

Ethical Search Warrants outline, Jerry Coleman, 2015

Course Summary: search warrants are a powerful law enforcement investigative tool, but are fraught with procedural limitations and ethical pitfalls. This lecture will cover a wide range of issues, from search warrant history, basic components, special master issues, dealing with Magistrates, timing/service/paperwork concerns, weird warrants (HIV testing, financial records, electronic devices), properly describing locations and laundry list of items to find, warrant horror stories, affiant expertise, and special warrant requests, to defense attacks on warrants in court. When you're done, your head may spin (like Linda Blair, in "The Exorcist"), but you'll be able to write (or help your officers write) a better, if not bullet-proof, search warrant.

- I. Warrant Components: The Three Legged Stool
 - a. Probable Cause re Crime Committed
 - b. Probable Cause re Location to Search
 - c. Laundry List of items to search for
- II. Warrant Brady Issues
 - a. Check affiant against your office Brady list (if office policy to not allow listee to be affiant)
 - b. If office policy allows listees w/ rap sheet brady only to be affiant, make sure affiant presents to court
 - c. Warrant must list exculpatory evidence (e.g., witness who could NOT id defendant)
- III. Final Intro: Search Warrant History & Advantages
 - a. 4th Amendment grew out of colonists' objection to general warrants allowing agents to rummage through anyone's house for smuggled goods
 - b. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
 - c. Legal advantages:
 - i. Courts give deference to warrant searches
 - ii. Cop can arrest w/o arrest warrant if serving s/w in residence
 - iii. Don't have to worry about consent being withdrawn
 - iv. Useful way to protect CRI's identity
 - v. Cop has qualified immunity from civil suit while lawfully serving s/w

- IV. Source of California search warrant law
 - a. Cal. Const., Art. I, sec. 12
 - b. No more "independent state grounds": Art.1, Sec.28(f)(2); *In re Lance W.* (1985) 37 Cal.3d 873
- V. Problem Search Warrant Locations
 - a. News out-takes (unpublished material): See, PC 1524g; EV 1070 (newsman's privilege)
 - b. Computer from any 'publisher' (anyone reasonably believed to be disseminating info to public; e.g., blogger): See, 42 USC sec.2000aa (Privacy Protection Act)
 - i. Must use SDT, not s/w, or big fine
 - ii. Excepts (when can use s/w):
 - iii. Material itself criminal to possess, or
 - iv. Imminent seizure necessary to prevent death or GBI
 - v. So if have 'publisher', note PPA & exception in s/w to protect from civil suit
 - c. PPA came into being to protect press after *Zurcher v. Stanford Daily* (1978) 436 US 547; Meant to supply the greatest protections for 3rd party record holders merely possessing evidence that may relate to a crime
 - d. Special Master Situations (searches of MD, JD, shrink, clergy): See, PC 1524 e-f
 - i. Designed to protect privileged communications with these professionals.
 - ii. Exception: if professional himself is suspected of crime.
- VI. Protecting Victim ID Info in Warrant
 - a. Penal Code sec. 964
 - b. Laundry list: don't use specific identifiers (like SSN, CDL#, V name/address)
 - c. No police reports as exhibits, by local rule
 - d. No victim names mentioned, by local rule
 - e. Policy: to encourage reporting of crime, combat id thieves from data-mining court records
- VII. Procedural Issues w/Affidavit
 - a. Usually written
 - b. But can be telephonic (use manual checklist)
 - c. Or facsimile
 - d. Or even email now
 - e. See, generally, PC 1526
- VIII. Magistrate Issues
 - a. Must be neutral & detached (see, e.g., *Lo-Ji Sales, Inc. v. NY* (1979) 442 US 319)
 - b. County-wide jurisdiction: magistrate can issue s/w for any location w/in the county where magistrate sits; *People v. Emanuel* (1978) 87 Cal.App.3d 205

