

SEARCH WARRANTS
 SARAH MURPHY, SENIOR DEPUTY DISTRICT ATTORNEY



FOURTH AMENDMENT

- United States Constitution, Fourth Amendment
 - 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.

UNREASONABLE SEARCHES & SEIZURES

- The Fourth Amendment is not a guarantee against all searches and seizures, but only those that are deemed unreasonable under the law.
- Began with protection of the home, a man's castle:
 - Searches and seizures inside a home without a warrant are presumptively unreasonable.
Payton v. New York, 445 U.S. 573 (1980).

SEARCH WARRANTS

- What is that?!?
- Do I need one?
 - If you are asking that...you probably do!
- Exceptions?
 - Exceptions are awesome... But only use them when they are appropriate!

EXCEPTIONS TO SEARCH WARRANT

- A search isn't unreasonable if it falls into a recognized exception category:
 - Plain View
 - Exigent Circumstances
 - Search Incident to Arrest
 - Probation & Parole Searches
 - Consent

PLAIN VIEW

- Lawful position to make observation
- Illegal character must be apparent on its face.
- Items can be moved to see if the items being searched for are located under them or within them.
People v. Schreier (1984) 158 Cal.App. 3d Supp. 20
Arizona v. Hicks (1987) 480 US 321.

SEARCH INCIDENT TO ARREST

- "One of the specifically established exceptions to the Fourth Amendment's warrant requirement is 'a search incident to a lawful arrest.'" (*People v. Diaz* (2011) 51 Cal.4th 84, 90 (*Diaz*).
- An officer may always thoroughly search a person incident to arrest when the person is taken into lawful custody, regardless of the offense for which the arrest is made. (*United States v. Robinson* (1973) 414 U.S. 218.)
 - Search incident to a lawful arrest extends to any item immediately associated with the person of the arrestee or otherwise within the immediate control of the person at the time of arrest. (*United States v. Chadwick* (1977) 433 U.S. 1, 14; *Chimel v. California* (1969) 395 U.S. 752, 763.)
- **BUT:** Although devices providing access to large amounts of often personal data, such as cell phones and computers, may be seized incident to arrest, the contents of such devices may not be searched absent a search warrant, consent, exigent circumstances, or some other exception to the Fourth Amendment warrant requirement. (*Riley v. California* (2014) 573 U.S. ____ [134 S.Ct. 2473, 189 L.Ed.2d 430].) – See California ECPA

PROBATION & PUNISHMENT SEARCH

- Warrantless searches are justified in the probation context because they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation." (*People v. Robles* (2000) 23 Cal.4th 789, 795.)
- A search or seizure conducted pursuant to the terms of a known probationer's advance consent is reasonable under the Fourth Amendment because it does not infringe upon any legitimate or reasonable expectation of privacy the probationer retains over his or her person or property. (*People v. Bravo* (1987) 43 Cal.3d 600, 607.)
- Under California law, a search conducted pursuant to a known probation search condition, even if conducted without reasonable suspicion of criminal activity, does not violate the Fourth Amendment as long as the search is not undertaken for harassment or for arbitrary or capricious reasons or in an unreasonable manner. (*People v. Medina* (2007) 158 Cal.App.4th 1571, 1577.)

CONSENT

- Voluntary consent to search permits an officer to search without a warrant and establishes the reasonable nature of the search. (*People v. Michael* (1955) 45 Cal.2d 751, 753; *People v. Tremayne* (1971) 20 Cal.App.3d 1006, 1015.)
- Test is voluntariness of consent.
 - Consent to search must be voluntary and freely given and not mere submission to an assertion of authority by law enforcement. (*People v. James* (1977) 19 Cal.3d 99, 106.)
 - Voluntariness is a question of fact to be resolved by considering all the surrounding circumstances. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218.)

SEARCH WARRANTS

- What is included in a search warrant?
 - Who is supplying affidavit to the magistrate?
 - Places to be Searched (Descriptions)
 - Things to be Seized (Descriptions)
 - "Hero" Sheet
 - Probable Cause
 - Protocols Which Must be Followed

Must contain exculpatory information if law enforcement is aware of that information.

PEOPLE & PLACES TO BE SEARCHED

- Describe both "with particularity" and don't be "overbroad."
- Particularity does not include – searching all people and vehicles present...
 - People move about – what is their nexus?
 - Vehicles move about – what is their nexus?

