

Task Force on Issuing Search Warrants

Meeting Agenda

Friday, July 23, 2021

1:00 p.m. to 3:00 p.m.

State Courts Building * 1501 West Washington * Conference Room 230* Phoenix, AZ

Conference Call Number: **8/77-853-5247**, Access Code: **966 7324 7383**

Item no. 1	Call to Order Introductory remarks	<i>Hon. Clint Bolick</i>
Item no. 2	Approval of the June 9, 2021 meeting minutes	<i>Justice Bolick</i>
Item no. 3	Presentation by the Education Services Division of the Administrative Office of the Courts	<i>Jeff Schrade, Director Paul Julien Matthew Estes</i>
Item no. 4	Discussion of search warrant application scenarios	<i>All</i>
Item no. 5	Continuing discussion of potential consensus items regarding adequate safeguards	<i>All</i>
Item no. 6	Roadmap <ul style="list-style-type: none">• Identification of items and issues for the fourth meeting• Next meeting date: To be determined	<i>All</i> <i>Justice Bolick</i>
Item no. 7	Call to the Public Adjourn	<i>Justice Bolick</i>

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Angela Pennington at (602) 452-3547. Please make requests as early as possible to allow time to arrange accommodations.

Task Force on Issuing Search Warrants
State Courts Building, Phoenix [virtual meeting]

Meeting Minutes: June 9, 2021

Members attending: Hon. Clint Bolick (Chair), Hon. Christopher Browning, Christina Cabanillas, Hon. Suzanne Cohen by her proxy Hon. Patti Starr, Chief Ken Cost, Hon. Jill Davis, Hon. Karl Eppich, Darrell Hill, Jerry Landau, Professor Sylvia Lett, Major George Manera, Armando Nava, Abril Ruiz Ortega, Sheriff David Rhodes, Professor Kevin Robinson, Primitivo Romero, Benjamin Taylor, Kent Volkmer. Hon. Melissa Zabor

Members absent: Anita Escobedo

Guests: John Thomas, Shawn Madsen, Liana Garcia, Elise Kulik, Brandon Macken, Yaegy Park, Marie Isaacson

AOC staff: Mark Meltzer, Angela Pennington

1. **Call to Order; introductory remarks from the Chair; approval of meeting minutes.** The Chair called the second, and first virtual, meeting of the Task Force on Issuing Search Warrants (“ISW”) to order at 1:01 p.m. The Chair welcomed Judge Patti Starr, presiding criminal judge in Maricopa County, appearing as proxy for Judge Cohen. The Chair also introduced David Rhodes, the Yavapai County Sheriff, who the Chief Justice appointed to ISW on May 26, 2021 by entry of Administrative Order No. 2021-80. The Chair reviewed materials in the meeting packet that are further described in sections (2) and (3) of these minutes. A supplement to the packet contained a report from Brandon Macken, Mr. Landau’s extern, regarding a ballot measure approved by voters last month in Pittsburgh, Pennsylvania. The Pittsburgh measure, among other things, precludes unannounced entries during the execution of search warrants. The Chair then directed members to draft minutes of the first ISW meeting on May 14. Members had no additions or corrections to the minutes.

Motion: A member moved to approve the May 14, 2021 meeting minutes. The motion received a second and it passed unanimously. **ISW 002**

2. **Consideration of locally available search warrant data.** The Chair invited Professor Lett, Chief Cost, and Commissioner Zabor to present their respective materials in the meeting packet.

Professor Lett had briefly referred to the September 13, 2014 *Arizona Daily Star* article during the May 14 ISW meeting. The article, which was written by a journalist who reviewed Tucson Police Department search warrants, noted an increase in the percentage of no-knock warrants served by the T.P.D. SWAT team, from 2% of all search warrants served during 2001 through 2004, to 75% of search warrants served

Task Force on Issuing Search Warrants
Draft minutes: 06.09.2021

during 2012 and 2013. Professor Lett cautioned that she did not have details concerning the journalist's methodology or whether the data had been verified.

A one-page summary of anecdotal information compiled by Chief Cost identified seven incidents between 2015 and 2021 where evidence of sex-related crimes was destroyed during the execution of knock-and-announce warrants. (Chief Cost also referred to these warrants as "surround and call.") It appears that most of the destroyed evidence was in electronic form, e.g., on cell phones or computers. A member asked whether the destroyed evidence might be available on a server or in the cloud. At least with destroyed phones, however, the devices at issue are frequently disposable or "burner" phones that lack network functionality. One member opined that given the number of sex offenses, the incidence of evidence destruction appeared to be comparatively low. Another member commented that drawing bright line rules concerning destruction of evidence might be impractical because actual situations are more nuanced. Members generally agreed to preserve the option of authorizing unannounced entry to prevent evidence destruction, but they might consider appropriate, generic requirements for issuing a no-knock warrant on this basis. Chief Cost noted that he had requested information concerning evidence destruction in only the limited category of sex offenses; he intends to continue gathering information involving evidence destruction during execution of knock-and-announce warrants in other case types.

Commissioner Zabor provided several years of Maricopa search warrant data and exemplar forms. Her e-warrant summary appeared to validate the members' general discussion during the May 14 meeting. Her summary showed that about 60% of DUI warrants, and about 33% of non-DUI warrants, were issued as nighttime warrants. In addition, 1.6% of the non-DUI warrants were issued as no-knock warrants. Members agreed that a warrant that permits an unannounced entry is not always executed in that manner. An officer member advised that executing a no-knock warrant involves a "game-time" decision, that is, the decision whether to proceed with a no-knock entry is made at the scene. Officers proceed without knocking only when not knocking or announcing is actually indicated. Another officer member advised that his unit recently went to a residence to execute a no-knock warrant but upon arrival, they found that the front door was partially open. Officers then made verbal contact with the occupant through the door opening, the occupant voluntarily exited the residence, and there was no need to forcibly enter. One officer member clarified that a breach-and-hold, which involves a forcible opening of a door without officers immediately entering into the residence, is considered a no-knock entry. A public member subsequently commented that when officers execute a no-knock warrant, they typically take additional safety precautions, such having an emergency medical vehicle on-site and parking marked police units in front of the residence to heighten the occupants' awareness of a police presence.

Task Force on Issuing Search Warrants
Draft minutes: 06.09.2021

The Maricopa forms included a request for expedited review and a cover sheet. The request for expedited review is completed by the requesting agency; the issuing magistrate completes the cover sheet. Commissioner Zabor observed that although a warrant application does not require a supervisor's signature, the expedited review form, which allows a request to go to the front of the court's queue, does require that signature. There is no checkbox on the expedited review form for a no-knock warrant, but members discussed the possibility of adding one. An alternative cover sheet displays a potential modification that would facilitate tracking of nighttime and no-knock data by adding checkboxes for these elements in the lower left margin of the form. A drawback of the Maricopa form is that it's utilized only in Maricopa County. A member observed that while A.R.S. § 13-3915(C) includes a warrant form, A.R.S. § 13-3918, which governs the return, does not prescribe a form. The member suggested that it might be advantageous to create a statewide form for a return, possibly adopted by an administrative order. The statewide return form could include checkboxes that would indicate whether the warrant was served at night or was served without knocking and announcing. Some warrants are issued yet not served, and those warrants don't generate a return, but that would not affect the ability to track data for warrants that are served. Commissioner Zabor and Judge Starr will follow up on potential form changes that could facilitate data collection.

3. **Discussion of potential consensus items.** Members then considered a list of proposed consensus items drafted by the Chair and staff. The 3-page list identifies potential features for requesting and issuing no-knock and nighttime search warrants. The list incorporates concepts that members discussed at the May 14 meeting; some but not all of the factors enumerated in HB 2751; and the recent Maryland legislation, which was included in the May 14 meeting packet. The Chair advised that items on which members have consensus will help determine whether ISW should recommend statutory amendments, rule amendments, or modifications to court policies or practices.

The draft consensus list contains five major headings: "generally" (items 1 through 4), "unannounced ('no-knock') entry" (items 5 through 9), "nighttime service" (items 10 and 11), "approval" (item 12), and "data" (item 13). Item 1 emphasizes the primary consideration of safety. Under item 2, a magistrate must weigh an application for a no-knock warrant to prevent destruction of evidence against safety considerations. Item 3 specifies that a magistrate has discretion to issue a no-knock or nighttime warrant, and would clarify that issuance is not mandatory. Item 4 requires the application to include "reliable, fact-specific information."

In the no-knock section, item 5 would require the application to include an explanation of the agency's investigative activities and "information the agency has gathered that specifically support[s] the request for a no-knock entry." Item 6 would require the application to address the identity and characteristics of the occupants of the place to be searched. The list of twelve factors in item 7 ("an application for a no-knock

Task Force on Issuing Search Warrants
Draft minutes: 06.09.2021

search warrant should address applicable safety factors”) is not exclusive. Item 8 expressly contains the “non-exclusive” qualification and says that “the magistrate’s decision to issue a no-knock warrant should be based on an overall showing of good and sufficient reasons.” This item would not require a magistrate to make factual findings about whether particular factors exist. Current Arizona statutes governing search warrants do not identify factors that merit the issuance of a no-knock warrant, and these factors would be useful for the issuing magistrate.

Item 9 provides that an application for a no-knock warrant based on destruction of evidence “should describe such evidence and explain why imminent destruction of the evidence is possible or likely absent an unannounced entry.” Item 10 would require an application for nighttime service to explain why daytime service would not be reasonable or feasible; item 11 proposes exempting DUI warrants from that requirement. Supervisor or command level approval of the application for a no-knock or nighttime warrant would be required under item 12. Item 13 would modify search warrant application forms to allow the tracking of data for no-knock and nighttime warrants. In light of the earlier discussion at today’s meeting, this item could include a reference to using search warrant returns for tracking the data.

A discussion ensued on individual items. Item 1 specifies that a magistrate’s primary consideration in issuing a no-knock or nighttime warrant is whether issuance “will enhance the safety of officers and civilians.” A member suggested that the word “enhance” was inapt, and after discussion, members changed it to “protect.” Item 1 and other items refer to a “no-knock” warrant. Members observed that the term “no-knock” is not used in Arizona statutes. (A.R.S. § 13-3915 refers to an “announced entry” and an “unannounced entry.” A.R.S. § 13-3916 requires “notice of the officer’s authority and purpose” at the place to be searched.) “No-knock,” however, is an informal term and in the vernacular, it means an “unannounced entry.” If ISW proposes statutory amendments, they should consider using the more formal term, but for ISW discussions, “no-knock” and “unannounced entry” have equivalent meanings.

A few of the proposed safety factors that a no-knock application should address (item 7) generated considerable discussion. The first such factor was 7(b): “weapons that the requesting agency reasonably believes are at the place to be searched.” On the one hand, when an occupant possesses a weapon, it creates a potential danger to officers and other occupants. On the other hand, because many Arizonans own guns, some members believed that the presence of a weapon should not be a per se safety factor. One member noted that Jose Guerena, a former Marine whose death during the execution of a no-knock warrant was described in the ISW resource materials and at the May 14 meeting, was presumably a law-abiding citizen, notwithstanding his ownership of a firearm. Members discussed whether qualifying this factor by including information concerning

Task Force on Issuing Search Warrants
Draft minutes: 06.09.2021

the number of weapons would be appropriate, but some believed that a homeowner who had multiple weapon could own them for legitimate reasons and that this alone should not implicate a safety concern. They also considered distinguishing the type of weapon, e.g., a pistol versus an automatic weapon, but members generally agreed that that distinction would not be dispositive. Even a single pistol can be used for a shootout, hostage taking, or to evade capture. A judge member proposed that whether the presence of firearms was a safety concern could be addressed by the officer who is applying for the warrant, and the magistrate would determine the weight given to the factor.