- c. Out-of-county jurisdiction: OK for Co.1 magistrate to issue s/w for def's home in Co.2 where evid. relates to crime committed w/in Co.1 & pertains to present or future prosecution in Co.1; see, *People v. Fleming* (1981) 29 Cal.3d 698
 - d. Out-of-State Jurisdiction: Must get local police/magistrate in that state to do s/w; but you send affidavit and you get s/w to authorize evid. brought to SF
 - e. Offenses in 2 Jurisdictional Territories: PC 781: Magistrate can issue s/w for offense in 2 territories, so long as one of them is magistrate's.
 - f. Identity Theft Cases: PC 1524(j): Magistrate may issue s/w for another county when id theft vic. lives in magistrate's county
- IX. Bringing Along Help Serving S/W
- a. The Press: 4th A. violated when cops bring press into home during s/w, when not there to aid in execution of warrant; see, *Wilson v. Layne* (1999) 526 US 603
 - b. Bringing Expert Assistant: Ok to bring "Dandy", the narco-detecting dog on s/w, even tho not noted to magistrate or on warrant; see, *People v. Russell* (1987) 195 Cal.App.3d 186
 - c. Expert Assistant (con't.): W/ human expert: name, say why, & get order; but if corp. victim, providing \$ could lead to office recusal (PC 1524); see, *People v. Eubanks* (1996) 14 Cal.4th 580
 - d. Burglary Victims to identify recently stolen property: OK; see, *People v. Superior Court (Meyers)* (1979) 25 Cal.3d 67
- X. Securing Scene PENDING S/W is Illegal; Exceptions
- a. Emergency
 - b. Arrest inside residence
 - c. Consent
 - d. Valid need to preserve evid. pending s/w
- XI. Knock Notice
- a. Required before entering to secure premises subject to s/w: *Machado v. Superior Court* (1975) 45 Cal.App.3d 316; PC 1531
 - b. BUT SEE, *Richards v. Wisconsin* (1997) 520 US 385: No-knock entry OK if reas. to believe dangerous/futile/or allowing evid. destruction(& note *Hudson v. Michigan* (2006) 547 US 586 [violation of knock-notice rule in s/w does not require exclusion of evidence]) But note: cops can still be sued for violating state law!
 - c. Rule doesn't apply to inner doors: See, *People v. Pompa* (1989) 212 Cal.App.3d 1308 [inner office of business]; *People v. Howard* (1993) 18 Cal.App.4th 1544 [inner bedroom door of residence]
 - d. Rule doesn't apply to fences: See, *People v. Mayer* (1987) 188 Cal.App.3d 1101 [OK to climb over back fence w/o knock-notice before serving s/w on residence]
- XII. S/W Time of Day Considerations
- a. Service for s/w is between 7 am and 10 pm: PC 1533

- b. But not invalid execution if one continuous transaction beginning before 10 pm (but going later): *People v. Zepeda* (1980) 102 Cal.App.3d 1
 - c. For Nighttime Service, affidavit must show specific facts why reasonable that contraband won't be present from 7 am to 10 pm. See, *People v. Watson* (1977) 75 Cal.App.3d 592, 598
- XIII. Misc. Police Service Issues
- a. During residential s/w service, officers may briefly detain persons on premises for officer safety/ to id / & to establish connection to premises: *People v. Glaser* (1995) 11 Cal.4th 354
 - b. OK in narco s/w, after find dope/\$, for police to answer def's phone, pose as def, and arrange dope deal: *People v. Vanvalkenburgh* (1983) 145 Cal.App.3d 163
- XIV. SW Timing & Paperwork Issues
- a. The Ten Day Rule (i.e., "staleness"): PC sec.1524 allows warrant validity for only 10 days (executed & returned w/in 10 days of issuance); void if not served w/in 10 days
 - b. Officer must return the warrant to magistrate, along w/sworn inventory: PC sec 1537
 - c. However, failure to timely file s/w return is not a 4th A. violation, so no suppression; See, *People v. Head* (1994) 30 Cal.App.4th 954 [s/w served the day it was signed, ready for filing return, but left in desk; 2nd ofcr. found it 377 days later in an old office among files to be destroyed, & filed it immediately!]
 - d. Officer taking property under a warrant must give detailed receipt to
 - i. person from whom property taken/
 - ii. person possessing property/ or
 - iii. place property found if nobody present: PC sec. 1535
- XV. Sealing S/W Affidavits
- a. *People v. Hobbs* (1994) 7 Cal.4th 948 allows sealing affidavit to protect CRI; sets procedure for defense to challenge s/w
 - b. Defense files motion to quash or traverse; court conducts in camera hearing
 - c. Court finds if CRI must stay confidential, then if sealing proper; DA present, def.atty. can submit questions to any wit.
 - d. If court says all sealed & unsealed materials = probable cause, motion denied; if court ready to quash, DA gets choice:
 - i. Disclose sealed materials and relitigate motion to quash, or
 - ii. Keep matter sealed and suffer dismissal
- XVI. Weird Warrants
- a. HIV Testing of crim. Def. on behalf of victim
 - i. Penal Code sec. 1524.1
 - ii. Typically used with sexual assault victims or law enforcement/jailers who are bitten
 - iii. very complex; special forms
 - b. Financial records