PARTICULARITY

- A warrant must describe place to be searched and items to be seized "with particularity sufficient to prevent a general exploratory rummaging of a person's belongings."
- Court considers three factors:
 - Whether PC exists to seize all items of a particular type described in warrant
 - Whether warrant sets out objective standards by which executing officers can differentiate seizable from non seizable items
 - Whether the gov't was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.



THINGS TO BE SEIZED

- Use standard boilerplate computer equipment language, being careful to exclude what you do not need.
- Make sure the PC justifies all the items you want to seize. Probable cause to seize a "computer" does not necessarily mean probable cause to seize the entire computer system. Each component in a computer system should be considered independently
 - Documents / Manuals?
 - Software?
 - External drives and peripherals?

HERO SHEET

- The affiant must state the basis of his/her expertise.
- Foreshadow the search and seizure of specified evidence.
 - Where have you been employed as an officer? How long?
 - Any academy training relevant to the warrant?
 - What training in the specific area of the warrant do you have?
 - How many cases like this have you handled?
 - Total arrests for crimes like this?
 - Search warrants of this nature you have worked on in some form?

ELECTRONIC DEVICES & COMPONENTS

- State your reasons for searching the computer or cellular phone and not just the premises where it is located
- State why you need to search the computer off-site.
- State why the suspect may have evidence on his computer.
- State why you need accessories, peripherals, documentation and passwords.
- Define your terms in plain non-technical language.

PROBABLE CAUSE

- California Penal Code section 1525:
 - A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched.
 - The application shall specify when applicable, that the place to be searched is in the possession or under the control of an attorney, physician, psychotherapist or clergyman.

PROBABLE CAUSE

- Reasonable suspicion
- A crime has taken place
- Evidence of that crime will be found in the location you'd like to search.
- ID your information sources and show why they are reliable.
- Corroboration of crime
- Tie it all together with expertise

BREAD IT!

- Justify seizing all media
 - CD's, tapes, disks can be intentionally mislabeled
 - Too risky, intrusive and time consuming to do on-scene analysis
 - Passwords, encryption, etc.
 - Protection of the suspect's property
- Court acknowledged that although many of the files on the computer did not constitute evidence, the warrant explained that, because information could be easily hidden in a computer, it was necessary to seize the entire system to adequately search for relevant files. - U.S. v. Kufrovich (1997) 997 F.Supp 246
- You can always go back with another warrant.

MORE THAN JUST THE CARRIER RECORDS

- I know that in order to interpret this data, as an investigator, I need to have information about the location and set-up of each respective cellular service provider's individual cell-sites. I know, that people often travel great distances and use their cellphones consistently. For these reasons, I know it is necessary to obtain a cell site list from each respective cellular service provider.
- I know from training that cellular coverage can be affected by a number of factors, including equipment failures, maintenance, overloads, obstructions and many others. Any records of equipment failures, maintenance, cell site overloads, or other outages that tend to show whether any of the listed cell sites were not operating normally during the specified time period would assist investigators in analyzing data received from tower dumps. It would help ensure that the evidence is analyzed in the most accurate way possible.

SOCIAL MEDIA ASSOCIATIONS

- In my experience as an investigator, I know that Facebook, Snapchat and Instagram can sometimes be an extremely useful tool in obtaining evidence for an investigation. It can be valuable in establishing the connection between certain subjects. I know from my training and experience that it's very common for people to communicate on a regular basis using Facebook, Snapchat and Instagram which can preserve records in a social network. The Facebook, Snapchat and Instagram accounts can be used for email type and multimedia messaging. This can be an efficient means of communicating with other people. In many instances, people rely solely upon Facebook, Snapchat or Instagram for their communication needs while in others, Facebook, Snapchat and Instagram serve as a supplemental form of communication to their cellular phones. This electronic data, including contact list (address book), inbound/outbound messages, e-mails and timeline information can provide additional evidence in this criminal investigation. Photographs contained in the above profiles can show a connection to the parties involved and may aid in establishing a timeline for each subjects whereabouts. This may show they were associated with any of the listed respective phones or subjects. Information obtained from Facebook may also show respective subjects have less of a connection to subjects of this investigation than appears on the public portion of their respective profiles.