Factor 7(c) is “gang or group affiliations of the occupants.” One member contended that neither gang membership nor affiliation with a gang should, by themselves, serve as justification for an unannounced entry, and that “group affiliations” in particular was a nebulous term. Another member thought gang affiliation was a reasonable factor because gang activity is often violent. A member suggested that if factor 7(c) implied a connection between gangs and violence, then other factors – such as factor 7(d), “any history of violence of any occupant” – were sufficient. Some members, however, opined that factor 7(d) – a “history of violence” – was also vague. Like the discussion concerning firearms, members observed that the application of these factors would be specific to the occupants and would vary based on the individuals and the circumstances involved in an actual situation.

Members discussed item 8, quoted above, which provides that the factors are not exhaustive and that issuing a no-knock warrant should be based on “good and sufficient reasons.” One member characterized the factors as “guidance,” and cautioned against using the factors as a checklist. A judge member agreed with this comment and added that the factors should not be used as a “scorecard.” The judge member thought the factors were useful, that no factor was dispositive, and that a magistrate should review the totality of circumstances and exercise discretion when presented with a no-knock warrant application. A member asked that ISW consider the safety factors in conjunction with the “castle doctrine” (see, e.g., A.R.S. § 13-404 on justification.) An officer member responded that officers who execute these warrants are indeed mindful of the castle doctrine, and they presume that every household has a firearm. The member observed that officers take care to avoid any occupants being shot as a result of being startled by the officers’ presence. Moreover, officers are selective in applying for no-knock entries, and some agencies already have lists similar to the consensus list presented today. Another officer noted that the initial version of HB 2751, in addition to being introduced without prefatory law enforcement input, would have prohibited no-knock warrants in any situation, and that prohibition would have deprived law enforcement of a necessary albeit infrequently used tool.

Task Force on Issuing Search Warrants
Draft minutes: 06.09.2021

Item 9 concerned destruction of evidence. As noted earlier, a large percentage of DUI warrants require nighttime service, as do warrants requesting DNA samples or to affix a GPS tracking device. An application for nighttime service might be combined with a no-knock request, but usually it is not combined, and members should consider nighttime search warrant applications as an independent issue.

Members also discussed item 12, which would require an application for a no-knock entry or nighttime service to show that the application “has been approved by an attorney advisor, a command level officer, or the highest-level officer supervisor who is available, or indicate why such approval was not requested or obtained.” One member asked whether “attorney advisor” meant a prosecutor or an attorney advisor within a law enforcement agency. An officer member observed that execution of a search warrant is a dynamic police event, and although attorneys can provide legal guidance when officers apply for warrants, attorneys are not trained in police tactics. Search warrant execution tactics are the responsibility of the requesting officer. The officer member reminded members that it is the officer, rather than the attorney, who is responsible for the outcome if execution goes wrong, and therefore the officer believed that the attorney’s approval would be inappropriate and unnecessary.

Law enforcement members also disfavored this item because they considered it restrictive. An officer in a remote assignment might have difficulty reaching a supervisor, who can be a considerable distance away. This item, however, would permit the requesting officer to note circumstances of remoteness and distance in the application. Another member observed that magistrates would need training on which circumstances would excuse the supervisor approval requirement. Regardless, some members considered the requirement of a supervisor’s signature to be an artificial roadblock that lacked substantive significance. One member also suggested that “command level officer or the highest-level supervisor who is available” was vague. Another member proposed an alternative that would permit the magistrate to consider the absence of a supervisor’s signature in deciding whether to grant the request, although that alternative lacked support. The Chair requested that members be prepared to offer other phrasing options for this item at the next meeting.

4. **Roadmap.** The Chair anticipates presenting a revised list of consensus items at the next meeting that reflects today’s discussion. He also invited the members to submit additions or revisions to the list and agreed that modifications to the initial list are warranted. He would like to review any additional data that might be available at the next meeting. He also requested a presentation from the AOC Education Services Division on judicial training regarding search warrants, including training that’s offered at new judge orientation and during subsequent educational events. He noted that

Task Force on Issuing Search Warrants
Draft minutes: 06.09.2021

judicial training is essential inasmuch as current statutes provide only minimal guidance regarding the circumstances that merit issuance of no-knock and nighttime warrants.

The Chair set the next meeting for Friday, July 23, 2021, from 1:00 p.m. to 3:00 p.m. The next meeting will be virtual.

5. **Call to the Public; Adjourn.** The Chair made a call to the public. Mr. Shawn Madsen on behalf of the Fraternal Order of Police responded to the call and addressed the members.

The meeting adjourned at 3:01 p.m.

SEARCH WARRANTS

**GENERAL JURISDICTION
NEW JUDGE ORIENTATION
AUGUST 31, 2020**

COMMISSIONER JANE MCLAUGHLIN

WARRANTS

A.R.S. § 13-3911 et seq. and A.R.S. § 13-4291 et seq.:

A search warrant is a court order authorizing police to search a **specific place** for **specific things** to prove a **specific crime**, *upon a showing of probable cause.*

Jurisdiction: **Statewide.***

See State v. Reed, 120 Ariz. 58, 61-62 (Ct. App. 1978).

* Many large corporations (e.g., phone and internet service companies) and banks will accept and comply with warrants issued from any state, even if their subpoena compliance departments are located elsewhere, and you will often receive such requests from law enforcement. Arizona law supports this. *See Helge v. Druke, 136 Ariz. 434, 437, 666 P.2d 534, 537 (App. 1983).*

WARRANT PROCESS

Initiated by:

Affiant (usually a Peace Officer), who submits **Application and Affidavit** with Proposed Form of Warrant to Judicial Officer/ Magistrate

Affidavit Contents:

Specify crimes being investigated, suspects (if known), places to be searched, items or information to be seized as evidence, or people to be electronically tracked, followed by a **Probable Cause Statement**

PC Statement:

Affiant's training and experience, and a narrative description of information and evidence submitted in support of PC (may include hearsay)

Sometimes:

- Reliability info when informant(s) used
- Officer's opinions or conclusions based on training & experience
- Opinions/conclusions from another expert (accountant, medical examiner, etc.)

Timing and Execution – Standard Warrants

A.R.S. § 13-3918

- Five calendar days to execute
 - Court may extend one time for five calendar days
- Three court business days to return
 - Contents of return: **A.R.S. § 13-3921**

Execution

- Peace Officer must execute. **A.R.S. § 13-3916(A)**
- Officer leaves Warrant
- Officer leaves **receipt** for what is taken **A.R.S. § 13-3919**
 - **A.R.S. § 13-3919(B)**: Court can **delay receipt** (to searched party) for a “reasonable period” with extensions, upon specific findings (see **recently amended A.R.S. § 13-3919**)
- Officer is responsible for what is taken. **A.R.S. § 13-3920**

Probable Cause: What Is It? The *Gates* “Fair Probability” Standard

“The task of the issuing magistrate is simply to make a **practical, common-sense decision** whether, given all the circumstances set forth in the affidavit before him, 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.**”

Illinois v. Gates, 462 U.S. 213, 238 (1983).; see also *State v. Sisco*, 373 P.3d 549, 552 (Ariz. 2016).

Probable Cause: What Is It? The *Gates* “Fair Probability” Standard

The existence of probable cause is determined using a **totality of the circumstances** analysis.

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

Probable cause, a.k.a. a “fair probability,...[is] **not certainty or even a preponderance of the evidence.**”

U.S. v. Gourde, 440 F.3d 1065, 1069 (9th Cir. 2006) (en banc), citing *Gates*; see also *State v. Sisco*, 373 P.3d 549, 552 (Ariz. 2016).

COMMON WARRANT ISSUES

- The rules of evidence generally do not apply to the issuance of search warrants. *Brinegar v. United States*, 338 U.S. 160, 174 n.12 (1949); *State v. Adamson*, 136 Ariz. 250, 258, cert. denied 464 U.S. 865 (Ariz. 1983), (“[e]vidence supporting a finding of probable cause need not meet the standard for admissibility at trial”).
- Expert opinions may be presented in a search warrant affidavit and may provide valuable context for conducting the “fair probability” inquiry. *See Gourde*, 440 F.3d at 1073.
- Anticipatory warrants may be granted if properly supported by probable cause. *Mehrens v. State*, 138 Ariz. 458, 461 (Ct.App. 1983) (“when it can be shown that the right to search will exist within a reasonable time in the future”).

Common Warrant Issues continued

- **Staleness**: PC must be timely

The most convincing proof that the property was in the possession of the person or upon the premises at some remote time in the past will not justify a present invasion of privacy....” *U.S. v. Fries*, 781 F.3d 1137, 1150 (9th Cir. (Ariz.) 2015) (citations omitted).



Common Warrant Issues

continued

- **Staleness Can Be Overcome:**
 - **Ongoing criminal activity:** “However, [i]nformation underlying a warrant is not stale if there is sufficient basis to believe, based on a **continuing pattern or other good reasons**, that the items to be seized are still on the premises....” *Fries* at 115o.
 - **The nature of the activity:** (“[t]he question of staleness depends more on the nature of the activity than on the number of days that have elapsed since the factual information was gathered”). *State v. Hale*, 131 Ariz. 444, 446 (1982).
 - **Examples:** *U.S. v. Lacy*, 119 F.3d 742, 745-46 (9th Cir. 1997) (child pornography); *U.S. v. Dozier*, 844 F.2d 701, 707 (9th Cir. 1988) (marijuana cultivation); *U.S. v. Gann*, 732 F.2d 714, 722 (9th Cir. 1984 (bank robbers’ equipment and clothing)).

Reviewing Affidavits

Some Issues to Be Alert for:

- **Missing connections between the suspect and the place/thing to be searched (a.k.a. forgetting the Four Corners Doctrine).**

[E.g., Police want to search a phone. The narrative describes their arrest of a subject with drugs in his car; no mention of where they found the telephone, though it appears to be the one seized at arrest. Affidavit should say it explicitly.]

- **Conclusory factual statements with insufficient support**

["The target location is the suspect's residence." "Investigative research has revealed that the listed Facebook account belongs to the suspect."]

- **No informant reliability information (or only a conclusory statement) when PC materially depends on informant's info**

[Need information regarding reliability and/or the source of their knowledge, and any corroboration of information by police. ***See Illinois v. Gates, 462 U.S. 213, 241-46 (1983)*** for thorough guidance; informants come in many shapes and sizes, as does corroboration.]

Reviewing Affidavits continued

Some Issues to Be Alert for:

- **Overbreadth** (a.k.a. Insufficient Particularity)

- A particular description of items to be seized limits the officers' discretion as to what they may search and take, to protect against the evil of "general warrants" prohibited by the 4th Amendment. *Marron v. U.S.*, 275 U.S. 192, 195-97 (1927). Tying items to be seized to the specific crime can be sufficient particularity (e.g., photos that tend to prove the crime, not "all photos").
- The scope of a warrant is always limited by the probable cause on which the warrant is based. *United States v. Smith*, 424 F.3d 992, 1005 (9th Cir. 2005).
- Cross out (or require deletion of) "catch-all" language, unless sufficiently circumscribed by the PC given or nature of the offense. (Ex: "Evidence of **any other crimes** which may have been committed by this suspect.")

Reviewing Affidavits continued

Examples of Overbroad Scope:

- No time frames for records to be seized

[E.g., Asking to seize all emails and private messages in a Facebook account, potentially going back for years, to prove one theft that occurred 30 days earlier.]

- Insufficient limits on items to be seized

[E.g., Asking to seize all transaction records, financial documents, order records, banking records and U.S. currency from a “dollar store” selling one rack of Super Bowl t-shirts during the previous 60 days.]