- i. Gov't. Code sec. 7460-7493
 - ii. See also, *Burrows v. Superior Court* (1974) 13 Cal.3d 238, and *People v. Blair* (1979) 25 Cal.3d 640
 - iii. Note: if bank itself the victim, no s/w needed for bank's records; e.g. credit card fraud, NSF checks
- c. Phone records & pen registers
 - i. *Smith v. Maryland* (1979) 442 US 735 held no search, so no s/w needed;
 - ii. BUT: 18 USC sec.3121-3127 now require court order for pen register/trap & trace;
 - iii. SO: Best to just get s/w
- d. Access to wire/electronic communication services
 - i. Internet Service Providers: Penal Code sec. 1524.2 allows "long arm" jurisdiction for CA to get electronic communications from foreign corp's doing business here (and foreign states to serve warrants on CA-based corps);
 - ii. See: <http://search.org/programs/hightech/isp> to locate all ISP's;
 - iii. *But still need search warrant!* See also, ECPA: 18 USC 2701-2712

XVII. Cell Phone Search Warrants

- a. Can't search digital evidence on cell phones when seized incident to arrest, without a warrant : *Riley v. California* (2014) 134 S. Ct. 2473
- b. Warrant: don't just ask for phone calls; get "call detail records" to include cell tower sites
- c. When find cell phone, to determine carrier (for s/w or SDT), contact Law Enforcement Cell Phone Registry: 571-434-5781 (then enter your agency's PIN)

XVIII. Drafting Issues: Grounds for S/W Issuance (Penal Code 1524(a))

- a. Property stolen or embezzled
- b. Property used to commit a felony; e.g., gun used in murder; computer in online fraud
- c. Property in possession of person w/intent to use to commit a public offense; e.g., bomb held by terrorist; weapon given to fellow gang member to hold
- d. Property is evidence showing felony committed or particular person committed the felony; e.g., drug sales registers in dealer's home; hacker's software on his computer
- e. Property is evidence showing sexual exploitation of child, or matter depicting sexual conduct of person under 18
- f. When warrant to arrest a person
- g. Electronic communication service records showing stolen property *in a misdemeanor*, or used to commit *a misdemeanor*
- h. Property showing violation of Labor Code sec. 3700.5 [*misdemeanor* failure to pay just compensation]
- i. Specified firearms seizure provisions

- j. When tracking device info shows fel/misdo violation of Fish & Game or Public Resources Code
- XIX. New Legislation re Warrants for 2016
 - a. AB 39: PC 1526 new language re getting a warrant electronically without ever personally visiting the judge
 - i. Call the judge, get sworn over the phone, and transmit the affidavit electronically
 - ii. Judge confirms receipt of all pages, which are legible, & of digital signature (genuine)
 - iii. Judge notes date & time of issuance & that affiant sworn
 - iv. Judge transmits signed warrant to affiant
 - v. NEW: No more req. that affiant acknowledges receipt of completed warrant
 - b. AB 539: DUI warrant fix [after Missouri v. McNeely, (2013) 133 S.Ct. 1552]: PC 1524 new subsec (13)
 - i. If DUI, DUI w/injury, or <21 w/> .05
 - ii. And they refuse
 - iii. And the sample is drawn in a reasonable, medically approved manner, then:
 - iv. NEW GROUNDS FOR S/W, EVEN THO CRIME OFTEN ONLY A MISDEMEANOR
 - c. AB 1104: Dealing w/ Prop. 47's aftermath re misdemeanor dope poss'n : PC 1524 new subsec (15)
 - i. When the property of things to be seized are controlled substances or a device, contrivance, instrument, or paraphernalia used for unlawfully using or administering a controlled substance pursuant to the authority described in Section 11472 of the Health & Safety Code
 - ii. NEW GROUNDS FOR S/W, EVEN THO CRIME NOW ONLY A MISDEMEANOR
 - d. SB 178: California's own Electronic Communications Privacy Act (new PC 1546); So, you want electronic data (including phone info) from a service provider or the device itself? Then just:
 - i. Get a warrant
 - ii. Or a wiretap order
 - iii. SDT won't work in criminal cases.
 - iv. OMG: Aren't there any exceptions? Yes:
 - v. Consent of device's authorized possessor
 - vi. Consent of owner of stolen device
 - vii. If good faith belief of emergency involving death/serious injury
 - viii. If good faith belief device lost/stolen/abandoned, can access only to identify & contact owner
 - ix. If device seized from CDCR inmate & not known to belong to authorized visitor
 - x. BUT NOTE: Evidence obtained illegally is inadmissible in court or in future S/W affidavit