STALENESS

- Things to consider:
 - Length of time since the information was received?
 - What type of crime is being investigated?
 - Type of items sought
 - Location
- "An affidavit must be based on facts so closely related to the time of the issue of the warrant' so as to justify a finding of P.C. at that time." (Sgro v. US (1932) 287 US 206)
- A warrant is not stale if there is a sufficient basis to believe, based on a continuing pattern or "other good reasons" that items are still on premises. (US v. Gann (1984) 732 F.2d 714)

STALENESS VS. EXPERTISE

- U.S. v. Lacy (1997) 119 F.3d 742 (9th Cir.)
 - Danish Computer Bulletin Board System
 - Download of 6 images
 - 10 months elapses before the warrant is sought
- Result? No suppression.
 - Court relied on expertise of affiant:
 - Collectors value their pix and rarely if ever dispose
 - Also important that deleted data can be recovered

SPECIAL MASTERS

- California Penal Code 1524(c):
 - No Search warrant shall issue for any documentary evidence in the possession or under the control of any person who is a lawyer as defined in Section 950 of the Evidence Code, a physician as defined in Section 990 of the Evidence Code, a psychotherapist as defined in Section 1010 of the Evidence Code, or a member of the clergy as defined in Section 1030 of the Evidence code, and **WHO IS NOT REASONABLY SUSPECTED OF ENGAGING OR HAVING ENGAGED IN** criminal activity related to the documentary evidence for which a warrant is requested unless the following procedure has been complied with...

SPECIAL MASTERS

- If **NO** special master is necessary but the documentary evidence is under the possession or control of lawyer, physician, psychotherapist, member of clergy I would consider including something like this in your warrant:
- Penal Code, Section 1524(c), provides, in part:

Notwithstanding subdivision (a) or (b), no search warrant shall issue for any documentary physician as suspected of evidence for of a special owner of the evidence of

evidence in the possession or under the control of any person who is a ... defined in Section 990 of the Evidence Code, ... and who is not reasonably engaging or having engaged in criminal activity related to the documentary which a warrant is requested unless the following procedure [appointment of a special master] has been complied with... Since the doctor is working for or is the medical office and is suspected of multiple sexual assault crimes involving suspected of possessing child pornography and the documents sought are their involvement in the criminal activity, a special master in this case is not required, and Your Affiant is not requesting the assistance of a special master.

READ YOUR WARRANTS

- We all cut and paste...make sure to read your warrants.
- Then follow-up by proof reading them!
- Are you asking to seize stolen property even though you have no information that stolen property is to be found? Or answering a phone if it rings when you have no reason to be answering the phone?
- Have you justified each and every item?
- Have you justified each and every item?
- What about when you are asking to search 17 cell phones and 4 computers and a home and car?
- Did you make sure that you justify each and every item?

REMOVAL AND OFF-SITE EXAMINATION

- Off-site examination must be separately requested and authorized.
- Justification may be based on volume of data, and complexity of forensic examination.
- Accuracy is best assured through examination in the lab.
- You must show removal is reasonable.
- You must search promptly and return materials that are not evidence.
- Consider the timeframes needed for off-site examination of seized computers.

PROTOCOLS - WHOSE DOING WHAT?

- Non-Peace Officer participants in the warrant service
 - Sometimes needed to execute the search
 - e.g., federal agents helping on a state-level search
- All non-peace officers must be separately authorized by the warrant
- State why the non-peace officer is needed and the role he or she will play.

SPECIAL REQUESTS IN WARRANT

- Photography and Videotaping
- Removal and Off-Site Examination
- Use of Civilians
- Non-disclosure Orders
- Special Master

PHOTOGRAPHY AND VIDEO TAPING

- Tell the court you want to do this and why!
- Photographing and videotaping can be a great way to capture the scene or capture what is on a computer or cellular phone before you have to turn it off to move it to download it.

SEARCH WARRANTS

Search warrants covering digital data may contain "some ambiguity... so long as law enforcement agents have done the best that could reasonably be expected under the circumstances, have acquired all the described facts which a reasonable investigation could be expected to cover, and have insured that all those facts were included in the warrant." (United States v. Urbahn (2d Cir. 2017) 858 F3d 71,100, quoting United States v. Gopin (2d Cir. 2013) 720 F3d 436, 446.)