- Items listed go beyond the scope of the crime(s) described

[E.g., Including search of all cell phones and computers based on finding two small marijuana plants growing in a closet and some baggies during an unrelated call for service, with no other “indicia of sale” described.]

Reviewing Affidavits continued

So **what do you do** when presented with an insufficient affidavit?

Some options:

1. You can **deny** their application without further explanation.
2. You can **tell them to resubmit it** with the missing information or with whatever additional PC they have, but failed to include.

Reviewing Affidavits continued

3. You may choose to **make small edits yourself** (by interlineation and initialing).
4. You can tell them you might consider granting it as to all locations/items/etc. if additional investigation were to result in better (or fresher) PC, but that for now, you will **limit it** as to certain locations, items, time-frames, etc.
5. You can tell them it is “**declined as to form,**” if it is unreasonably long and indigestible (and require them to resubmit with summaries, headings, topic paragraphs, etc.)

Reviewing Forms of Warrants

- If it calls for nighttime execution (between 10pm and 6:30am), did the affidavit provide “good cause” under A.R.S. § 13-3917?

See State v. Adamson, 136 Ariz. 250, 665 P.2d 972, cert. denied 464 U.S. 865 (1983) (if the facts “reasonably support the inference that the interests of justice are best served by the authorization of a nighttime search”).

See also State v. Foncette, 356 P.3d 328, 333 (Ariz. Ct. App. 2015) (absent a constitutional violation, suppression is not a remedy for an improper night search).

Reviewing Forms of Warrants continued

- If it calls for a no-knock entry, did the affidavit provide a “**reasonable showing**” under A.R.S. § 13-3915(B) of potential danger or possible destruction of evidence?

See Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (adopting a reasonable suspicion standard that knocking “would be dangerous or futile, or that it would inhibit the effective investigation of the crime”).

Reviewing Forms of Warrants continued

- Remember it's their Affidavit, but it's **the Court's warrant**, and you decide what goes in it (or doesn't), in compliance with **A.R.S. § 13-3911 *et seq.*** If you want changes to the proposed form of warrant, the affiant must make them and resubmit it.
- **A.R.S. § 13-3915(C)** contains simple form language that must be “substantially” included in warrants. That language is a starting point. You may add to it as necessary for the situation at hand using common sense and legal skills.

NEW (ISH) LAWS !

ARIZONA HAS (FAIRLY) NEW
SEARCH WARRANT LAWS:

A.R.S. §13-4291 et seq.,

CREATING THE
“TRACKING DEVICE SEARCH WARRANT”
AND THE “CELL SITE SIMULATOR DEVICE
SEARCH WARRANT.”

Effective 8-9-17



THREE COMMON KINDS:

1. **Vehicle (GPS) or Item** tracking: police attach a device on or in a vehicle (or other physical non-phone item) which records and/or transmits location information.
2. **Telephone** tracking of a **known phone number**: can be done **either** (a) through the **telephone company** (called “**Pinging**”) or (b) by the **police** using their own equipment (called a “Cell Site Simulator,” “SICS,” “**Stingray**,” etc.).
3. **Canvassing the area around a person** in several locations to discover **unknown** telephone numbers in the target’s possession (using the police’s own equipment, called a “Cell Site Simulator,” “SICS,” “**Stingray**,” etc.).

Electronic Tracking





Electronic Tracking continued

1. VEHICLE (GPS) or non-phone ITEM tracking:

ALWAYS requires a **SEARCH WARRANT**, because of the physical intrusion into a suspect's property.

See United States v. Jones, 132 S. Ct. 945 (2012), which did not reach the many other privacy issues raised by electronic tracking.

All GPS warrants for vehicles and other non-phone items should be issued in accordance with Arizona's "new" law:

A.R.S. §13-4293

as **"Tracking Device Search Warrants"**

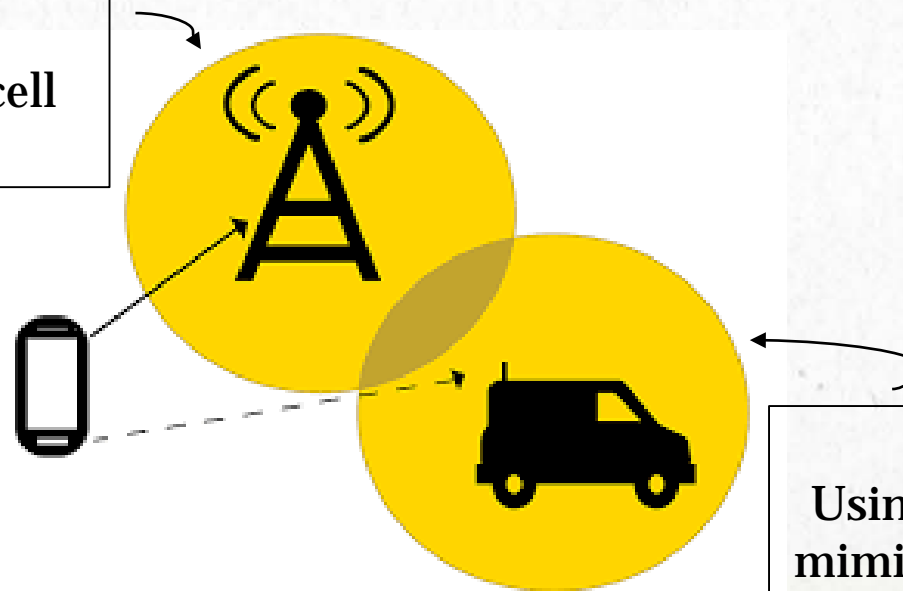
Electronic Tracking continued



2. TELEPHONE tracking by (a) “**Pinging**” OR (b) “**Stingray**” of a KNOWN phone number:

PINGING:

Using the PHONE COMPANY’s cell towers to locate a cell phone



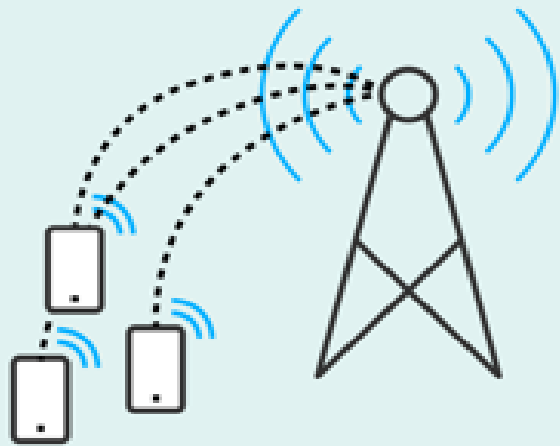
STINGRAY:

Using POLICE-OWNED equipment to mimic a cell tower to locate a cell phone

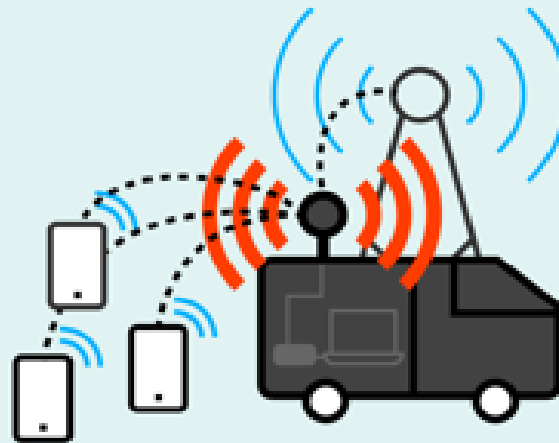
2.

WHAT IS A “STINGRAY” OR CELL SITE SIMULATOR?

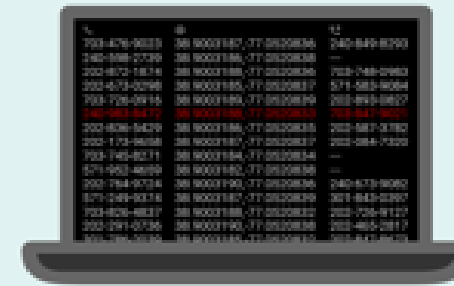
HOW CELL SITE SIMULATORS WORK



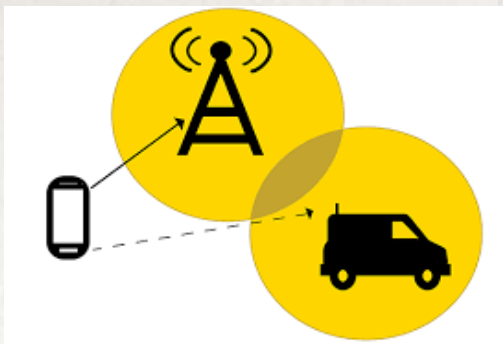
Cellphones look for closest cell tower, even when not in use.



A Cell Site Simulator sends out its own signals, mimicking a normal cell tower, and force all phones nearby to connect to it.



After collecting the data, a Cell Site Simulator passes it along to the actual cell tower. Police then store intercepted data and pinpoint cell phones of interest.



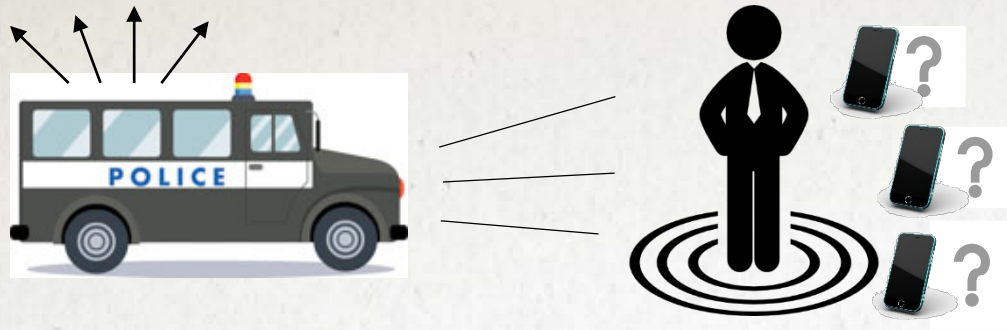
2. **Telephone tracking by (a) “Pinging” or (b) “Stingray” of a KNOWN phone number may be requested either as a:**

- a. **“Tracking Device Search Warrant”** under Arizona’s new law, **A.R.S. § 13-4293**, or
- b. **“Hybrid Order”** using both **A.R.S. § 13-3017** and **18 U.S.C. § 2703(d)**, with a showing and finding of probable cause.

THESE ARE NOT RECOMMENDED!!!

The rationale behind the *Carpenter v. U.S.* decision casts doubt on the validity of “hybrid orders,” though it did not directly address them. See *Carpenter v. U.S.*, 585 U.S. --, 138 S.Ct. 2206 (Jun. 22, 2018). Similarly, *State v. Conner*, -- P.3d --, 2020 WL 3422519 (Ariz. App. 6/26/2020), casts very serious doubt on their validity (affirming denial of a motion to suppress based on the hybrid order “substantially compl[ying] with the requirements of a search warrant”).

Electronic Tracking continued



3. Canvassing the area around a person in several locations to **discover UNKNOWN phone numbers** in the target's possession (using the police's own equipment, called a "Cell Site Simulator," "SICS," "**Stingray**," etc.) can be requested as either:

- a. "Cell Site Simulator Device Search Warrant," under **Arizona's new law, A.R.S. §13-4294** , or
- b. "Hybrid Order" using both A.R.S. § 13-3017 and 18 U.S.C. § 2703(d), with a showing and finding of probable cause.

THESE ARE NOT RECOMMENDED!!!

SEE THE PREVIOUS SLIDE FOR THE REASONS WHY.

