offense<br>• person for whose arrest there is probable cause or who is concealed unlawfully | • may supplement the affidavit | • if impractical for applicant to appear in person. Statement must be recorded, transcribed and certified by judge. Original signed by judge; duplicate original by officer. |
| • contraband, fruits of a crime, or property possessed unlawfully<br>• used in a crime<br>• evidence of a crime | • oral testimony expressly prohibited | |
| • stolen, embezzled, taken by false pretenses with intent to cheat or defraud<br>• possessed unlawfully<br>• designed or intended to be used unlawfully<br>• evidence of a crime | | |
| • stolen or embezzled<br>• possessed unlawfully<br>• used or to be used in a crime<br>• evidence of a crime<br>• narcotics, barbiturates or other drugs | | |
| • evidence of a crime<br>• contraband, fruits of a crime, or property possessed unlawfully<br>• designed, used or to be used in a crime | • may supplement the affidavit if recorded | • The requesting officer or attorney must read the contents to the magistrate verbatim.<br>• The officer or attorney signs the magistrate's name on the warrant and duplicate original. The magistrate signs and enters the exact time of issuance of the duplicate warrant on the face of the original. |

## **Chart I.** Search Warrant Application Procedures

| State | Who May Apply For a Search Warrant | Who May Issue a Search Warrant | Where Is the Search Warrant Applicable |
|---|---|---|---|
| **Tennessee** | • district attorney<br>• criminal investigator<br>• any other law enforcement officer | • any magistrate | • within the issuer's territorial jurisdiction |
| **Texas** | | • magistrate<br>• for items constituting mere evidence, only a judge of a statutory county court, district court, court of criminal appeals, or supreme court | |
| **Utah** | • law enforcement officer<br>• attorney for the state | • magistrate | |
| **Vermont** | • law enforcement officer<br>• attorney for the state<br>• any other person authorized by law | • superior court judge<br>• district judge, for daytime searches resulting from violations of local codes or ordinances | |
| **Virginia** | • some person | • justice of peace<br>• any judge or magistrate or other person with authority to issue criminal warrants | • statewide |

* Additional items subject to seizure, pursuant to a search warrant, include arms or munitions for riot, weapons prohibited under the Penal Code, drugs violative of the state laws, gambling devices, and obscene materials. In addition, a search warrant may be issued to search for and photograph a physically or sexually abused child.

† "Property" includes "any object or thing, including without limitation, documents, books, papers, records, or body fluids."

| Property and Persons Subject to Seizure | Sworn Oral Testimony Permitted in Lieu of or in Addition to Affidavit | Special Provision for a Telephone Warrant |
|---|---|---|
| • evidence of a crime<br>• contraband, fruits of a crime, or property possessed unlawfully<br>• used or to be used in a crime | | |
| • acquired unlawfully or by theft<br>• designed or used commonly in an offense or possessed unlawfully<br>• instruments/implements used in a crime<br>• evidence of a crime (excluding personal papers)<br>• persons<br>• other* | | |
| • stolen or embezzled<br>• used in a felony<br>• to be used in a public offense<br>• in possession of another for concealment | • in lieu of or may supplement the affidavit | • Applicant must have approval of prosecutor for telephonic application.<br>• Sworn oral testimony shall be recorded and transcribed. After transcription, the statement shall be certified by the magistrate and filed with the court.<br>• Applicant signs duplicate original, judge signs original and enters date and time of issuance. |
| • evidence of a crime<br>• used in an offense<br>• contraband, fruits of a crime, or property possessed unlawfully<br>• human corpse or fetus<br>• kidnapped, unlawfully restrained or imprisoned person<br>• wanted person who is believed to be secreted | • may supplement the affidavit if recorded | |
| • weapons/objects used in a crime<br>• stolen or the fruits of a crime<br>• possessed or sold unlawfully<br>• evidence of a crime†<br>• machine guns<br>• "sawed-off" shot guns | | |

## **Chart I.** Search Warrant Application Procedures

| State | Who May Apply For a Search Warrant | Who May Issue a Search Warrant | Where Is the Search Warrant Applicable |
|---|---|---|---|
| **Washington** | • peace officer<br>• prosecuting attorney | • any magistrate or judge | |
| **West Virginia** | | • judge<br>• justice<br>• mayor<br>• judge of police court | • within the issuer's territorial jurisdiction |
| **Wisconsin** | | • judge | • statewide |
| **Wyoming** | | • district judge or commissioner<br>• justice of peace | • within the issuer's territorial jurisdiction |

* Property subject to seizure also includes any counterfeit coins or equipment used in their manufacture, any gaming apparatus, and any equipment used to obtain illegal telephone or telegraph service.

† Includes documents, books, papers, and other tangible objects.

| Property and Persons Subject to Seizure | Sworn Oral Testimony Permitted in Lieu of or in Addition to Affidavit | Special Provision for a Telephone Warrant |
|---|---|---|
| • evidence of a crime<br>• contraband, fruits of a crime, or property possessed unlawfully<br>• weapons or other things used or to be used in a crime<br>• evidence material to the investigation or prosecution of a homicide or felony<br>• other* | • may supplement the affidavit if a summary is made | • The issuing judge must record the affiant's sworn telephonic testimony on a machine in the judge's control. The recording must be retained in court records and reduced to writing as soon as possible. |
| • stolen, embezzled, taken by false pretenses<br>• intended or designed for use in a crime<br>• used in crime<br>• unlawfully possessed† | | |
| • contraband<br>• fruit of crime or used in commission of a crime<br>• evidence of a crime (other than documents)<br>• documents, if there is probable cause that documents are under the control of one reasonably suspected to be involved in the crime | • in addition to or in lieu of the affidavit | • The warrant may be based on testimony recorded by a phonographic reporter |
| • stolen or embezzled<br>• designed or to be used in a crime<br>• used in violation of any law<br>• evidence of a crime<br>• obscene materials, conterfeited items, unlawful gaming equipment | | |

## **Chart II.** Form of Applications and Warrants

| State | Contents of the Warrant Application | | | | Do Statutes or Rules Prescribe a Standard Search Warrant Form? | | | |
|---|---|---|---|---|---|---|---|---|
| | Affidavit Required | Person or Property to Be Searched | Items or Persons Sought | Probable Cause Specified | | Affidavit Attached | Name of the Issuing Court | Date of Issuance |
| Alabama | Yes | Yes | Yes | Yes | Yes | | | Yes |
| Alaska | Yes | Yes | Yes | | Yes | | | Yes |
| Arizona | Yes | Yes | Yes | Yes | Yes | | | Yes |
| Arkansas | Yes | Yes | Yes | | | | Yes | Yes |
| California | Yes | Yes | Yes | Yes | Yes | | Yes | Yes |
| Colorado | Yes | Yes | Yes | Yes | | | | |
| Connecticut | Yes | Yes | Yes | Yes | | | | |
| Delaware | Yes | Yes | Yes | | Yes | Yes | Yes | Yes |
| District of Columbia | Yes | Yes | Yes | Yes | | | Yes | Yes |
| Florida | Yes | Yes | Yes | Yes | Yes | | Yes | Yes |
| Georgia | Yes | Yes | Yes | Yes | | | | Yes |
| Hawaii | Yes | | Yes | Yes | | | Yes | |
| Idaho | Yes | Yes | Yes | Yes | Yes | | Yes | Yes |
| Illinois | Yes | Yes | Yes | Yes | See below[a] | | | Yes |
| Indiana | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Iowa | Yes | Yes | Yes | Yes | Yes | | Yes | |
| Kansas | Yes | | | Yes | | | | Yes |
| Kentucky | Yes | | | | | | | |
| Louisiana | Yes | | | Yes | | | | |
| Maine | Yes | Yes | Yes | Yes | | | | |
| Maryland | Yes | | | Yes | | | | |
| Massachusetts | Yes | Yes | Yes | Yes | Yes | | Yes | Yes |
| Michigan | Yes | Yes | Yes | Yes | | Yes[b] | | |
| Minnesota | Yes | | | Yes | | | Yes | |
| Mississippi | Yes | Yes | Yes | | Yes | | Yes | Yes |

a. Form prescribed for search warrants issued under liquor control act.