SPECIFICITY

- Specificity has two aspects--particularity and over breadth.
 - Particularity is about details: the warrant must clearly describe what it seeks -- Not just "computers and media"
 - To be sufficiently particular under the Fourth Amendment, a warrant must, among other things, specify the items to be seized by their relation to designated crimes. (United States v. Urbahn (2d Cir. 2017) 858 F3d 71, 99.)
 - Breadth is about scope: the warrant cannot include items for which there is no probable cause.
 - Justify each piece of evidence and don't include ANYTHING in the warrant unless you've justified it in your affidavit.
- Generic classifications in a warrant are acceptable only when a more precise description is not possible.

SUBSCRIBER RECORDS

Subscriber Records: All information for the following mobile number(s):

- Subscriber information to include name, tax identification number (social security number or employer identification number).
- Physical address, mailing address, residential address, business address, e-mail addresses and any other address information.
- Credit information obtained or used by the company to grant account status.
- All numbers associated with account.
- Billing records.
- All payments to include method, date and time of payment, location (store name, address, and phone number or location where payment(s) were made), and copies of payment items.
- All authorized users on the associated account.
- All activation dates and termination date of each device associated with the account and above listed number(s).
- Types of service subscriber utilized (e.g., text, friends and family).
- Make, model and serial number associated with the above listed numbers including any and all equipment or sim card changes for the life of the account.
- All customer service and account notes.
- Any and all number changes prior to and after any of the numbers were activated.

EXAMPLE CELLULAR PHONE

- Manufacturer.
- Color.
- IMEI or Other Identifying Numbers.
- Phone number.
- Service provider.
- Anything unique?

EXAMPLE - HELD AT POLICE DEPARTMENT

For property held at the Shasta County Sheriff's Office, 300 Park Marina Circle, in the City of Redding, located in the County of Shasta, specifically within the High Tech Crimes Unit (H.T.C.U.) of the Major Crimes Unit (M.C.U.) described below.

EXAMPLE RESIDENCE

- Want to paint a picture...
- Street Address.
- Garage?
- Outbuildings?
- Color & type of exterior (including the roof).
- How is address displayed on residence?
- Which direction does front door face?
- Other characteristics that make location unique.
- Why not just include a picture!

EXIGENT CIRCUMSTANCES

- Exigent Circumstances Conduces; *Missouri v. McNeely*, 133 S. Ct. 1552 (2013)
- To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances.
- We apply this "finely tuned approach" to Fourth Amendment reasonableness in this context because the police action at issue lacks "the traditional justification that... a warrant... provides." (*Atwater v. Lago Vista*, 532 US 318, 347 (2001)). Absent that established justification, "the fact-specific nature of the reasonableness inquiry" (*Ohio v. Robinette*, 519 US 33, 39), demands that we evaluate each case of alleged exigency based "on its own facts and circumstances." (*Go-Bart Importing Co. v. United States*, 282 US 344, 357 (1931)).
- If you have time to call the DA... IT PROBABLY ISN'T EXIGENT!

EXIGENT CIRCUMSTANCES

- Exigent Circumstances; *Missouri v. McNeely*, 133 S. Ct. 1552 (2013)
- A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home. (*Michigan v. Fisher*, 558 US 45, 47-48 (2009)) (per curiam) (1976)).
- The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. To be arrested in the home makes not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant. In the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is present in terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.
- If there is probable cause to search and exigent circumstances; *Fyton v. New York*, 445 U.S. 573 (1980)

EXIGENT CIRCUMSTANCES

- An emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a subject, or destruction of evidence.

PLAINVIEW DURING SEARCH

- In general, an officer who stumbles upon evidence of a crime that is not the target of the search needs to stop and seek a SW.

PLAINVIEW DURING SEARCH

- If officer has lawful search warrant to search a computer or cellular phone for items relating to drug sales and locates child pornography and continues to search computer for both child pornography and drug sales...
 - What happens at a suppression motion for the child pornography?

PLAINVIEW

- If the items are in plain view; *Marion v. Macon*, 472 U.S. 463 (1985).
- Absent some action taken by government agents that can properly be classified as a "search" or a "seizure," the Fourth Amendment rules designed to safeguard First Amendment freedoms do not apply.
- The officer's action in entering the bookstore and examining the wares that were intentionally exposed to all who frequented the place of business did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment.
- And the subsequent purchase was not a Fourth Amendment seizure, since a seizure occurs when there is some meaningful interference with an individual's possessory interests in the property seized, and here respondent voluntarily transferred any possessory interest he may have had in the magazines to the purchaser upon the receipt of the funds.