Timing and Execution of Tracking Warrants

A.R.S. § 13-4293 and 13-4294

- Tracking permitted for up to 60 days at a time; extensions (of up to 60 days at a time) may be granted with a new affidavit and warrant
- Police have ten calendar days to initiate tracking
 - Court may extend one time for ten calendar days
- Return to the court is due within three court business days after authorized period ends

Timing and Execution of Tracking Warrants continued

- Police must provide a copy of the warrant (notice) to the person who was tracked by serving a copy on them within 90 days after use of the device ends (may be delayed for a “reasonable period” with extensions, upon specific findings, under **A.R.S. § 13-3919B**).
- “Non-target data” gathered with a SICS device must be destroyed within 60 days after the return to the court (unless a court orders it to be preserved). *See A.R.S. § 13-4294(H) and (I).*

Public Records

- **A.R.S. § 13-3918:** Warrant stays sealed until the return is made, then becomes public record unless time is delayed by the court for “good cause”
- **May remain or be sealed upon court order**
 - Frequently sealed until remaining target(s) arrested
 - Court can seal for a longer period in its discretion for, e.g., protection of informants, victim information, juvenile identifying information or to protect an ongoing investigation (i.e., “good cause”)

Contravention

A.R.S. § 13-3922

- Civil action by owner to get seized property back
- Action is precluded if forfeiture action filed
- May order return of property to its owner if property seized was not listed on warrant or if no probable cause to seize property at issue, and property is not contraband

Suppression Checkpoints

- **Standing:** Does defendant have an expectation of privacy in place searched or item/information taken?
- Did warrant contain the **statutory requirements**?
- Did warrant **include the item or place** at issue?
- Was there **probable cause**?



Suppression Checkpoints continued

- **Burden of Proof is on the defendant**, unless warrant did not include item or place at issue
- If warrant was erroneous, does the State have a **good-faith exception** argument that will save it? *See* A.R.S. § 13-3925.
- Remember: (1) Warrants are **not** required to be perfect; and (2) **Severance** of erroneous parts is permitted if remainder will stand without them.

Other Types Of Orders Police Will Ask You To Issue

Personal Characteristics Order (PCO)

A.R.S. § 13-3905

- Court Order authorizing police to detain a person for up to three hours to take physical identifying evidence in a felony investigation
- Showing is less than probable cause (“reasonable cause” to believe felony was committed; the evidence “may contribute” to identifying the perpetrator; the evidence is not already available through affiant’s agency or DPS)
 - Requires an application under oath; see statute for specifics of what the application and order must contain. Most agencies have good forms.
- Do not use for blood draws (need a search warrant to “invade” a person’s body, even though the PCO statute refers to taking blood)

Pen Register/Trap and Trace Order (“Pen & Trap”)

A.R.S. § 13-3017

- Court Order permitting police to obtain incoming and outgoing phone numbers from a target phone (or IP address information for email or Facebook accounts, e.g.) as they occur (live).
- Showing is much less than probable cause (only a “certification” that information likely to be obtained is relevant to an ongoing investigation).
 - Neither a sworn affidavit nor any specific factual statement are required by law, but a basic statement of facts is customarily provided by police as part of their applications, and you may insist on it if you choose.

A.R.S. § 13-3017

- Jurisdictions are still split on whether the inclusion of “live” (prospective/ future) cell tower (or IP address) information constitutes electronic tracking.
- If you believe it does, then you may require police to resubmit their Pen & Trap request as a “Tracking Device Search Warrant” or “Hybrid Order” (not recommended) as described above. If you believe it does not, you could authorize it under A.R.S. § 13-3017, as there is still no *binding* precedent prohibiting this.
- The *Carpenter v. U.S.* rationale suggests the inclusion of “live” (prospective/future) cell tower (or IP address) information *is* also tracking, though its holding was expressly limited to historical cell site data. See *Carpenter* 138 S.Ct. at 2200. The requirement of a warrant is also supported by the recent decision in *State v. Conner*, -- P.3d --, 2020 WL 3422519 (Ariz. App. 6/26/2020).

2703(d) Order (Stored Communications Data)

18 U.S.C. § 2703(d)

- Court Order issued under **federal** law for stored **telephone and internet records** (subscriber, billing and call records, cloud storage data, etc.)
- Showing is less than probable cause (**specific and articulable facts** establishing **reasonable grounds** to believe records/info are **relevant & material** to ongoing investigation). A sworn affidavit is **not** required, but is typically provided by police as part of their application.
- **NOT VALID FOR JUST ANY STORED ELECTRONIC RECORDS** (e.g., bank or DHS marijuana card records), **ONLY** for records stored by an “electronic communication” or “remote computing” service provider, which are defined terms, which do not cover banks, DHS, accounting firms, etc.

2703(d) Order continued

18 U.S.C. § 2703(d)

- Do not use for content of texts, emails and voice mails (the words of the messages); the statutes require a search warrant for the **content** of stored communications (rather than just data/metadata) unless the police notify the target. See 18 USC § 2703(a) & (b) and A.R.S. § 13-3016(B)(1).
- Do not use for historical Cell Site Location Information (“CSLI”): This is the exact holding of the *Carpenter* case. If the order includes historical CSLI, cross it out before issuing, or require resubmission as a search warrant. See *Carpenter v. U.S.*, 585 U.S. --, 138 S.Ct. 2206 (Jun. 22, 2018).
- A 2703(d) Order is NOT RECOMMENDED for “live” (prospective/future) Cell Site Location Information (“CSLI”) either: Both *Carpenter*, *supra*, and the new *Conner* case strongly indicate that a search warrant is required. See *State v. Conner*, -- P.3d --, 2020 WL 3422519 (Ariz. App. 6/26/2020).

18 U.S.C. § 2703(d)

- The Arizona Constitution has been held to require a warrant to obtain subscriber information and IP addresses (even without CSLI included). *Despite federal case law permitting it, Div. 2 of the Arizona Court of Appeals held last year that this information requires a warrant. See **State v. Mixton, 247 Ariz. 212, 447 P.3d 829 (Ariz.App. 2019)**. Mixton involved an administrative subpoena, but the same rationale would apply to a 2703(d) Order. Review was granted by the Arizona Supreme Court in this case on November 19, 2019.*

“Tower Dump” Search Warrants

State and federal police agencies have been using new approaches to continue seeking “tower dumps” in the post-*Carpenter* era.

- A “**Tower Dump**” was a 2703(d) Order for disclosure of all numbers hitting (being located within the ambit of) cellular tower(s) during a certain time frame within a certain geographic area, plus subscriber records for each cell phone number identified this way.
- A new form of warrant calls for a 2-step “anonymized” process, sometimes called a “**Geofence Warrant**.” In an initial (first) warrant, the service provider is required to generate an anonymized list of phones hitting the applicable cell towers that meet certain limited time and geographical criteria. Police may then obtain actual phone numbers from the service provider but only for the purpose of applying for subsequent (2nd) warrants to obtain the historical CSLI as to each phone identified this way (upon a showing of probable cause as to that phone).

Electronic Tracking is Confusing

Police have an enormous variety of nicknames, jargon and descriptive terms for electronic tracking warrants and orders, and for the equipment and methods they are seeking to use. Technology is also changing and being invented faster than the law can keep up.

If (when) you are not sure what the police are asking permission to do in a given order/warrant, call the affiant and ask, so you can be sure that sufficient material information is included in the affidavit, and that you apply the right (or most closely applicable) statutes and evidentiary standards.

Questions?

SEARCH AND SEIZURE & CONFESSIONS

Honorable Craig Jennings
Avondale City Court

Christina M. Cabanillas
Assistant U.S. Attorney

Materials

- Participant Study Guide
- *Search & Seizure Practice Manual*
- Arizona Judicial Conference outlines
- For scripts, see the LJ Benchbook
- Order of presentation will follow Participant Study Guide

Lesson Preview

Stops / Arrests

Confessions / Voluntariness

Search Warrants

Warrantless Searches

- The two of us will take turns covering particular topics or information
- Scenarios are included
- We'll need to move swiftly sometimes to ensure we cover all topics, but feel free to ask q's as we go

The Fourth Amendment to the U.S. Constitution guarantees:

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.

Arizona Constitution, Article 2, Section 8:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

(Litigants relying on this provision must do so expressly, and Arizona courts generally have declined to find that greater protections exist under this provision than the Fourth Amendment.)

Some preliminary considerations

- Fourth Amendment applies to state actors, not private citizens
- An action must be justified at the time, not based on what officers discover later
- Collective knowledge of officers can be considered
- Objective, not subjective, test

Take a guess...

(We won't be discussing in groups)

What information do you think you might need to ensure Fourth Amendment has been complied with:

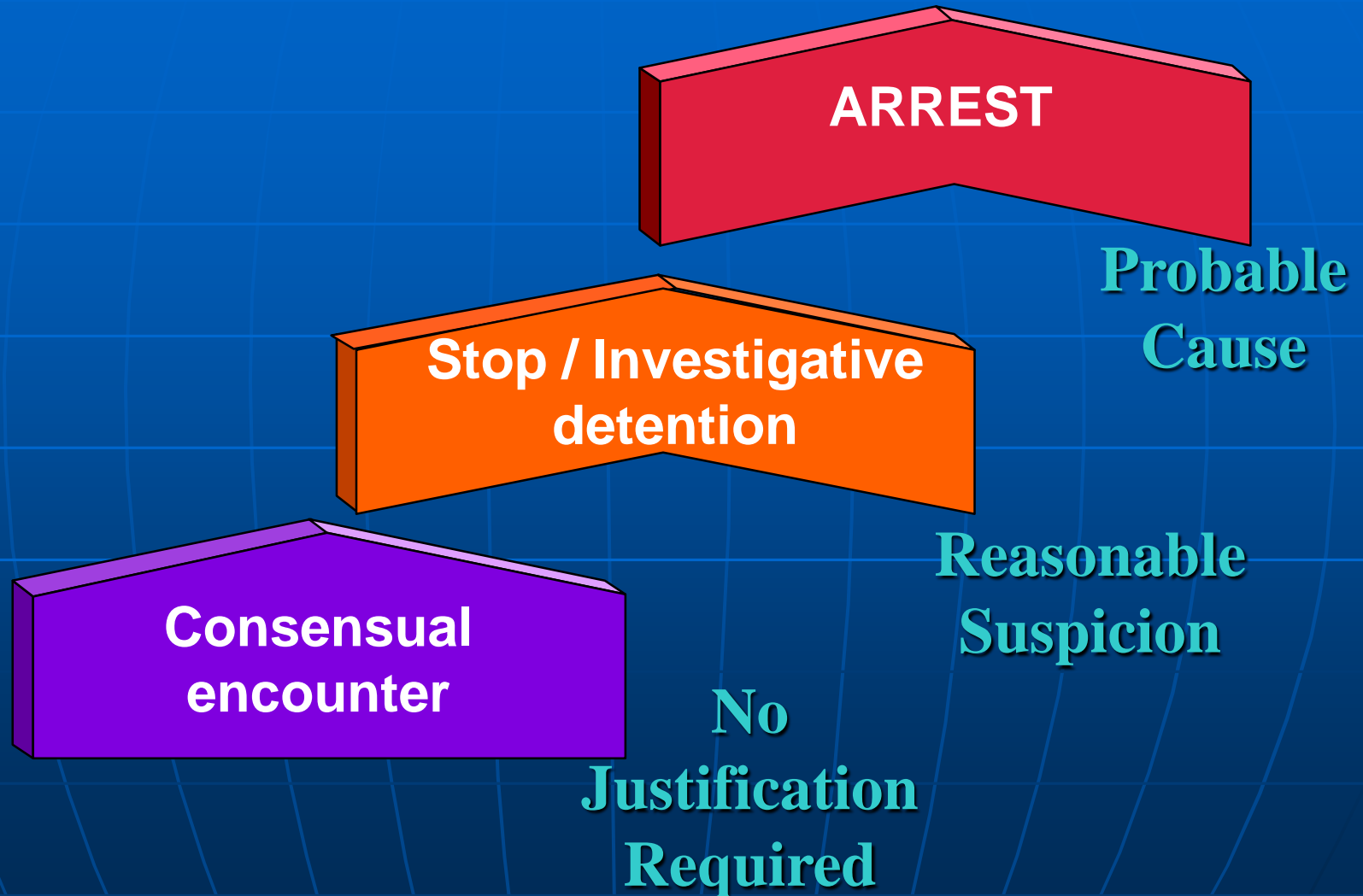
1. when presented with a request for a search warrant?
2. when the defense is arguing that an unlawful search or seizure occurred?