b. The search warrant either shall state the grounds, reasonable cause, or probable cause for issuance of the warrant or have a copy of the affidavit attached.

| Contents of the Search Warrant | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Time of Issuance | Name of the Applicant | Name(s) of the Affiant(s) | Name of the Custodian of the Property | Person or Place to Be Searched | The Property Sought | Alleged Offense | Special Authorization Required For Nightime Search | Recitation of Probable Cause |
| | | | | Yes | Yes | | Yes | Yes |
| | | Yes | Yes | Yes | Yes | | Yes | Yes |
| Yes[c] | Yes | Yes | | Yes | Yes | | Yes | Yes |
| Yes | | | | Yes | Yes | | Yes | Yes[d] |
| Yes[c] | | | Yes | Yes | Yes | | Yes | Yes |
| | | Yes | Yes | Yes | Yes | | | Yes |
| | | | | Yes | Yes | | | Yes |
| | | Yes | | Yes | Yes | Yes | Yes | Yes |
| | | | | Yes | Yes | | Yes | |
| | | | | Yes | Yes | | Yes | Yes |
| Yes | | | Yes | Yes | Yes | | | |
| | | | | | Yes | | | |
| | | Yes | Yes | Yes | Yes | | Yes | Yes |
| | | | | Yes | Yes | | | Yes |
| | Yes | Yes | | Yes | Yes | Yes | | |
| | Yes | | | Yes | Yes | | | |
| Yes | | | | Yes | Yes | | | |
| | | | | Yes | Yes | | | |
| | | | | Yes | Yes | | Yes | Yes |
| | | Yes | | Yes | Yes | | Yes | |
| | Yes | | | Yes | Yes | Yes | | |
| | | Yes | | Yes | Yes | | Yes | Yes |
| | | | | Yes | Yes | Yes | | Yes[b] |
| | Yes | Yes | | Yes | Yes | | Yes | |
| | | Yes | | Yes | Yes | Yes | Yes | |

c. Telephonic applications only.
d. "Reasonable" cause.

## **Chart II.** Form of Applications and Warrants

| State | Contents of the Warrant Application | | | | Do Statutes or Rules Prescribe a Standard Search Warrant Form? | | | |
|---|---|---|---|---|---|---|---|---|
| | Affidavit Required | Person or Property to Be Searched | Items or Persons Sought | Probable Cause Specified | | Affidavit Attached | Name of the Issuing Court | Date of Issuance |
| Missouri | Yes | Yes | Yes | Yes | Yes | | Yes | Yes |
| Montana | Yes | Yes | Yes | Yes | | | | |
| Nebraska | Yes | Yes | Yes | Yes | See below[c] | | | Yes[f] |
| Nevada | Yes | | | | Yes | | Yes | |
| New Hampshire | Yes | Yes | Yes | Yes | Yes | | Yes | Yes |
| New Jersey | Yes | Yes | Yes | Yes | | | | Yes |
| New Mexico | Yes | Yes | Yes | Yes | Yes | Yes | | Yes |
| New York | Yes | Yes | Yes | Yes[b] | | | Yes | Yes[f] |
| North Carolina | Yes | Yes | Yes | Yes | | | | Yes |
| North Dakota | Yes | | | Yes | | | | |
| Ohio | Yes | Yes | Yes | Yes | | | | |
| Oklahoma | Yes | Yes | Yes | Yes | Yes | | Yes | |
| Oregon | Yes | Yes | Yes | | | | | Yes |
| Pennsylvania | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Rhode Island | Yes | Yes | Yes | Yes | | | | |
| South Carolina | Yes | | | | See below[d] | | | |
| South Dakota | Yes | | | Yes | | | | |
| Tennessee | Yes | Yes | Yes | Yes | Yes | | Yes | Yes |
| Texas | Yes | Yes | Yes | Yes | | | | Yes |
| Utah | Yes | Yes | Yes | Yes | | | | |
| Vermont | Yes | Yes | Yes | Yes | | | | Yes |
| Virginia | Yes[a] | Yes | Yes | Yes | Yes | Yes[e] | | Yes |

a. The warrant application must recite "reasonable cause" for allowance of the search.
b. The warrant application need only establish the "grounds" for issuance of a search warrant.
c. Form prescribed for search warrants issued under liquour control act.
d. Form to be prescribed by the Attorney General.

| Contents of the Search Warrant | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Time of Issuance | Name of the Applicant | Name(s) of the Affiant(s) | Name of the Custodian of the Property | Person or Place to Be Searched | The Property Sought | Alleged Offense | Special Authorization Required For Nighttime Search | Recitation of Probable Cause |
| Yes | | | | Yes | Yes | | | |
| | | | | Yes | Yes | | | |
| Yes[f] | Yes[f] | Yes | Yes | Yes | Yes | | Yes | Yes |
| | | Yes | | Yes | Yes | | Yes | Yes |
| | Yes | Yes | | Yes | Yes | | Yes | Yes |
| Yes | | Yes | | Yes | Yes | | Yes | |
| | | Yes | | Yes | Yes | | Yes | Yes |
| Yes[f] | | | | Yes | Yes | | Yes | |
| Yes | Yes | Yes | | Yes | Yes | | | |
| | | | | Yes | Yes | | Yes | Yes |
| | | | Yes | Yes | Yes | | Yes | Yes |
| | Yes | Yes | | Yes | Yes | | Yes | Yes |
| Yes[f] | | | | Yes | Yes | | Yes | Yes |
| Yes | | | | Yes | Yes | | Yes | Yes |
| | | Yes | Yes | Yes | Yes | | Yes | Yes |
| | | | | Yes | Yes | | | |
| Yes[f] | | | | Yes | Yes | | Yes | Yes |
| Yes | | Yes | | Yes | Yes | | | Yes |
| Yes | | | | Yes | Yes | | | |
| Yes[f] | | Yes | | Yes | Yes | | Yes | Yes |
| Yes[f] | | | | Yes | Yes | | Yes | Yes |
| Yes | | Yes | Yes | Yes | Yes | Yes | | Yes |

e. The affidavit(s) need not be attached to the search warrant when the affidavit is acquired by means of voice or videotape recording.

f. Telephonic applications only.