XX. Describing Locations, Persons, & Vehicles (Particularity)

- a. "Premises" in a s/w describing a "house ... with a detached garage" covers both house & garage: *People v. Mack* (1977) 66 Cal.App.3d 839, 859; BUT: better to expressly list both
- b. "Premises" in a s/w at a 40 acre parcel of land sufficiently particular to cover barn ½ mile away from mobile home (both on the 40 acres) : *People v. Smith* (1994) 21 Cal.App.4th 942
- c. Locked safe found on premises during s/w, but removed & forcibly opened 4 days later w/ fire dept. help is OK, as search of residence includes all containers within which could hold the contraband described in the warrant: *People v. Kibblewhite* (1986) 77 Cal.App.3rd 783 (But if know a safe present, better to have Court authorize expert to drill it)
- d. Insufficiently described premises example: *US v. Collins* (9th Cir. 1987) 830 F.2d 145: s/w says: "last house on the east side"; (but then orally amended to last on west side); 9th Cir. says: "The police were remarkably unparticular. They got the street address wrong twice. They got the sides of the street wrong once...." [Even exterior description was wrong!] Cops found nothing in middle of night search of Sebastopol house, then went across street and found meth lab. Result: evidence suppressed.
- e. Vehicles: don't just rely on being able to search an unspecified vehicle in a garage as being a 'container' within the building; specify it! See, e.g., *People v. Dumas* (1973) 9 Cal.3d 871: Search of car no good where car not mentioned in warrant, nor even found in place noted in warrant, but parked two lots away from apt.
- f. Laundry List: DON'T just say, "all evidence of crimes found within premises"; Not much better to say "among other things", "including but not limited to", "all other records & paraphernalia"; see, e.g., *Aday v. Superior Court* (1961) 55 Cal.2d 789 [invalidated s/w for def's business because all categories, together, so sweeping as to include virtually all property on premises w/ no meaningful restriction on things to be seized]
- g. The Severance Exception: If affiant fails to properly describe some, but not all, of the evidence, courts usually suppress only those items poorly described: *People v. Sup.Ct. (Marcil)* (1972) 27 Cal.App.3d 404; But if inadequately described evidence so predominates as to effectively authorize a general search, then exception no good
- h. Examples of inadequate descriptions: "stolen property"; "all other property owned by [the theft victim]"; "any and all illegal contraband"; "certain personal property used as a means of committing grand larceny"; "all business records and paraphernalia"; "other evidence"
- i. When Description Based on Direct Observation: When police have specific description of item (or even photo), s/w authorizing broader class of items may be invalid; see, *Millander v. Co. of LA* (9th Cir. 2010)

620 F.3d 1016 [DV victim describes ADW with black sawed-off shotgun w/pistol grip, & gives police photo; s/w for "all handguns, rifles, or shotguns or any caliber..." lacked particularity]