Judge's Responsibilities (p. 3)

- Neutral, objective reviewer
- Determining whether to authorize arrest warrants and search warrants
- Determining whether to grant or deny motions to suppress evidence gathered as result of:
 - Stop or Arrest
 - Confession
 - Search or Arrest Warrant
 - Warrantless Search

Consensual Encounters, Stops, and Arrests

Escalating Levels of Restraint (p. 5)



You make the call...

Is this a stop?

As Bill enters a Circle K, a police officer approaches him and asks: “Where were you before coming to this store?”

Is this a stop if Bill stops to talk to the officer?

No – it’s a consensual encounter

If Bill ignores the officer and goes into the store, does the officer now have the right to stop Bill without reasonable suspicion?

Consensual Encounter (p. 6)

- No justification necessary
- Officer may always ask someone for voluntary cooperation
- No “show of authority” is permitted (i.e. “We need to talk to you” or grabbing arm)
- The test is whether a “reasonable person” would feel free to leave
- If person declines and walks away, no stop or detention is permitted unless officer has reasonable suspicion
- Unprovoked flight is different (Wardlow)

You make the call....

Is this a stop?

A police officer notices stolen license plates on Jack's car. He approaches Jack as he is leaving his car and asks, "Wait! Is this car yours? Can you come to the police station to answer some questions?"

Jack gets nervous, and stops to talk to the officer. Is this a stop?

What if Jack keeps walking? Can officer stop?

Investigatory Stop / Detention (p. 7)

- Lawful if police have “reasonable and articulable suspicion” that person is involved in criminal activity
- Or if there is reasonable suspicion person committed a traffic violation - see A.R.S. 13-3883(B)
- Totality of circumstances (Arvizu)
- May detain *only* as long as reasonably necessary to confirm or dispel suspicion
- *Terry* “stop and frisk” permitted if fear for safety (see Frisk section, pp. 47-48)
- Anonymous tips and face-to-face tips
- Officers must be careful not to convert a detention into an arrest (“de facto” arrest) if there is no probable cause. Consider totality, i.e., length of time, restraints, *Miranda* warnings, transported, etc.

Arrest (p. 8)

- Police must have “probable cause”:
 - reasonable person would believe
 - that a criminal offense has been committed
 - and that the suspect *probably* committed it
(The test is not a “free to leave” test)
- If arrest is justified:
 - subject may be taken into custody
 - reasonable force allowed to effect arrest
 - search incident to arrest
 - issuance of criminal charges

You make the call... (pp. 8-9)

When would you permit an investigatory detention? Don't read ahead – Consider each fact as it comes.

When would you permit an arrest?

Remember: The law permits an officer to investigate something that is objectively suspicious, even if there could be an innocent explanation

Reasonable Person Test

Objective versus Subjective (pp. 9-10)

SUBJECTIVE

Perspective of one who is involved in the incident (i.e. suspect or officer)

- The "reasonable person" is society's collective common sense.

OBJECTIVE

Neutral, detached analysis of facts by an outside observer

"reasonable person"

You make the call... (p. 11)

Is this a seizure?

If so, what kind?

- **Consensual stop**
- **Investigatory detention**
- **Arrest**

Motion Procedure (p. 12)

- Motion to suppress filed – e.g., illegal arrest
- Judge sets evidentiary hearing
- At hearing (see Hyde for procedure)
 - Defense generally has burden of going forward initially
 - Warrantless searches – State has burden
 - Searches WITH warrant
 - Defense has burden of “overcoming presumption of regularity”
 - If not, motion denied, hearing is over
 - If so, State has burden to prove evidence was lawfully gathered
- Judge decides by preponderance of evidence whether evidence was obtained lawfully
- If defendant testifies at hearing, his testimony is only admissible at trial to impeach if he testifies

Exclusionary Rule (pp. 12, 19)

- If evidence obtained as a result of an unlawful stop or arrest, it is generally excluded as "fruit of the poisonous tree" (p. 12)
- Sometimes evidence not excluded if purpose of rule would not be served (Booker, Hudson, Herring) (p. 19). Evidence is not excluded if would have been inevitably discovered (See State v. Rojers) (inventory search exception) *See also Segura v. U.S.* (p. 49) (warrant obtained independent of illegal home entry)
- Some aspects discussed more later

Scenarios 1 & 2:

Probable Cause (pp. 14-18)

Read each scenario.

How would you rule on the motions?

Consider:

- 1) at what point you would find that there was a stop or arrest;
- 2) whether the correct level of justification existed
- 3) whether any evidence should be suppressed



Step-by-step Analysis of Stops/Arrests

■ Did a stop occur?

- Would a reasonable person have believed he was free to leave? (If so, it's consensual encounter. If not, it's a stop.)

■ If a stop occurred, was it supported by reasonable suspicion?

■ Did an arrest occur?

- Would a reasonable person have believed he was being arrested?

■ If an arrest occurred, was there probable cause to support it?

- Would a reasonable person have suspected that the arrestee was probably involved in criminal activity?

If there was an illegal stop or search....(p. 19)

- Was the evidence derived from the illegality? (i.e. fruit of poisonous tree)
Is there dissipation of taint?
- If evidence was derived from the illegal act, does the exclusionary rule apply? (Is there inevitable discovery, an independent source, or is this a case where the purposes of the exclusionary rule are not served?)

Confessions (p. 19)

Miranda & Voluntariness (p.19)

- Generally, there are two main considerations:

1) Does the statement comply with *Miranda v. Arizona*?

2) Was it voluntary (not the product of coercion)?

Sometimes there is a third assessment:

3) Was the Sixth Amendment violated?

Miranda Rule (p. 20)

Miranda v. Arizona, 384 U.S. 436, 444-445 (1966)

- 1) Miranda warnings are required when a person is subject to **custodial interrogation**
- 2) Miranda warnings – Before custodial interrogation, suspect must be informed:
 - He has the right to remain silent;
 - Any statement he makes can be used against him in court;
 - He has the right to consult with lawyer and to have the lawyer with him during questioning; AND
 - If he cannot afford to hire lawyer, one will be appointed to represent him free of charge

Important to understand the terms

CUSTODY?

Custody exists when a person is formally taken into custody or a reasonable person would believe he was being arrested. The totality of circumstances are considered objectively. Custody is more than an investigative detention; consider factors that may indicate arrest.

INTERROGATION?

Police do something (words or actions) that is reasonably likely to elicit an incriminating statement; also objective test

---Remember that a suspect must be in custody AND being interrogated before *Miranda* warnings are required . Thus, if a person is in custody but is not being interrogated, or he is being interrogated but is not in custody, no warnings are required.

-- Forget TV shows.

-- Some questions – p. 22

Exceptions to *Miranda* (p. 22)

- Non-testimonial evidence (“the glove”)
- Spontaneous statements (2 examples)
- Booking questions
- Public safety questions
- Undercover officers with jail inmate
- One more – probation and parole officers
- Only suppress in criminal proceeding (so not probation revocation or deport)

Waivers (p. 23)

- Knowing & Intelligent and Voluntary
- State has BOP to prove adequacy of waiver
- Suspect can waive expressly (“I will talk to you”) or impliedly (answering questions after receiving warnings)
- Consider language issues, suspect’s physical condition, environment, prior law enforcement contacts, etc.

Invoking Rights (p. 24)

- Clear and unambiguous – questioning stops
- **Right to remain silent**
 - “I don’t want to talk”
 - Officers **can** re-initiate w/ fresh Miranda & waiver
- **Right to counsel**
 - “I want a lawyer”
 - Officers **can’t** re-initiate, unless def is released and they wait 14 days (and get Miranda waiver)
- Need to be specific about which right is invoked because different re-initiation rules apply for officer questioning
- **Defendant can always re-initiate**
 - Compare “Can I have a drink” (no re-initiation) with “what’s going to happen to me now?” (yes)

Voluntariness (Due Process)

(p. 25)

- Even if a confession complies with *Miranda*, it is only admissible if made **voluntarily**, i.e., without police coercion
- Confessions are **presumed** to have been made involuntarily
- **State** must prove voluntariness of confession by preponderance of evidence

Voluntariness

- **The test:**
 - Under the **totality of the circumstances**, was the statement the product of free and rational choice?
- **Factors to weigh:**
 - Force
 - Restraint
 - Lack of physical comfort (sleep, food, injuries)
 - Age
 - Promises / threats / verbal coercion
 - Custodial interrogation / *Miranda* rights
- **Examples... (p. 25)**

Sixth Amendment Right to Counsel

- Statement cannot be a product of Sixth Amendment right to counsel violation
- Sixth Amendment right to counsel generally attaches at adversary criminal proceedings
- If suspect **has invoked** Miranda right to counsel, officers **cannot** interrogate him about any offense
- If defendant has not invoked Miranda right to counsel, but counsel has been appointed under **Sixth Amendment**, officers may ask him about an offense other than the one for which counsel has been appointed. Officers may also ask him about the charged offense after Sixth Amendment right to counsel attaches, if defendant waives Miranda right to counsel (Montejo v. Louisiana).

Exclusionary Rule for Statements (p. 27)

If you find there was a *Miranda* violation:

** State cannot use statement in case in chief, but may use statement for *impeachment* if defendant testifies

** Physical evidence is *not* suppressed (Patane) (p. 28)

If you find that the statement was made *involuntarily*:

** State cannot use confession for *any* purpose

** Physical evidence discovered as a result is *likely suppressed* unless there is an independent source or inevitable discovery

Voluntariness Hearing (p. 28)

- Defense requests voluntariness hearing
- If defense alleges *Miranda* violation, hearing concerns that issue, as well
- Court sets hearing **outside presence of jury**
- State identifies each statement they intend to use at trial (sometimes State chooses not to use a statement instead of litigating issue)
- **State goes first** – involuntariness presumed
- Defense presents case
- State presents rebuttal evidence
- Judge decides whether State has proven that confession was voluntary

Activity: *Miranda & Voluntariness* (pp. 29-32)

- Read Scenario 1 and 2.
- How would you rule on the motions?



Summary: Confessions (p. 33)

- Confessions are presumed involuntary
- State must prove voluntariness by preponderance
- *Miranda* must be considered. Determine whether custody **and** interrogation existed. If not, no *Miranda* violation. Consider any exceptions.
- Consider invocations and waivers
- Be accurate with ruling if finding statement was improperly obtained (*Miranda* vs. voluntariness). Different exclusion rules at trial apply.

Search & Arrest Warrants (p. 34)

See also A.R.S. 13-3911, et. seq.