## **Chart II.** Form of Applications and Warrants

| State | Contents of the Warrant Application | | | | Do Statutes or Rules Prescribe a Standard Search Warrant Form? | | | |
|---|---|---|---|---|---|---|---|---|
| | Affidavit Required | Person or Property to Be Searched | Items or Persons Sought | Probable Cause Specified | | Affidavit Attached | Name of the Issuing Court | Date of Issuance |
| Washington | Yes | | | | | | | |
| West Virginia | Yes | | | | | | | |
| Wisconsin | Yes | Yes | Yes | Yes | Yes | | Yes | Yes |
| Wyoming | Yes | Yes | Yes | | Yes | | Yes | Yes |

| Contents of the Search Warrant | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Time of Issuance | Name of the Applicant | Name(s) of the Affiant(s) | Name of the Custodian of the Property | Person or Place to Be Searched | The Property Sought | Alleged Offense | Special Authorization Required For Nightime Search | Recitation of Probable Cause |
| | | | | Yes | Yes | | | |
| | | Yes | | Yes | Yes | | | Yes |
| Yes | Yes | Yes | | Yes | Yes | Yes | | |
| | | Yes | | Yes | Yes | Yes | Yes | Yes |

## **Chart III.** Search Warrants Execution Requirements

| State | How Quickly Must the Search Warrant Be Executed? | Who May Execute A Search Warrant? | When May a Warrant Be Executed? | | Is a "No-Knock" or Forced Entry Authorized? |
|---|---|---|---|---|---|
| | | | Daytime | Nighttime | |
| **Alabama** | • within 10 days | • sheriff or constable of a county<br>• by any one of the officers to whom the warrant is directed | yes | • if affiant is positive that the item sought is on the person or property to be searched and a nighttime search is authorized expressly | • only when the officer is refused admittance after giving notice of his authority |
| **Alaska** | • within 10 days | • peace officer | yes | • if affiant is positive that the item sought is on the person or property to be searched | • upon refused admittance |
| **Arizona** | • within 5 days | • peace officer | yes | • between 10 pm and 6 am if magistrate finds "good cause" | • upon refused admittance or after receiving no response within a reasonable period of time |
| **Arkansas** | • a reasonable time set by the issuing officer, not to exceed 60 days | • any officer | yes | • between 8 pm and 6 am if magistrate finds items are in imminent danger of removal and warrant can only be executed at night or at an uncertain time | • upon refused admittance<br>• if notice would endanger the success of the search with all practical safety<br>• such force as may reasonably be necessary |

| Special Provisions on the Scope of the Search | What Documents Must Be Left at the Scene of the Search, or Given to Person From Whom Items Are Seized? | | Special Penalties for Abuse of the Search Warrant Process |
|---|---|---|---|
| | Receipt | Copy of Warrant | |
| | yes | | • procuring a search warrant maliciously and without probable cause punishable by a fine of up to $500 and imprisonment of up to 6 months |
| | yes | yes | • misdemeanor to procure a warrant maliciously and without probable cause |
| • executing officer may seize any property discovered in the course of a search upon reasonable cause to believe that it is subject to seizure<br>• executing officer may make photos, measurements, impressions or scientific tests<br>• executing officer may search any person on the property if reasonably necessary to prevent attack or discover items sought | yes | | • class 2 misdemeanor to procure a search warrant with the intent to harass and without probable cause |
| • search must be conducted as authorized in the warrant and as is reasonably necessary<br>• objects not listed in the warrant, but subject to seizure may be seized if uncovered in the course of the search | yes | yes | |

## **Chart III.** Search Warrants Execution Requirements

| State | How Quickly Must the Search Warrant Be Executed? | Who May Execute A Search Warrant? | When May a Warrant Be Executed? | | Is a "No-Knock" or Forced Entry Authorized? |
|---|---|---|---|---|---|
| | | | Daytime | Nighttime | |
| **California** | • within 10 days | • a peace officer | yes | • between 10 pm and 7 am if the warrant so directs | • upon refused admittance<br>• when necessary to liberate one aiding in the execution<br>• officer safety<br>• when the house is secured and there is no danger of violent confrontation<br>• occupants known to be absent<br>• officers have knowledge of firearms inside and believe they will be used against them |
| **Colorado** | • within 10 days | • any authorized officer | yes | yes | • officer may employ such force as may reasonably be necessary in the execution of the warrant |
| **Connecticut** | • within 10 days | • police officer<br>• conservation officer | | | |
| **Delaware** | • within 10 days<br>• within 3 days of issuance when nighttime search of dwelling house is authorized | • proper officer<br>• person designated in warrant | yes | • yes, except a nighttime search of a "dwelling house" is not permitted unless necessary to prevent removal and magistrate expressly authorizes a nighttime search | |

*Executing officer must leave a copy of the affidavit also, unless it has been demonstrated that the safety of a confidential informant would be jeopardized, or an ongoing investigation would be adversely affected, or confidential information would be disclosed.

| Special Provisions on the Scope of the Search | What Documents Must Be Left at the Scene of the Search, or Given to Person From Whom Items Are Seized? | | Special Penalties for Abuse of the Search Warrant Process |
|---|---|---|---|
| | Receipt | Copy of Warrant | |
| • evidence in plain view may be seized | yes | | |
| | yes | yes | |
| • executing officer may search person if there is reason to believe items sought are concealed on that person | | yes* | |
| | | | |

## **Chart III.** Search Warrants Execution Requirements

| State | How Quickly Must the Search Warrant Be Executed? | Who May Execute A Search Warrant? | When May a Warrant Be Executed? | | Is a "No-Knock" or Forced Entry Authorized? |
|---|---|---|---|---|---|
| | | | Daytime | Nighttime | |
| **District of Columbia** | • within 10 days | • special law enforcement officer<br>• authorized agency<br>• any member of police force<br>• marshal or deputy marshal | yes | • only if there is probable cause to believe that warrant can't be executed during the day<br>• that property is likely to be removed or destroyed or that property is likely to be found only at certain times | • upon refused admittance or an unreasonable delay |
| **Florida** | | • sheriff and deputies<br>• police officer<br>• by any officer named in warrant | yes | • if expressly authorized | • upon refused admittance |
| **Georgia** | • within 10 days | • all peace officers | yes | yes | • upon refused admittance<br>• upon refusal to acknowledge the officer's verbal notice<br>• if the building or property is unoccupied |

| Special Provisions on the Scope of the Search | What Documents Must Be Left at the Scene of the Search, or Given to Person From Whom Items Are Seized? | | Special Penalties for Abuse of the Search Warrant Process |
|---|---|---|---|
| | Receipt | Copy of Warrant | |
| • executing officer may take photographs, measurements, physical or other impressions, perform chemical, scientific or other tests<br>• executing officer may search any person in the premises or vehicle if reasonably necessary to prevent attack or discover items sought<br>• executing officer or agent may seize any property discovered in the course of a lawful execution if there is probable cause to believe the property is subject to seizure | yes | | |
| | yes | yes | • misdemeanor of 1st degree to obstruct service or execution of a warrant<br>• misdemeanor of 1st degree to procure a search warrant maliciously and without probable cause<br>• misdemeanor of 2nd degree for an officer to exceed his authority wilfully or to exercise it with unnecessary severity in the execution |
| • person executing the search warrant may reasonably detain or search any person on the premises to prevent attack or the disposal or concealment of articles sought | | yes | |

## **Chart III.** Search Warrants Execution Requirements

| State | How Quickly Must the Search Warrant Be Executed? | Who May Execute A Search Warrant? | When May a Warrant Be Executed? | | Is a "No-Knock" or Forced Entry Authorized? |
|---|---|---|---|---|---|
| | | | Daytime | Nighttime | |
| **Hawaii** | | • sheriff and deputies<br>• law enforcement officer<br>• chief of police | | | • if the doors, gates or other bars to entry are not opened immediately upon demand, the officer may break them<br>• if any closet or closed place in which the officer has reason to believe property is concealed is refused opening for inspection, the officer may break it |
| **Idaho** | • within 10 days | • peace officer<br>• officer whose aid is required<br>• any sheriff, constable, marshal, or policeman specified in warrant | yes | • if reasonable cause shown and expressly authorized | • upon refused admittance<br>• to liberate officer or another aiding in the execution |
| **Illinois** | • within 96 hours | • all peace officers of state<br>• one named specifically in warrant | yes | yes | • probable use of a weapon against officer if notice is given<br>• probable destruction of evidence<br>• uselessness of prior notice<br>• all necessary and reasonable force may be used |

| Special Provisions on the Scope of the Search | What Documents Must Be Left at the Scene of the Search, or Given to Person From Whom Items Are Seized? | | Special Penalties for Abuse of the Search Warrant Process |
|---|---|---|---|
| | Receipt | Copy of Warrant | |
| | | | |
| | yes | yes | |
| • person executing the warrant may reasonably detain to search any person in the place at the time to protect against attack or to prevent disposal or concealment of items | | yes | |