- j. Describing documents & computer files (courts take particular care here); GOOD examples:
 - i. "loan records reflecting the \$500,000 teamster trust fund loan & its subsequent disbursement"
 - ii. "drug trafficking records, ledgers, or writings identifying cocaine customers, sources"
- k. BAD examples:
 - i. "all financial records"
 - ii. "all medical records"
 - iii. "any and all records & paraphernalia pertaining to def's business"
- l. Other computer files rules:
 - i. If relevance of document depends on who sent it, its date, or to whom addressed, *include that info to narrow the description*
 - ii. Exception to specificity req. for biz recs if pc established that biz "permeated w/fraud", such that all recs likely constitute crim evidence: see, e.g., *US v. Kow* (9th Cir. 1995) 58 F.3d 423; *People v. Hepner* (1994) 21 Cal.App.4th 761
 - iii. But if fraud pertained only to certain product, or only occurred during certain time, s/w should specify documents pertaining only to that product/time
- m. Rules regarding particularity w/respect to Indicia
 - i. Indicia or evid. of dominion & control best when s/w for drugs, weapons, child porn, stolen prop.
 - ii. Description of types of things to est. dom. & control: Delivered mail; Bills & receipts; Bail contracts & other legal documents; Keys to cars, safe deposit/post office boxes; Photos; Answering machine tapes
 - iii. Remember: the smaller the item listed, the more places you can search (e.g., stolen 60" TV vs. false notary stamp)
 - iv. Computer seizable as 'item tending to show dominion and control', but better to list computer specifically, esp. if you know one on premises; see, *People v. Balint* (2006) 138 Cal.App.4th 200
- n. Particularity horror stories
 - i. *Stanford v. Texas* (1965) 379 US 476, 485: "[T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. "
 - ii. *Mink (plaintiff) v. Knox (a deputy DA)* (10 Cir. 2010) 613 F.3d 995; no reasonable prosecutor could believe it probable that student-journalist's publishing certain statements satirically

hostile to Univ. of Northern Colo. Professor constituted a crime warranting seizure of student's computer; the warrant's authorizing the search & seizure of all computer and non-computer equipment and writings was a "general exploratory rummaging" unspecified by a criminal offense, and thus was overbroad.

XXI. Affiant Expertise

- a. a. State in detail & include:
 - i. Most current training
 - ii. Past & continuing experience
 - iii. Similar s/w's done
 - iv. Testified as an expert in court on topic
- b. "young" officer affiant can rely on expertise of more experience officer
- c. Warning re Expertise: Other jurisdictions have refused to adopt per se rule that use of drugs automatically establishes probable cause to search a user's residence for more drugs; cf: *People v. Pressy* (2002) 102 Cal.App.4th 1178

XXII. Informants in S/W's

- a. Special language needed when probable cause based on informants, esp. CRI's; tell court record & inducements, but not in such detail as to reveal id. (See, CDAA search warrant manual)
- b. Probable Cause Examples in dope warrants:
 - i. Info from CRI alone sufficient for s/w: *People v. Hansborough* (1988) 199 Cal.App.3d 579 [CRI reliable as gave info on 2 coke sales in past month that lead to s/w's, seizures, arrests, & filed charges]
 - ii. Statement of co-conspirator sufficient: *People v. Aho* (1985) 166 Cal.App.3d 984
 - iii. Anonymous tip, narco traffic, & outstanding narco warrant sufficient: *People v. Kershaw* (1983) 147 Cal.App. 3d 750
 - iv. Controlled buy sufficient: *People v. Hernandez* (1974) 43 Cal.App. 3d 581
- c. NO Probable Cause example: *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107: Reports from anonymous informant and citizen informant that heavy foot traffic at particular apartment, without more, insufficient for s/w issuance.

XXIII. Special Requests in Warrants

- a. State why requesting in affidavit; have judge specifically authorize the special request
- b. Examples:
 - i. To photograph or videotape service of s/w
 - ii. To permit fed. ofcr. or civilian expert to assist in service of s/w
 - iii. To permit off-site forensic exam of computer
 - iv. To order non-disclosure to a customer of a s/w seeking info about that customer (e.g., banking)

XXIV. Defense Attacks on Warrants

- a. Motion to Quash (no prob. cause) : Affidavit w/o sufficient detail ('bare bones') in any of 3 legs (pc crime, pc location, laundry list); may be able to come under the good faith exception of *US v. Leon* (1984) 468 US 897; but not if ofcr reasonably should have known no pc, or warrant overbroad on its face
- b. Motion to Traverse (affidavit false) : *Franks v. Delaware* (1978) 438 US 154: Def. has limited 4th Amend. rt. to controvert factual allegations in affidavit
- c. In a Franks hearing:
 - i. Def. must 1st substantially show affidavit statement false or w/ reckless disregard to truth AND that such statement necessary for probable cause; *only then gets close to hearing*
 - ii. Must have specific allegations re portion(s) of affidavit, & sworn offer of proof
 - iii. Even if court agrees, remedy is to excise statement and retest remaining affidavit for probable cause; only if pc lacking does def. get evidentiary hearing; but if pc still there, motion denied w/o hearing
- d. Motion to Discover Reliability of s/w Informant (pre-traversal discovery): *People v. Luttenberger* (1990) 50 Cal.3d 1

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