Search & Arrest Warrants (p. 34)

- “Reasonable expectation of privacy”
- Officers need a warrant to enter a home unless an exception applies
- Warrant exceptions to be discussed later
- Search Warrant may only issue if:
 - neutral magistrate
 - finds probable cause
 - to believe evidence was involved in criminal act
 - and evidence is probably at place to be searched

Judge's Responsibilities (p. 34)

- Rule on warrant petitions
 - Administer oath
 - Determine whether probable cause exists
 - Define parameters of searches
 - Issue the warrant
- Rule on objections and motions to preclude evidence
 - Set hearings
 - Determine if warrant requirements were followed

Search Warrants - Probable Cause

- Reasonable person would believe that the items to be seized were or are:
 - Associated with criminal activity
 - Presently located at place to be searched
- Objective test
- Can't be unduly stale information
- Examine totality of circumstances
- May consider hearsay and inadmissible information

Activity – Search Warrants

At what point would you grant a search warrant? (p. 36)

Search Warrant Documents (p. 36)

■ Affidavit / Petition

- Contains information to support probable cause
- Defines requested search areas and items
- Must be signed under oath

■ Search warrant

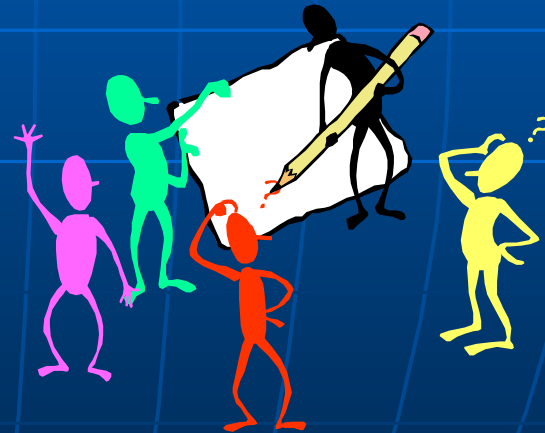
- Defines search parameters (places, times, items) – needs to be executed

■ Execution & Return (*see also ARS 13-3918*)

- SW needs to be executed w/in 5 calendar days
- Return -- Describes results of search (how conducted, what was found)
- Return must be signed under oath & filed with Court within 3 business days of warrant

Activity: Would You Issue the Search Warrant? (p. 37)

- Exercise (p. 37)
- Scenarios 1 and 2 (pp. 37-38)



Warrants (con't) (p. 39)

- Other Execution Issues
 - Knock & Announce
 - Plain view & reasonably related to crime
- Exclusionary rule re: search warrants
- Challenges to warrants
 - Good Faith
 - Franks hearing

Telephonic Warrants: Overview

(p. 41)

- AZ statutes permit telephonic search warrants
- Only differences are:
 - Must be recorded
 - Witness must be present to sign with officer
 - Documents may be faxed to judge but all original signatures filed with Court later
- LJ Benchbook provides script

Overview of the procedure

- Officer calls for warrant
- Judge or officer sets up recording device
- Officer provides probable cause over phone
- Judge:
 - Gives oath
 - Determines whether PC exists
 - Issues warrant by telephone
- Judge must complete record (see p. 42)

Warrant Exceptions (p. 43)

See also other materials and handouts

Warrant Exceptions

- **Expectation of Privacy (p. 43)**
 - Non-private areas
 - Cars (drivers / passengers)
 - Houses (owners / renters / guests)
 - Knock & talks / o.k. to cross curtilage (but officers cannot take dog to porch – Florida v. Jardines)
 - **New case – Collins v. Virginia (US 2018)**
- **Abandonment (words or conduct) (p. 44)**
- **Search by Private Person (p. 44)**
- **Plain view (p. 44)**
- **Exigency / Emergency Aid (p. 45)**
 - Exigency - destruction of evidence, hot pursuit
 - What about DUI? (evanescent evidence)
 - Emergency aid (whether someone is in need of aid or assistance)

Warrant Exceptions (con't)

- **Community Caretaking (p. 45)**
- **Protective Sweeps (p. 46)**
- **Vehicle search w/probable cause (p. 46)**
 - Ex. Plain view drugs or drug odor (i.e. dog alert)
 - Includes containers and trunk
 - Does not need to be contemporaneous
- **Search incident to arrest (p. 46)**
 - Must be contemporaneous
 - Person – wingspan rule
 - Car - Officers can search area arrestee recently occupied (passenger compartment only), if arrestee is still within reaching distance or evidence of crime of arrest likely to be found
 - Includes items, but cannot search cellphones without warrant or other exception (Riley)

Warrant Exceptions (con't)

- **Inventory search (p. 47)**
 - Search pursuant to standard policy
 - This exception may exist even if others (i.e. search incident to arrest) do not
- **Consent (p. 47)**
 - Person must give clear consent (words /actions)
 - Consent must be voluntary
 - Person giving consent (often not the arrestee) must have actual or apparent authority to consent
 - Apparent authority (Matlock and Rodriguez)
 - Present & objecting co-occupant rule (Georgia v. Randolph and Fernandez v. California)
 - Police must honor limits of consent and cannot exceed scope

Warrant Exceptions (con't)

- **Frisks of Person or Vehicle (p. 47)**
 - Recent Case – Officers in Arizona cannot frisk during consensual encounter (Serna); rule is different in federal court
- **Border or checkpoint (p. 48)**
- **Other reasonable searches (p. 48)**
- **Remember:**
 - Sometimes there is no "stop" (i.e. consensual encounter) or no "search" (i.e. dog sniff of outside of bag)
 - One search may be justified by multiple warrant exceptions
- **Consider inevitable discovery & independent source (State must prove) (p. 49)**
- **Examples (p. 49)**

Activity: Warrant Exceptions (pp. 49-52)

- Examples (p. 49)
- Scenarios 1 and 2
- How would you rule on the motions?



LESSON SUMMARY

- Consensual Encounters, Stops, Arrests
 - Confessions
 - Search Warrants & Exceptions
-

Probable cause

Reasonable Suspicion

Stop & Detention

Consensual Encounter

Arrest

Voluntariness

Miranda & Custodial
interrogation

Exclusionary Rule

Search Warrants

Warrant Exceptions

Questions?

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SEARCH WARRANT AFFIDAVIT CHECKLIST

INTRODUCTION:

Pursuant [A.R.S. § 13-3911](#) a search warrant is an order in writing issued in the name of the State of Arizona, signed by a magistrate, directed to a peace officer, commanding him/her to search for personal property, persons or items.

AFFIANT

__1. Is the name of the affiant stated?

COMMENTS: The affiant may be either a peace officer or a private citizen. The affidavit must be made in the affiant's true identity.

CRIMINAL ACTIVITY

__2. Does the affidavit specify the suspected criminal activity?

DESCRIPTION OF THE PERSON TO BE SEARCHED

__3. Does the affidavit name the person to be searched or describe him or her with sufficient detail so that he or she can be identified with reasonable certainty?

COMMENTS: If a description is used rather than a name, the description should identify the person in such a manner as to leave the officer no doubt and no discretion as to the person to be searched. A warrant for the search of premises only, and not for the search of a person, need not name the owner or occupant of the premises.

DESCRIPTION OF THE PLACE TO BE SEARCHED

__4. Does the description of the place to be searched contain sufficient detail so that the place can be identified with reasonable certainty?

COMMENTS: The description of the place to be searched must be identified and exclude all other places. However, a technical or legal description is not required.

FOUNDATIONS

__5. Are the grounds for the issuance of the search warrant specified?

COMMENTS: One or more of the following grounds set forth in [A.R.S. §13-3912](#) must be specified:

- a) The property to be seized was stolen or embezzled;
- b) The property or things to be seized were used as a means of committing a public offense;
- c) The property or things to be seized are in possession of a person having intent to use them as a means of committing a public offense or in possession of another to whom he may have delivered it for the purpose of concealing it or preventing it from being discovered;
- d) The property or things to be seized consist of any item or constitute any evidence which tends to show that a particular public offense has been committed, or tends to show that a particular person has committed a public offense;
- e) The property is to be searched and inspected by an appropriate official in the interest of the public health, safety or welfare as part of an inspection program authorized by law;
- f) The person sought is the subject of an outstanding arrest warrant.

DESCRIPTION OF THE ITEMS TO BE SEIZED

- __6. Are the items to be seized described with sufficient particularity that the officer executing the search warrant can identify the items with reasonable certainty and is left with no discretion as to which items are to be seized?

COMMENTS: The description must not be so general that the officer is left with discretion in what is to be seized. The use of general descriptions such as “written documents” or “stolen property” should be avoided. However, the specificity required depends on the nature of the items to be seized. If the item cannot be described with specificity, a more general description will be acceptable.

FACTUAL NATURE OF THE ALLEGATIONS

- __7. Does the affidavit allege facts, rather than mere conclusions, statements of belief or opinion?

COMMENTS: An allegation in the affidavit that the informant stated that “John Doe is in possession of heroin” is a mere conclusion because it does not indicate the source of the information. An allegation that “the informant saw John Doe in possession of heroin” is a factual allegation. Enough details and underlying circumstances must be given so that the magistrate knows something more substantial than casual rumor or general reputation is involved.

RULE OF STALENESS

- __8. Do the facts alleged provide reason to believe that the criminal activity is presently occurring or that the evidence is presently at the location?

COMMENTS: Whether the information is stale depends on the nature of the activity and not on the mere lapse of time. Where the criminal activity involved is of a continuous nature or course of conduct, passage of time becomes less important. The affidavit should state the date the information was received by the officer and the date it was obtained by the informant. However, it is permissible instead to allege that the informant observed the conduct within a certain specified period of time, such as “within the past 72 hours.” If the affidavit specifies too broad a time period it may be subject to an objection on the grounds of staleness.

PROBABLE CAUSE

- ___9. Do the facts set forth in the affidavit indicate that there is a fair probability that contraband or evidence of a crime will be found in a particular place?

COMMENTS: The test for probable cause for the issuance of a search warrant is whether the facts presented to the magistrate, based either on personal knowledge or trustworthy information, are sufficient to warrant a person of reasonable caution to believe that items to be seized are located on the premises or persons sought to be searched. Whether probable cause exists is tested by an objective standard; that is, by the outward facts and circumstances as they are seen by a reasonable person. The facts upon which the probable cause is based may be obtained through the affiant’s own senses or from reliable informants.

There must be some basis for believing the information or the source of the information. Probable cause may be based on hearsay. A police officer is entitled to use his past experience as a police officer in interpreting the facts. The United States Supreme Court has abandoned the so-called “two-pronged” test for determining whether the information supplied by an informant is sufficient to establish probable cause, and in its place has promulgated a “totality of the circumstances” test. Inquiry into the informant’s veracity and reliability and the basis of the informant’s knowledge is still highly relevant, but they are not entirely separate and independent factors to be rigidly required in every case. Probable cause is a common sense, practical and non-technical concept. Courts should not review an affidavit for a search warrant in a hyper-technical manner, but should do so in a common sense manner. The test is whether, after reviewing all the facts set forth in the affidavit, the magistrate had substantial basis for concluding that a search would uncover evidence of wrongdoing.

RELIABILITY OF INFORMANT

- ___10. Are sufficient facts set forth in the affidavit to demonstrate that the informant is credible or that the information he gives is reliable?