## **Chart III.** Search Warrants Execution Requirements

| State | How Quickly Must the Search Warrant Be Executed? | Who May Execute A Search Warrant? | When May a Warrant Be Executed? | | Is a "No-Knock" or Forced Entry Authorized? |
|---|---|---|---|---|---|
| | | | Daytime | Nighttime | |
| **Indiana** | | • any constable<br>• police officer<br>• sheriff<br>• conservator of peace | yes | yes | |
| **Iowa** | • within 10 days | • peace officer<br>• persons authorized by peace officer | yes | yes | • upon refused admittance<br>• if structures or vehicles are abandoned or vacated |
| **Kansas** | • within 96 hours | • all state law enforcement officers<br>• law enforcement officers named in search warrant | yes | yes | • all necessary and reasonable force may be used to effect an entry into any building or property or part thereof |
| **Kentucky** | • on day received for warrant issued under alcoholic beverage control laws | | | | • if admittance is not given on demand for warrant issued under alcoholic beverage control laws |
| **Louisiana** | • within 10 days | • any peace officer | yes | • if expressly authorized | |
| **Maine** | • within 10 days | • state law enforcement officer | yes | • between 7 pm and 7 am if reasonable cause is shown and magistrate expressly authorizes nighttime search | |

| Special Provisions on the Scope of the Search | What Documents Must Be Left at the Scene of the Search, or Given to Person From Whom Items Are Seized? | | Special Penalties for Abuse of the Search Warrant Process |
|---|---|---|---|
| | Receipt | Copy of Warrant | |
| | | | |
| • person or thing may be detained at the place searched to prevent attack or to prevent bodily harm or disposal or concealment | yes | | • serious misdemeanor to procure a warrant maliciously and without probable cause<br>• serious misdemeanor to exceed one's authority or exercise it with unnecessary severity in executing a search warrant |
| • person executing the warrant may reasonably detain and search any person in the place searched to prevent attack or the disposal or concealment of items sought | yes | yes | • class B misdemeanor to disclose a warrant unlawfully |
| | | | |
| • executing officer may make photographs, lift fingerprints, and seize things which tend to constitute evidence of a crime, whether or not described in the warrant | yes | | |
| | yes | yes | |

## **Chart III.** Search Warrants Execution Requirements

| State | How Quickly Must the Search Warrant Be Executed? | Who May Execute A Search Warrant? | When May a Warrant Be Executed? | | Is a "No-Knock" or Forced Entry Authorized? |
|---|---|---|---|---|---|
| | | | Daytime | Nighttime | |
| **Maryland** | • within 15 days | • policeman | | | |
| **Massachusetts** | • within 7 days | • sheriffs and deputies<br>• any state police officer<br>• any constable or municipal police officer | yes | • if expressly authorized | |
| **Michigan** | | • the sheriff<br>• any peace officer | | | • if the officer is refused admittance after giving notice of his authority<br>• when necessary to liberate officer or any person assisting |
| **Minnesota** | • within 10 days | • sheriff<br>• deputy sheriff<br>• policeman<br>• constable<br>• University of Minnesota peace officer<br>• agent of bureau of crim. apprehension | yes | • if expressly authorized to prevent loss, removal or destruction | |
| **Mississippi** | | • any lawful officer of the county | | | |

| Special Provisions on the Scope of the Search | What Documents Must Be Left at the Scene of the Search, or Given to Person From Whom Items Are Seized? | | Special Penalties for Abuse of the Search Warrant Process |
|---|---|---|---|
| | Receipt | Copy of Warrant | |
| | yes | yes | • a person who discloses, prior to execution, that a warrant has been sought or issued, or who discloses the content of the warrant or related papers following execution except as prescribed by law, may be cited for criminal contempt of court |
| | | | • fine of ≤ $50 for an officer who delays service of a warrant wilfully |
| | yes | yes | • fine of $1,000 or imprisonment of not more than 1 year for exceeding authority wilfully or exercising it with unnecessary severity in execution<br>• fine of ≤ $1,000 or imprisonment of not more than 1 year for procuring a search warrant maliciously and without probable cause |
| | yes | yes | |
| | | | • one who procures a search warrant without reasonable cause may be required by the court to pay the costs incurred |

## **Chart III.** Search Warrants Execution Requirements

| State | How Quickly Must the Search Warrant Be Executed? | Who May Execute A Search Warrant? | When May a Warrant Be Executed? | | Is a "No-Knock" or Forced Entry Authorized? |
|---|---|---|---|---|---|
| | | | Daytime | Nighttime | |
| **Missouri** | • within 10 days | • peace officer | yes | • if daytime search is not practicable | |
| **Montana** | • within 10 days | • peace officer | yes | yes | |
| **Nebraska** | • within 10 days | • state law enforcement officer | yes | • if "public interest" requires | • upon refused admittance<br>• if authorized in the warrant because the property sought may be destroyed easily and quickly<br>• if authorized in the warrant because of danger to the officer or another person |
| **Nevada** | • within 10 days | • police officer in the county of execution | yes | • between 7 pm and 7 am if expressly authorized | • upon refused admittance |
| **New Hampshire** | • within 7 days | • sheriffs and deputies<br>• any state police officer<br>• any constable or municipal police officer | yes | • if expressly authorized | |

| Special Provisions on the Scope of the Search | What Documents Must Be Left at the Scene of the Search, or Given to Person From Whom Items Are Seized? | | Special Penalties for Abuse of the Search Warrant Process |
|---|---|---|---|
| | Receipt | Copy of Warrant | |
| | yes | yes | • failure to execute or return a warrant directed and delivered to him punishable by a fine of up to $1,000 |
| • all necessary and reasonable force may be used to execute a search warrant<br>• the person executing a search warrant may reasonably detain and search any person on the premises to prevent attack, or the disposal or concealment of the items sought | yes | yes | |
| | yes | yes | • class III misdemeanor or criminal contempt of court to disclose that a warrant has been applied for or issued prior to its execution |
| | yes | yes | • gross misdemeanor to procure a search warrant maliciously and without probable cause |
| | yes | yes | |

## **Chart III.** Search Warrants Execution Requirements

| State | How Quickly Must the Search Warrant Be Executed? | Who May Execute A Search Warrant? | When May a Warrant Be Executed? | | Is a "No-Knock" or Forced Entry Authorized? |
|---|---|---|---|---|---|
| | | | Daytime | Nighttime | |
| **New Jersey** | • within 48 hours | • any law enforcement officer<br>• the attorney general, county prosecutor, sheriff or member of their staff | yes | • if expressly authorized | • upon refused admittance |
| **New Mexico** | • within 10 days | • full-time salaried state or county law enforcement officer<br>• municipal police officer<br>• campus security officer<br>• tribal or pueblo police officer | yes | • between 10 pm and 6 am if property likely to be moved or destroyed | |
| **New York** | • within 10 days | • police officer<br>• peace officer appointed by state university | yes | • between 9 pm and 6 am if expressly authorized | • premises or vehicle are or are reasonably believed to be unoccupied<br>• if authorized in warrant because the property sought may be destroyed or disposed of easily and quickly<br>• if authorized in warrant because of danger posed to the life or safety of the executing officer or another person |

| Special Provisions on the Scope of the Search | What Documents Must Be Left at the Scene of the Search, or Given to Person From Whom Items Are Seized? | | Special Penalties for Abuse of the Search Warrant Process |
|---|---|---|---|
| | Receipt | Copy of Warrant | |
| | yes | yes | • disclosure of a warrant prior to its execution may constitute contempt |
| | yes | yes | |
| | yes | | |

## **Chart III.** Search Warrants Execution Requirements

| State | How Quickly Must the Search Warrant Be Executed? | Who May Execute A Search Warrant? | When May a Warrant Be Executed? | | Is a "No-Knock" or Forced Entry Authorized? |
|---|---|---|---|---|---|
| | | | Daytime | Nighttime | |
| **North Carolina** | • within 48 hours | • law enforcement officers acting within their territorial and legal authority | | | • if the officer reasonably believes that admittance is being denied or delayed unreasonably<br>• if officer reasonably believes that the premises or vehicle is unoccupied<br>• if officer has probable cause to believe that notice would endanger the life or safety of a person |
| **North Dakota** | • within 10 days | • peace officer | yes | • between 10 pm to 6 am if expressly authorized | • upon refused admittance<br>• to liberate officer or assistant<br>• if authorized in the warrant because the property sought may be destroyed or disposed of easily and quickly or because of danger posed to the executing officer if notice is given |
| **Ohio** | • within 3 days | • law enforcement officer | yes | • between 8 pm and 7 am if expressly authorized | |
| **Oklahoma** | • within 10 days | • peace officer<br>• officers designated in warrant | yes | • if property likely to be destroyed, concealed,or moved | • upon refused admittance<br>• to liberate a person detained within |

| Special Provisions on the Scope of the Search | What Documents Must Be Left at the Scene of the Search, or Given to Person From Whom Items Are Seized? | | Special Penalties for Abuse of the Search Warrant Process |
|---|---|---|---|
| | Receipt | Copy of Warrant | |
| • items discovered inadvertently in the course of a search may be subject to seizure, even though they are not specified in the warrant | yes | • warrant and affidavit | |
| | yes | yes | • misdemeanor to procure a search warrant without probable cause<br>• misdemeanor for officers to exceed their authority wilfully or to exercise it with unnecessary severity |
| | yes | yes | |
| | | | • misdemeanor to procure a search warrant maliciously and without probable cause<br>• misdemeanor for officers to exceed their authority or exercise it with unnecessary severity<br>• misdemeanor for failure to comply with time and reporting provisions applicable to seizure or liquors or gambling paraphernalia |

## **Chart III.** Search Warrants Execution Requirements

| State | How Quickly Must the Search Warrant Be Executed? | Who May Execute A Search Warrant? | When May a Warrant Be Executed? | | Is a "No-Knock" or Forced Entry Authorized? |
|---|---|---|---|---|---|
| | | | Daytime | Nighttime | |
| **Oregon** | • within 5 days<br>• up to 10 days from date of issuance with special authorization | • sheriff<br>• municipal policeman or state policeman<br>• Justice Department Investigator<br>• other persons reasonably necessary | yes | • between 10 pm and 7 am if expressly authorized | |
| **Pennsylvania** | • within 2 days | • law enforcement officer | yes | • between 10 pm and 6 am if expressly authorized | • if exigent circumstances exist<br>• if not admitted after a reasonable period of time following notice of intent to search |
| **Rhode Island** | • within 7 days | • authorized officer | yes | • if there is good cause | |
| **South Carolina** | • within 10 days | • any peace officer in county where property is located | | | |
| **South Dakota** | • within 10 days | • law enforcement officer | yes | • if expressly authorized | • upon refused admittance<br>• to liberate one who entered to aid the executing officer<br>• if authorized in warrant because the property may be destroyed quickly and easily or due to the danger to the officer if notice is given |

| Special Provisions on the Scope of the Search | What Documents Must Be Left at the Scene of the Search, or Given to Person From Whom Items Are Seized? | | Special Penalties for Abuse of the Search Warrant Process |
|---|---|---|---|
| | Receipt | Copy of Warrant | |
| • executing officer also may seize things not specified in the warrant upon probable cause to believe they are subject to lawful seizure<br>• force may be used as reasonably necessary to execute the warrant with practicable safety | yes | yes | • class A misdemeanor to procure a search warrant maliciously and without probable cause |
| | yes | • warrant and affidavit | • 2nd degree misdemeanor to subject one to search or seizure when cognizant that the search is illegal<br>• 3rd degree misdemeanor for signing the inventory if it is not a true and correct listing of items seized |
| | yes | yes | |
| | | • warrant and affidavit | • misdemeanor for judicial official authorized to issue search warrants to fail to keep records or to alter the records, warrants, and documents during the three years after the date of issuance |
| | yes | yes | • class I misdemeanor to procure a search warrant maliciously and without probable cause<br>• class I misdemeanor for law enforcement officers to exceed their authority wilfully or exercise it maliciously |

## **Chart III.** Search Warrants Execution Requirements

| State | How Quickly Must the Search Warrant Be Executed? | Who May Execute A Search Warrant? | When May a Warrant Be Executed? | | Is a "No-Knock" or Forced Entry Authorized? |
|---|---|---|---|---|---|
| | | | Daytime | Nighttime | |
| **Tennessee** | • within 5 days | • peace officer to whom the warrant is directed | yes | yes | • upon refused admittance<br>• if premises are unoccupied |
| **Texas** | • within 3 days | • peace officer | | | • if officer reasonably believes his purpose and identity are already known or cannot reasonably be made known |
| **Utah** | • within 10 days | • peace officer<br>• another officer whose aid was required | yes | • if affiant is positive of the property's location | • upon refused admittance<br>• if authorized in the warrant for officer safety or probable destruction of evidence<br>• to liberate officer or assistant |
| **Vermont** | • within 10 days | • all law enforcement officers<br>• any person named specifically in warrant | yes | • between 10 pm and 6 am if expressly authorized | • all necessary and reasonable force may be used |
| **Virginia** | • within 15 days | • sheriff<br>• any policeman of county or city where property is located | yes | yes | |

| Special Provisions on the Scope of the Search | What Documents Must Be Left at the Scene of the Search, or Given to Person From Whom Items Are Seized? | | Special Penalties for Abuse of the Search Warrant Process |
|---|---|---|---|
| | Receipt | Copy of Warrant | |
| | yes | yes | • misdemeanor for executing officer to exceed warrant authority or to exercise it too severely |
| | yes | yes | |
| | yes | | • misdemeanor to procure a search warrant maliciously and without probable cause<br>• misdemeanor for peace officers to exceed their authority or exercise it with unnecessary severity |
| • person executing the search warrant may reasonably detain any person on the premises for a search to prevent attack or disposal or concealment of the items sought | yes | yes | |
| | | | • malfeasance to issue a general search warrant or a search warrant without an affidavit wilfully and knowingly<br>• malfeasance in office to search a place, thing, or person without a search warrant<br>• one guilty is liable to the aggrieved compensatory and punitive damages<br>• forfeiture of office upon second conviction |