COMMENTS: An informant is someone who informs; that is, gives information. The term may include police informants, paid informants, victims of crimes or witnesses to a crime. The underlying rule is that there must be facts and circumstances set forth in the affidavit to give a reasonable basis for believing the information. There are no set formulas but there are some general guidelines:

- a) Information given by an anonymous “crime stop” caller is generally considered to be reliable, provided there is no reason to believe a corrupt motive exists;
- b) A victim or citizen eye-witness is usually considered to be reliable unless there is some reason to disbelieve the statement;
- c) Information received from fellow police officers or through official police channels may be considered reliable if it is accompanied by some fact or circumstance which attests to its reliability;
- d) Information received from a police informant may be considered reliable if the police have had past dealings with the informant and the information received in the past has proved to be true;
- e) Consistent information received from two independent sources may be considered reliable;
- f) Information may be rendered reliable by independent investigation that corroborates the incriminating details of the information;
- g) The fact that events of a criminal nature occur as the informant said they would may establish reliability of the information;
- h) Information obtained by an informant while being directly supervised by police officers may be considered reliable
- i) If the information is against the penal interest of the informant, it may be considered reliable;

Even though no other basis for reliability exists, the reliability of the informant may be established by corroborating some of the details of the informant’s statement. The court may conclude that because the informant is right about some things, he is probably right about other things.

INFORMANT’S BASIS OF INFORMATION

- __11. Are sufficient facts set forth in the affidavit to demonstrate that the informant has a basis for his or her knowledge; that is, does the affidavit state how the informant gained the information?

COMMENTS: The affidavit should state how, when and where the informant obtained the information. There must be facts and circumstances set forth to satisfy the magistrate that the informant’s information was not the result of mere rumor or suspicion. The affidavit must set forth facts enabling the magistrate to independently evaluate the accuracy of the informant’s conclusion.

NIGHTTIME SEARCH WARRANT

- __12. If a nighttime search warrant is being requested, did the affidavit state facts which show good cause for the issuance of a nighttime search warrant?

COMMENTS: The good cause for issuance for a nighttime search warrant under [A.R.S. § 13-3917](#), means that the affidavit upon which the magistrate issues the warrant must set forth specific facts which show a necessity for service of the warrant at night, such as: facts that indicate that the contraband or evidence to be seized will not be in the place to be searched during the daytime hours or in the case of a DUI, the evidence is perishable and would be rendered useless. Nighttime hours are 10:00 p.m. to 6:30 a.m.

NO-KNOCK WARRANT

- __13. So called “no-knock” search warrants where the notice of authority and purpose requirement of [A.R.S. § 13-3916](#) are dispensed with are authorized by [A.R.S. § 13-3915 \(B\)](#). There should be a showing that the “knock and announce” required by [A.R.S. § 13-3916](#) would “endanger the safety of any person or would result in the destruction of any of the items described in the warrant.”

ANTICIPATORY SEARCH WARRANT

- __14. An anticipatory search warrant describes acts which have not yet occurred, but the officer has probable cause to believe they will occur. In evaluating probable cause, the reviewing magistrate should assume that the acts will occur EXACTLY as described by the affiant. If the acts that are anticipated to occur, coupled with that which has already occurred, set out probable cause, then the warrant should be signed. The affidavit should recite that if the “anticipatory acts” do not occur exactly as described, then the warrant will not be executed.

REVIEW BY MAGISTRATE

- __15. Did the magistrate read the entire affidavit and exercise independent judgment in ruling on its sufficiency?

COMMENTS: The magistrate may examine the affiant and other witnesses under oath ([A.R.S. § 13-3914](#)). Any oral testimony thus given should be recorded, transcribed and subscribed and sworn to by the person giving the testimony. An affidavit need not be drafted with legal precision and should not be interpreted in a hyper-technical manner. The magistrate must be neutral and detached and must not be a mere rubber stamp for police. The review should not be mechanical or perfunctory.

ADMINISTRATION OF THE OATH

__16. Was the affidavit received upon a properly administered oath?

COMMENTS: The affiant should raise his/her right hand. The magistrate should also raise his/her right hand. The magistrate then administers the oath:

“Do you solemnly swear (or affirm) that the facts stated in the affidavit for the search warrant in this matter are true to the best of your information and belief (knowledge)?”

SIGNATURE

__17. Did the magistrate sign the oath on the affidavit?

ISSUANCE OF SEARCH WARRANT

__18. Did the magistrate read and sign the search warrant and endorse thereon the date and time of issuance?

COMMENTS: The warrant should be in substantial compliance with the form set forth in [A.R.S. § 13-3915 \(C\)](#).

TELEPHONIC SEARCH WARRANT SCRIPT

1. Initiation of Procedure

A police officer telephones the magistrate and requests the issuance of a telephonic search warrant. The [police officer/magistrate] sets up the recording device, tests it for operability and begins recording the conversation.

2. Administration of the Oath

[Magistrate]: "Do you solemnly swear (or affirm) that all statements you will make during your application for the search warrant and all statements you will make in connection with the issuance of the search warrant will be true to the best of your knowledge (information and belief)?"¹

¹ In lieu of, or in addition to a written affidavit, or affidavits, as provided in subsection A, the magistrate may take an oral statement under oath that shall be recorded on tape, wire or other comparable method. This statement may be given in person to the magistrate or by telephone, radio or other means of electronic communication. This statement is deemed to be an affidavit for the purposes of issuance of a search warrant. If a recording of the sworn statement is made, the statement shall be transcribed at the request of the court or either party and certified by the magistrate and filed with the court. [A.R.S. § 13-3914\(C\)](#).

3. Affidavit

a. Written Affidavit Prepared

"Do you already have the affidavit written?"

(If yes) "Please read me the affidavit."

b. Written Affidavit Not Prepared

"Do you already have the written affidavit?"

(If no, pose the following questions to the officer and evaluate the answers.)

"State your name."

"What is your badge number?"

"By whom are you employed?"

"Are you a certified and sworn peace officer in the state of Arizona?"

"What is the kind of criminal activity you believe is taking place?"

"Do you believe it is currently taking place?"

"(If not) when do you believe it took place?"

"What is the name of the person you believe has engaged in this criminal activity (or who possesses the evidence for which you wish to search?)"

"Do you wish to search the person of that individual?"

"What is the address (description) of the premises where the criminal activity is taking (has taken) place (or where you believe the evidence for which you are searching is located?)"

"What is the description of the vehicle involved in the criminal activity (or where you believe the evidence of the crime is located?)"

"What legal grounds do you allege exist for searching the person (premises, vehicle?)² Describe the items you believe you will discover

² Grounds for issuance: A search warrant may be issued upon any of the following grounds:

a. When the property to be seized was stolen or embezzled.

b. When the property or things to be seized were used as a means of committing a public offense.

upon a search of the person (premises, vehicle) and which are to be seized if found?"

"Why do you believe that these items are presently on the person (premises, vehicle?)"

"When (or between what dates) did you obtain the facts you are relying upon for this affidavit?"

"Do you wish to disclose the name of your informant?"

"(If yes) What is the name of your informant?"

"Why do you believe the informant is reliable?"

"Why do you believe the information the informant gave you is reliable?"

"What are the facts that indicate to you that the criminal activity is taking (has taken) place (or indicate to you that you will find evidence of the crime?)"

"How did you obtain this information?"

"How did your informant obtain this information?"

"What are the facts that indicate to you that the person you named (described) is engaged in this criminal activity?"

"How did you obtain this information?"

"How did your informant obtain this information?"

"Are you requesting a nighttime search warrant?"

(If yes) "What are the reasons for your request?"

4. Issuance of the Search Warrant

(If probable cause has been found)

c. When the property or things to be seized are in the possession of a person having the intent to use them as a means of committing a public offense or in possession of another to whom he may have delivered it for the purpose of concealing it or preventing it from being discovered.

d. When property or things to be seized consist of any item or constitute evidence that tends to show that a particular public offense has been committed or tends to show that a particular person committed the offense.

e. When the property is to be searched and inspected by an appropriate official in the interest of public health, safety or welfare as part of an inspection program authorized by law.

f. When the person sought is the subject of an outstanding arrest warrant. [A.R.S. §13-3912.](#)

"Officer _____, I find from your sworn statement that probable cause exists for the issuance of the search warrant. Please read me the search warrant as you have completed it." (The officer must have already completed form or must do so at this time. The information in the search warrant must conform to the information in the telephonic search warrant affidavit as it was delivered to the magistrate.)

5. (If night-time service is requested):

"I find that there is good cause for the warrant to be served in the night-time."

6. (If "no-knock" service is requested):

"a reasonable showing having been made pursuant to [A.R.S. § 13-3915\(B\)](#), I hereby authorize an unannounced entry."

7. (If the search warrant conforms to the information in the affidavit)

"Officer _____, you may sign my name to the search warrant in your possession."³

(If probable cause not found)

"Officer _____, I do not find from your sworn statement that probable cause exists for the issuance of the search warrant."

[Complete the Record.⁴]

³ The magistrate may orally authorize a peace officer to sign the magistrate's name on a search warrant if the peace officer applying for the warrant is not in the actual physical presence of the magistrate. This warrant shall be called a duplicate original search warrant and shall be deemed a search warrant for the purposes of this chapter. In such cases, the magistrate shall cause to be made an original warrant and shall enter the exact time of issuance of the duplicate original warrant on the face of the original warrant. Upon the return of the duplicate original warrant, the magistrate shall file the original warrant and the duplicate original warrant as provided in [A.R.S. §13-3923](#), [A.R.S. §13-3915\(D\)](#).

A magistrate may affix the magistrate's signature on a telefacsimile of an original warrant. The telefacsimile of the original warrant is deemed to be a search warrant for the purposes of this chapter. On return of the telefacsimile of the original warrant, the magistrate shall file the original warrant and the telefacsimile of the original warrant as provided in [A.R.S. §13-3923](#), [A.R.S. §13-3915\(E\)](#).

⁴ Completing the Record: The magistrate:

- a. may direct that the statement be transcribed [A.R.S. §13-3914\(C\)](#);
- b. certifies the transcript, if the statement is transcribed [A.R.S. §13-3914\(C\)](#);
- c. files the transcript in court [A.R.S. §13-3914\(C\)](#);
- d. causes an original warrant to be prepared and enters the exact time of the issuance of the duplicate original warrant on the face of the original affidavit. [A.R.S. §13-3915\(D\)](#);
- e. upon return of the duplicate original warrant, causes the original warrant and the duplicate original warrant to be filed as provided for in [A.R.S. §13-3923](#), [A.R.S. §13-3915\(D\)](#)

A.R.S. § 13-3915. Issuance; form of warrant; duplicate original warrant; telefacsimile

A. If the magistrate is satisfied that probable cause for the issuance of the warrant exists, the magistrate shall issue a search warrant commanding a search by any peace officer of the person or place specified, for the items described.

B. On a reasonable showing that an announced entry to execute the warrant would endanger the safety of any person or would result in the destruction of any of the items described in the warrant, the magistrate shall authorize an unannounced entry.

C. The warrant shall be in substantially the following form:

County of _____, state of Arizona.

To any peace officer in the state of Arizona:

Proof by affidavit having been this day made before me by (naming every person whose affidavit has been taken) there is probable cause for believing that (stating the grounds of the application) according to [section 13-3912](#), you are therefore commanded in the daytime (or in the night, as the case may be, according to [section 13-3917](#)) to make a search of (naming persons, buildings, premises or vehicles, describing each with reasonable particularity) for the following property, persons or things: (describing such with reasonable particularity), and if you find such or any part thereof, to retain such in your custody subject to [section 13-3920](#) .

Given under my hand or direction and dated _____ (judge, justice of the peace or magistrate.)

D. The magistrate may orally authorize a peace officer to sign the magistrate's name on a search warrant if the peace officer applying for the warrant is not in the actual physical presence of the magistrate. This warrant shall be called a duplicate original search warrant and shall be deemed a search warrant for the purposes of this chapter. In such cases, the magistrate shall cause to be made an original warrant and shall enter the exact time of issuance of the duplicate original warrant on the face of the original warrant. Upon the return of the duplicate original warrant, the magistrate shall file the original warrant and the duplicate original warrant as provided in [section 13-3923](#).