## **Chart III.** Search Warrants Execution Requirements

| State | How Quickly Must the Search Warrant Be Executed? | Who May Execute A Search Warrant? | When May a Warrant Be Executed? | | Is a "No-Knock" or Forced Entry Authorized? |
|---|---|---|---|---|---|
| | | | Daytime | Nighttime | |
| **Washington** | • within a specified reasonable time, not to exceed 10 days | • any peace officer | yes | yes | |
| **West Virginia** | • within 10 days | • sheriff<br>• deputy sheriff<br>• constable<br>• member of Department of Public Safety<br>• police officer | yes | yes | • upon refused admittance, if the place to be searched is a dwelling<br>• if the place to be searched is not a dwelling, officers may break in to execute a search warrant or commit such breaking as may be necessary to liberate themselves or one aiding in the execution |
| **Wisconsin** | • within 5 days | • law enforcement officer | | | • all necessary force may be used |
| **Wyoming** | • within 10 days | • any state law enforcement officer<br>• sheriff or constable | yes | • if there is an urgent necessity | • upon refused admittance |

| Special Provisions on the Scope of the Search | What Documents Must Be Left at the Scene of the Search, or Given to Person From Whom Items Are Seized? | | Special Penalties for Abuse of the Search Warrant Process |
|---|---|---|---|
| | Receipt | Copy of Warrant | |
| | yes | yes | |
| | yes | yes | |
| • the executing officer may reasonably detain and search any person on the premises searched to prevent attack or disposal or concealment of the items sought | yes | | • class E felony to disclose that a warrant has been applied for prior to its execution |
| | yes | yes | |

## **Chart IV.** Search Warrant Return Procedures and Records

| State | When Must the Search Warrant Be Returned? | Where is the Search Warrant Returned? | Documentation When | | |
|---|---|---|---|---|---|
| | | | Detailed Inventory Required? | Verification Under Oath by Executing Officers Required? | Inventory Witnessed By |
| **Alabama** | • within the period allowed for execution | • the issuing judge or magistrate | yes | | |
| **Alaska** | • within the period allowed for execution | • the issuing judge or magistrate | yes | yes | • person with whom property was seized<br>• or, at least one other credible person |
| **Arizona** | • within the period allowed for execution | • the issuing magistrate | yes | yes | • person from whom property was seized<br>• warrant applicant<br>• or, made publicly |
| **Arkansas** | • as soon as possible, if executed<br>• within 60 days if not executed | • the issuing judicial officer | yes | yes | • person from whom property was seized<br>• or, person in control of searched premises |
| **California** | • within the period allowed for execution | • the issuing magistrate or court | yes | yes | • person from whom property was seized<br>• warrant applicant<br>• or, made publicly |
| **Colorado** | • within the period allowed for execution | • the judge named in the warrant | yes | yes | • warrant applicant<br>• person from whom property was seized<br>• or, other credible person |
| **Connecticut** | • with reasonable promptness consistent with due process of law | | yes | | |
| **Delaware** | • within the period allowed for execution | • the judicial officer named in the warrant | yes | | |

| Property Is Seized | | Immediate Disposition of Property Seized | Retention and Availability of Search Warrant Records | | |
|---|---|---|---|---|---|
| Inventory Must Be Filed With Court | Magistrate Must Give Copy Upon Request to Applicant and Person From Whom Property Was Seized | | What Is Retained? | Where Is It Retained? | Is It a Public Record? |
| yes | yes | • Stolen or embezzled property shall be delivered to the issuing court in order to facilitate return to rightful owner. Other property seized retained subject to court order by the executing officer. | | | |
| yes | yes | • The property seized is delivered to the judge or magistrate. | | | |
| yes | yes | • The property seized shall be retained in the seizing officer's custody, subject to the order of the issuing court or any other court in which the seized property is used as evidence. | • warrant<br>• affidavit<br>• return<br>• inventory | • magistrate or court with jurisdiction over the offense | • after execution |
| yes | | | • warrant<br>• report<br>• inventory<br>• record of proceedings | • court with jurisdiction over the offense | |
| yes | yes | • The property seized is kept in the executing officer's custody, subject to court order | • warrant<br>• affidavits<br>• return<br>• inventory | • magistrate or clerk of the court with jurisdiction over the offense | |
| yes | yes | | • warrant<br>• return<br>• inventory<br>• all related papers | • court with jurisdiction over the offense, or in issuing court if case is filed | |
| yes | | | | | |
| yes | | • The property seized shall be retained by the police for a reasonable time. | | | |

## **Chart IV.** Search Warrant Return Procedures and Records

| State | When Must the Search Warrant Be Returned? | Where is the Search Warrant Returned? | Documentation When | | |
|---|---|---|---|---|---|
| | | | Detailed Inventory Required? | Verification Under Oath by Executing Officers Required? | Inventory Witnessed By |
| **District of Columbia** | • next court day after its execution or expiration | • issuing court | yes | yes | |
| **Florida** | • within 10 days from date of issuance | • the issuing judge or some other court | yes | yes | |
| **Georgia** | • without unnecessary delay | • the judicial officer named in the warrant or any court of competent jurisdiction | yes | yes | |
| **Hawaii** | | | | | |
| **Idaho** | • within the period allowed for execution | • the issuing magistrate | yes | yes | • person from whom property was seized<br>• or, made publicly |
| **Illinois** | • without unnecessary delay | • the issuing judge<br>• any judge named in the warrant<br>• any court of competent jurisdiction | yes | yes | |
| **Indiana** | • forthwith | • the issuing judicial officer | | | |
| **Iowa** | | • the issuing magistrate | yes | yes | |

*To be given to "any claimant" also.

| Property Is Seized | | Immediate Disposition of Property Seized | Retention and Availability of Search Warrant Records | | |
|---|---|---|---|---|---|
| Inventory Must Be Filed With Court | Magistrate Must Give Copy Upon Request to Applicant and Person From Whom Property Was Seized | | What Is Retained? | Where Is It Retained? | Is It a Public Record? |
| yes | | • The property seized shall be "safely kept" for use as evidence. | • warrant<br>• return | • issuing court | |
| yes | yes* | | | | |
| yes | yes | | | | |
| | | • The property seized shall be brought before the magistrate "to be disposed of according to justice." | | | |
| yes | yes | • Property seized is retained in the magistrate's possession; if stolen or embezzled magistrate must follow procedures for restoring property to lawful owner. | • warrant<br>• depositions<br>• return | • clerk of the District Court | |
| yes | yes | • The property seized is delivered to the issuing judge, a judge named in the warrant, or to any court of competent jurisdiction.<br>• The judge or court shall provide for custody of the property pending further proceedings. | | | |
| | | • The property seized by any law enforcement agency shall be held by the law enforcement agency under the order of the court trying the case. | | | |
| yes | yes | • The property seized is kept by the executing officer. | • warrant<br>• return<br>• inventory | • clerk of the District Court of county where property was seized | • confidential until warrant is executed and returned |

## **Chart IV.** Search Warrant Return Procedures and Records

| State | When Must the Search Warrant Be Returned? | Where is the Search Warrant Returned? | Documentation When | | |
|---|---|---|---|---|---|
| | | | Detailed Inventory Required? | Verification Under Oath by Executing Officers Required? | Inventory Witnessed By |
| **Kansas** | | | yes | | |
| **Kentucky** | • within a reasonable time following execution | | | | |
| **Louisiana** | | • the issuing court | yes | | |
| **Maine** | • within the period allowed for execution | • court named in the warrant | yes | yes | • persons from whom property was seized<br>• or, at least one credible person other than warrant applicant |
| **Maryland** | • within 5 days after execution unless a shorter period is ordered | • issuing judge or another judge in the same circuit | yes | | • person from whom property was seized or in charge of premises being searched |
| **Massachusetts** | • as soon as served and not later than 7 days after issuance | • to the issuing court or the District Court named in the warrant | | | |

| Property Is Seized | | Immediate Disposition of Property Seized | Retention and Availability of Search Warrant Records | | |
|---|---|---|---|---|---|
| **Inventory Must Be Filed With Court** | **Magistrate Must Give Copy Upon Request to Applicant and Person From Whom Property Was Seized** | | **What Is Retained?** | **Where Is It Retained?** | **Is It a Public Record?** |
| yes | | • The property seized is safely kept by the executing officer, unless the magistrate directs otherwise.<br>• The property shall be kept as long as needed as evidence and may not be taken from the officer's custody for the duration of its use as evidence. | | | • affidavits or sworn testimony not available without court order except to defendants and counsel |
| | | | • warrant<br>• affadavit | • clerk of court where warrant to be returned | |
| | | • Pending its use as evidence or when needed, property used is retained under the judge's direction. | | | |
| yes | yes | | • warrant<br>• return<br>• inventory<br>• all connected papers | • clerk of the District Court of the district in which the property was seized | |
| yes | | • Executing officer | • warrant<br>• return<br>• inventory<br>• all connected papers | • if warrant executed, materials to be filed with clerk of criminal court for county in which material was seized | • available upon court order to persons aggrieved by search, or having interest in property taken<br>• otherwise, to be kept confidential |
| | | • Executing officer shall safely keep the seized property as long as necessary for production or use as evidence in any trial, under the direction of the court.<br>• All other property seized shall be disposed of as the court orders. | | | • confidential until warrant is returned |

## **Chart IV.** Search Warrant Return Procedures and Records

| State | When Must the Search Warrant Be Returned? | Where is the Search Warrant Returned? | Documentation When | | |
|---|---|---|---|---|---|
| | | | Detailed Inventory Required? | Verification Under Oath by Executing Officers Required? | Inventory Witnessed By |
| **Michigan** | • promptly | • the issuing court or magistrate | yes | | • person from whom property was seized<br>• or, at least one other person |
| **Minnesota** | • within 10 days | • the issuing court or the justice of the peace | yes | yes | |
| **Mississippi** | • within 10 days unless otherwise ordered*<br>• forthwith† | • the judge named in the warrant<br>• or, some other justice, court judge† | yes* | | • person executing warrant, and person from whom property seized or at least one other credible person* |
| **Missouri** | • within the period allowed for execution | • the issuing judge | yes | yes | • person from whom property was seized |
| **Montana** | • promptly | • the issuing judge<br>• if the issuing judge is absent or unavailable, to the nearest available judge | yes | yes | |
| **Nebraska** | • within the period allowed for execution | • the issuing judge or magistrate | yes | yes | • at least one credible person other than the applicant and the person from whom property is seized |

*Controlled substances only.

† Stolen goods.

| Property Is Seized | | Immediate Disposition of Property Seized | Retention and Availability of Search Warrant Records | | |
|---|---|---|---|---|---|
| **Inventory Must Be Filed With Court** | **Magistrate Must Give Copy Upon Request to Applicant and Person From Whom Property Was Seized** | | **What Is Retained?** | **Where Is It Retained?** | **Is It a Public Record?** |
| yes | | • The property seized shall be safely kept by the executing officer as long as necessary for its production or use as evidence in any trial. | | | |
| yes | | • The executing officer shall retain custody subject to the issuing court's direction. | • warrant<br>• application<br>• affidavits<br>• inventory<br>• statement of unsucessful execution | • the court | • yes, except that filing of the affidavit and sworn testimony may be prohibited or delayed by order of the court |
| yes | yes* | | | • clerk of appropriate state court | |
| yes | yes | | • warrant<br>• affidavits<br>• application | • the issuing court | |
| yes | yes | • The judge before whom the property seized is brought shall provide for its custody pending further proceedings.<br>• The property seized may be retained in the seizing officer's custody pending an investigation, if no arrest has been made. | • warrant<br>• application | • clerk of the issuing court | |
| yes | yes | • The property seized shall be safely kept by the seizing officer, unless directed otherwise by judge or magistrate. | • warrant<br>• return<br>• inventory<br>• all connected papers | • clerk of the court in the jurisdiction where the property was seized | • after execution |

## **Chart IV.** Search Warrant Return Procedures and Records

| State | When Must the Search Warrant Be Returned? | Where is the Search Warrant Returned? | Documentation When | | |
|---|---|---|---|---|---|
| | | | Detailed Inventory Required? | Verification Under Oath by Executing Officers Required? | Inventory Witnessed By |
| **Nevada** | • within the period allowed for execution | • the magistrate who issued or is named in the warrant | yes | yes | • applicant<br>• and, person from whom property was seized or one other credible person |
| **New Hampshire** | • warrant must be returned as soon as served and no later than 7 days after issuance | • the court to which it was made returnable | yes | yes | • person from whom property was seized or at least one credible person |
| **New Jersey** | • within the period allowed for execution | • the issuing judge | yes | yes | • person from whom property was seized or some other person |
| **New Mexico** | • promptly | • issuing court | • yes | | • applicant and person from whom property was seized or other credible person |
| **New York** | • without unnecessary delay | • the issuing judge | yes | yes | |

| Property Is Seized | | Immediate Disposition of Property Seized | Retention and Availability of Search Warrant Records | | |
|---|---|---|---|---|---|
| **Inventory Must Be Filed With Court** | **Magistrate Must Give Copy Upon Request to Applicant and Person From Whom Property Was Seized** | | **What Is Retained?** | **Where Is It Retained?** | **Is It a Public Record?** |
| yes | yes | • The property seized is kept in the custody of the executing officer. | • warrant<br>• return<br>• inventory<br>• transcript of oral statement<br>• all connected papers | • clerk of the court with jurisdiction where the property was seized | |
| yes | yes | • The executing officer shall safely keep property seized under the court's direction as long as necessary for its production or use as evidence in any trial. | • warrant<br>• affidavit<br>• notes or transcript | • court to which the warrant is returnable | • unless otherwise ordered by a court of record |
| yes | yes | | • warrant<br>• return<br>• inventory<br>• affidavits<br>• transcript or summary of oral testimony | • county clerk of county in which property was seized | • available to defendant and person claiming to be aggrieved by the search after notice to the prosecution "for cause shown" |
| yes | yes | • The seized property is kept in the custody of the issuing court. | | | |
| yes | | • The property seized shall be kept in the custody of the issuing court.<br>• The warrant application or the executing police or peace officer or law enforcement agency may retain custody upon condition that the property seized be returned or delivered to a court upon order of the court. | | | |

## **Chart IV.** Search Warrant Return Procedures and Records

| State | When Must the Search Warrant Be Returned? | Where is the Search Warrant Returned? | Documentation When | | |
|---|---|---|---|---|---|
| | | | Detailed Inventory Required? | Verification Under Oath by Executing Officers Required? | Inventory Witnessed By |
| **North Carolina** | • without unnecessary delay | • the clerk of the issuing court | yes | yes | |
| **North Dakota** | • promptly | • the state or federal magistrate designate in the warrant | yes | yes | • person from whom property was seized<br>• applicant<br>• or, one credible person |
| **Ohio** | • promptly | • the judge designated in the warrant | yes | yes | • applicant<br>• person from whom property was seized<br>• or one other credible person |
| **Oklahoma** | • within the period allowed for execution | • the issuing magistrate | yes | yes | • persons from whom property was seized<br>• warrant application<br>• or, made publicly |
| **Oregon** | • within 5 days of execution | • the issuing judge | yes | • list must be signed | |
| **Pennsylvania** | | • the issuing authority | yes | yes | • persons from whom property was seized<br>• the warrant applicant<br>• or, at least one witness |

*The statute specifies that the search warrant documents are to be filed alphabetically until a prosecution is initiated, at which time they are to be placed in the case file.

| Property Is Seized | | Immediate Disposition of Property Seized | Retention and Availability of Search Warrant Records | | |
|---|---|---|---|---|---|
| Inventory Must Be Filed With Court | Magistrate Must Give Copy Upon Request to Applicant and Person From Whom Property Was Seized | | What Is Retained? | Where Is It Retained? | Is It a Public Record? |
| yes | | • The property seized may be held in the custody of the warrant applicant, the executing officer, the agency or department employing the officer, or any other law enforcement agency or person for evaluation or analysis, upon condition that the property be returned or delivered to a court upon order of the court. | • warrant<br>• application | • clerk of the issuing court | |
| yes | yes | | • warrant<br>• inventory<br>• return<br>• other related papers | • clerk of the trial court | |
| yes | yes | • The property seized is kept in the custody of a law enforcement agency. | • warrant<br>• return<br>• inventory<br>• all other papers | • clerk | |
| yes | yes | • The property seized is delivered to the magistrate. | • warrant<br>• affidavit<br>• transcript of oral testimony | • clerk of the District Court* | |
| yes | yes | | • warrant<br>• application<br>• inventory | • clerk of the court with jurisdiction over the offense | • after execution |
| yes | yes | | • warrant<br>• affidavit<br>• inventory | • clerk of the Court of Common Pleas in district where property seized | |

## **Chart IV.** Search Warrant Return Procedures and Records

| State | When Must the Search Warrant Be Returned? | Where is the Search Warrant Returned? | Documentation When | | |
|---|---|---|---|---|---|
| | | | Detailed Inventory Required? | Verification Under Oath by Executing Officers Required? | Inventory Witnessed By |
| **Rhode Island** | • promptly | • the judge named in the warrant | yes | yes | • person from whom property was seized<br>• the warrant applicant<br>• or, at least one witness |
| **South Carolina** | • within the period allowed for execution | • the magistrate in the issuing county<br>• the magistrate with jurisdiction where the property was located when issue is by a court of record | yes | • no, but list must be signed | |
| **South Dakota** | • promptly | • to a committing magistrate designated by warrant | yes | yes | • at least one credible person other than the applicant and the person from whom property is seized |
| **Tennessee** | • promptly | • the issuing magistrate | yes | | |
| **Texas** | | • the magistrate | yes | • no, but list must be signed | |
| **Utah** | • within the period allowed for execution | • the issuing magistrate | yes | yes | • person from whom property was seized<br>• or, made publicly |

| Property Is Seized | | Immediate Disposition of Property Seized | Retention and Availability of Search Warrant Records | | |
|---|---|---|---|---|---|
| **Inventory Must Be Filed With Court** | **Magistrate Must Give Copy Upon Request to Applicant and Person From Whom Property Was Seized** | | **What Is Retained?** | **Where Is It Retained?** | **Is It a Public Record?** |
| yes | yes | • The property seized is kept by the seizing officer. | • warrants<br>• returns<br>• inventory<br>• other related papers | • clerk of the District Court with jurisdiction over the place where property seized | |
| yes | • person from whom property seized only | | | | |
| yes | yes | • The property seized shall be safely kept and may not be removed from its custodian for as long as it is required as evidence. | • warrant<br>• return<br>• inventory | • clerk of the Circuit Court of county where the property seized | |
| yes | yes | | • warrant<br>• return<br>• inventory | • clerk of the court with jurisdiction over the offense | |
| yes | • or left at site of search by the executing officer | • The executing officer shall take possession of the seized property and present it to the magistrate.<br>• The property shall be safely kept by the executing officer, subject to the further order of the magistrate. | • record of all proceedings<br>• original papers<br>• inventory | • clerk of the court with jurisdiction over the case | • affidavit is public information after execution |
| yes | yes | • The property seized is retained in the magistrate's possession, unless it encompasses stolen or embezzled property.<br>• Stolen or embezzled property is kept in the custody of the peace officer, subject to the magistrate's order. | • affidavit<br>• warrant<br>• return<br>• inventory | • District Court of county in which warrant issued | |

## **Chart IV.** Search Warrant Return Procedures and Records

| State | When Must the Search Warrant Be Returned? | Where is the Search Warrant Returned? | Documentation When | | |
|---|---|---|---|---|---|
| | | | Detailed Inventory Required? | Verification Under Oath by Executing Officers Required? | Inventory Witnessed By |
| **Vermont** | • promptly<br>• without unnecessary delay | • the issuing judge<br>• any judge named in the warrant<br>• any court of competent jurisdiction | yes | yes | • applicant, and person from whom property seized or at least one other credible person |
| **Virginia** | • within the period allowed for execution | • the issuing officer | yes | yes | |
| **Washington** | • promptly | • the issuing judge or magistrate<br>• any judge with cognizance of the case | yes | | |
| **West Virginia** | • promptly within the period allowed for execution | • the issuing judge or magistrate | yes | | |
| **Wisconsin** | • within 48 hours after execution | • the clerk designated in the warrant | yes | | |
| **Wyoming** | • promptly within the period allowed for execution | • the judge or commissioner named in the warrant | yes | yes | • warrant applicant<br>• and person from whom property seized or other credible person |

*Clerk is responsible for distributing inventory.

| Property Is Seized | | Immediate Disposition of Property Seized | Retention and Availability of Search Warrant Records | | |
|---|---|---|---|---|---|
| Inventory Must Be Filed With Court | Magistrate Must Give Copy Upon Request to Applicant and Person From Whom Property Was Seized | | What Is Retained? | Where Is It Retained? | Is It a Public Record? |
| yes | yes* | • The judge or court shall enter an order providing for the custody of the seized property. | | | |
| yes | | • The property seized is kept in the custody of the court designated in the warrant. | • affidavits<br>• warrant<br>• inventory | • affidavit filed by magistrate with clerk of the court where search is made<br>• affidavit warrant and inventory filed by executing officer with clerk of court where the search was made | • affidavit subject to inspection by the public<br>• warrant and inventory part of case file |
| yes | yes | • The property seized is kept in the custody of the magistrate of the issuing court or the court having cognizance of the case. | | | |
| yes | • person from whom property seized only | • The property seized is preserved by the court or magistrate. | | | |
| yes | • controlled substances only | • The property seized shall be safely kept by the seizing officer or left in the custody of the sheriff after obtaining a receipt for the property. | • affidavit<br>• return<br>• inventory | • clerk of the court designated in the warrant | • after execution |
| yes | yes | • The property seized is kept by the justice or delivered to the sheriff. | • warrant<br>• return<br>• inventory<br>• other papers | • clerk of the District Court where property was seized | |

## The National Center for State Courts

The National Center for State Courts is a nonprofit organization dedicated to the modernization of court operations and the improvement of justice at the state and local level throughout the country. It functions as an extension of the state court systems, working for them at their direction and providing for them an effective voice in matters of national importance.

In carrying out its purpose, the National Center acts as a focal point for state judicial reform, serves as a catalyst for setting and implementing standards of fair and expeditious judicial administration, and finds and disseminates answers to the problems of state judicial systems. In sum, the National Center provides the means for reinvesting in all states the profits gained from judicial advances in any state.

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