E. A magistrate may affix the magistrate's signature on a telefacsimile of an original warrant. The telefacsimile of the original warrant is deemed to be a search warrant for the purposes of this chapter. On return of the telefacsimile of the original warrant, the magistrate shall file the original warrant and the telefacsimile of the original warrant as provided in [section 13-3923](#).

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

LIMITED JURISDICTION NEW JUDGE ORIENTATION

Learning Objectives

By the end of this session, participants will be able to:

1. Given a scenario, determine if “probable cause” exists for an arrest.
2. Given a voluntariness objection, determine if the confession is admissible.
3. Given details provided by a police officer in support of a requested search warrant, rule correctly upon the request for the search warrant.
4. Given an objection regarding evidence obtained without a search warrant, rule appropriately.
5. Given a scenario, determine whether the defendant’s statements were obtained lawfully, in compliance with Miranda, voluntariness, and Sixth Amendment rules.
6. Answer specific questions about the rules and procedures regarding Stops, Arrests, Warrants, Warrantless Searches, and Confessions.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

I. INTRODUCTION TO THE LESSON

A. The Fourth Amendment of the U.S. Constitution

“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.”

B. Arizona Constitution, Article 2, Section 8

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” A.R.S. Const. Art. 2 § 8. See *State v. Bolt*, 142 Ariz. 260, 264-265 (1984) (Arizona's constitutional provisions were intended to incorporate federal protections but are more specific in preserving sanctity of homes and may offer greater constitutional protection than the federal Constitution.)

C. Activity: Examining the implications of the Fourth Amendment

1. Purpose: To expand your understanding of the impact of the Fourth Amendment on our legal actions and decisions.
2. Directions:
 - a. With your group, discuss the following:
 - (1) When presented with a request for a warrant for an arrest or search and seizure, what factors do you want to consider ensuring adherence to the Fourth Amendment?

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

(2) When hearing a motion challenging the validity of an arrest or a search, what factors do you want to consider ensuring adherence to the Fourth Amendment?

b. Summarize your key points or your list of issues/questions.

D. The judge's general responsibilities

1. As a judge, you help to ensure that law enforcement officers adhere to the law when arresting people, conducting searches, and taking confessions. You provide a neutral, objective perspective in making this determination; unlike officers, you are not embroiled in the intensity of an on-scene investigation. *Johnson v. U.S.*, 333 U.S. 10, 13-14 (1948) (purpose of Fourth Amendment is to ensure prior review by a neutral and detached magistrate “instead of . . . the officer engaged in the often competitive enterprise of ferreting out crime”.)

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

2. Your responsibilities are as follows:
 - a. Authorize arrest and search warrants. This responsibility requires that you assess the evidence provided by law enforcement officers and decide whether or not you should issue a warrant.
 - b. Rule on objections and motions regarding the admissibility of evidence gathered as the result of:
 - Arrests. Were they conducted lawfully, and if not, is suppression of evidence warranted?
 - Admissions and confessions. Were they obtained legally, and if not, should they be suppressed?
 - Search warrants. Did officers act within the authority of search warrants, and if not, is suppression of evidence warranted?
 - Warrantless searches. Did an exception to the warrant requirement exist, and if not, is suppression of evidence warranted?
3. Your decisions will be critical to the viability of the prosecution and the defendant's ability to defend himself.

II. BASICS ABOUT STOPS & ARRESTS

A. Different Levels of Contact

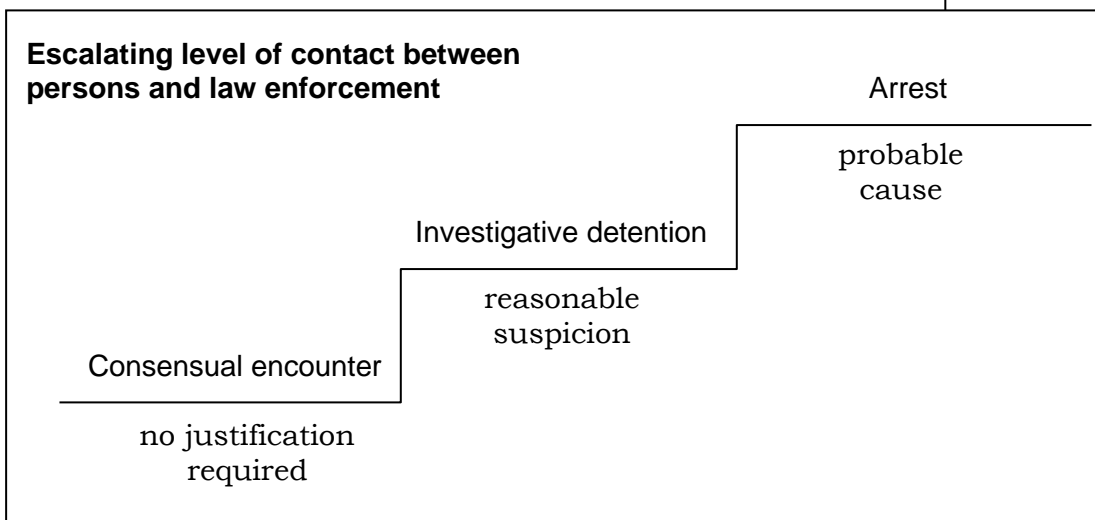
1. A stop or arrest of a person is considered a "seizure" and therefore falls under the Fourth Amendment. Different standards of justification apply for each. A stop requires reasonable suspicion. An arrest requires probable cause.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

2. The figure below shows the escalating level of contact (restraint) between persons and law enforcement.
- a. At the lowest level of contact is the “consensual encounter.” This is not considered a seizure and so does not fall under the scope of the Fourth Amendment.



- b. An “investigative detention” is at the mid-level. This is a brief, temporary stop that is permitted based on reasonable and articulable suspicion that (1) the person is involved in criminal activity **or** (2) the driver of a motor vehicle was involved in either a crime or suspected traffic violation. A.R.S. 13-3883(B).
- c. The most restrictive level of contact is an “arrest.” An arrest must be based on probable cause to believe that the person is or was involved in criminal activity. Once an arrest occurs, the rules about other actions, such as questioning a suspect or searching him, change.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

B. Consensual encounter

1. Imagine that while a person is getting out of his car and entering a Circle K, a police officer approaches him and asks, "Where were you before coming to this store?"

2. Is this a seizure? Why or why not?

3. An officer may walk up to someone and ask questions, including asking for identification or consent to search. The officer needs no justification to do so and may have just a "hunch" or a general desire for information.

4. It is a seizure only if the officer does or says something that would lead a reasonable person to believe that she or he is not free to go.

5. The kinds of factors a judge might consider in determining whether a consensual encounter occurred include an officer's words, actions, or use of force. An officer's act of frisking a person constitutes a stop. *In Re Ilono*, 210 Ariz. 473 (App. 2005) (Div. 2). (See also Frisk section, pp. 47-48.)

6. Unless the officer has either reasonable suspicion or probable cause to believe that a person has been involved in criminal activity, that person need not stop, need not identify himself, and need not answer any questions. He may leave. However, unprovoked flight from law enforcement may in some circumstances justify a stop. *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000).

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

C. Investigatory stop or detention

1. Now let's say that the police officer notices stolen license plates on the person's car at the Circle K. He approaches as the man is leaving the car and asks, "Wait! Is this car yours? Can you come to the police station to answer some questions?"
2. Is this a seizure? Yes, this action involves a show of authority that would make a reasonable person believe that he is not free to leave. This show of authority is considered an investigatory stop, which is sometimes called a "*Terry v. Ohio*" stop, a "*Terry Stop*" or a "Stop and Frisk." (During such a detention, if the officer has reason to believe that the person might have a weapon, the officer may frisk. See frisk section.)
3. To make an investigatory stop and detention, the officer must have a reasonable suspicion to believe that criminal activity is occurring (or has occurred) and that the person stopped was involved in that criminal activity. The totality of circumstances are considered. Officers may also stop a vehicle based on reasonable suspicion that a traffic violation occurred. See also A.R.S. 13-3883(B) (authorizing stop and detention to investigate traffic violation).
4. Reasonable suspicion is distinguished from no suspicion by the fact that there are some objective facts to support the belief. It is more than a "hunch." It is distinguished from probable cause by the fact that the specific nature of the criminal activity and specific nature of the person's involvement may not be known. But there is reason to stop the person to investigate further.
5. Anonymous tips that are sufficiently reliable, as well as face-to-face tips to an officer, can support an investigatory stop.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

5. The officer may detain the suspect only as long as is reasonably necessary to confirm or dispel suspicion and establish if probable cause exists.

D. Arrest

1. Now picture a worse scenario: this time the officer arrests the person.
2. To arrest someone, the officer must have probable cause to believe that person has committed a crime. The officer has credible information that would be sufficient to lead a reasonable person to believe that an offense has been committed and that the suspect committed it.
3. Even though there may be an innocent explanation for the facts, or other non-criminal scenarios may explain the activity in question, probable cause can lawfully still be found.
4. Probable cause permits a full custodial arrest, a search incident to that arrest, and the basis to charge the individual with a criminal offense. A law enforcement officer may also use reasonable force to effect the arrest. However, if the subject of the arrest is interrogated while in custody, *Miranda* rules apply. (We'll discuss this more later.)

E. The scale of certainty

Read each factor below, one at a time, without reading ahead. Identify the following:

- a. At what point might the officer legally make an investigatory detention?
- b. At what point might the officer arrest the person?

=====

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

- You are a police officer on patrol.
- It is 2:00 a.m.
- You see a man walking down the sidewalk.
- It is a residential neighborhood with expensive homes.
- It is primarily a white area; he is black.
- The man is in poor clothes.
- He has long hair.
- He keeps looking around.
- He is carrying something.
- He stops to look at a house.
- He goes up to the house.
- The house is dark.
- He stands by the door a while.
- He goes around to the back door.
- He appears to be trying to pry it open.
- He pries open the door.
- He goes inside.
- He emerges from the house carrying a stereo.
- He leaves the property with the stereo.

=====

F. The standard of judgment

1. How do we determine if an arrest has occurred?
This issue is determined objectively, not by what the officer intended, nor by what the suspect thinks is happening. An arrest occurs when, based on the circumstances, a reasonable person would reasonably believe that he was being arrested. *State v. Navarro*, 201 Ariz. 292, 298 (App. Div. 2 2001).

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

2. How do we determine if the officer had probable cause to justify an arrest? Probable cause exists if the police had sufficient information to lead a reasonable person to suspect that an offense has been committed or is being committed, and that the person being arrested committed it.
3. Who is this “reasonable person”? This is a fictional person invented by the law to create an objective standard of conduct or judgment in all situations, regardless of the circumstances or the intent or subjective thoughts of the participants involved. A reasonable person weighs all evidence objectively, carefully and rationally decides correctly given any particular set of circumstances. The reasonable person is society’s collective common sense.

G. “Objective” versus “subjective”

- We must rely on objectivity. What are the objective facts, as viewed by a reasonable person?
 - a. “Subjective”: Something is a matter of opinion or feelings, and is experienced only by the individual. For example, a person may think he is being arrested, but his subjective opinion does not count. Or an officer may think he’s only detaining an individual, but it is actually an arrest given the circumstances. However, the issue is objective.
 - b. “Objective”: Exists in the outer world; it is observable, measurable, a matter of fact. It can be experienced by more than one person. Objectivity involves a neutral, detached analysis of facts.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

H. Is there a seizure?

What type of restraint is exhibited by the following: consensual encounter, investigatory stop, or arrest?

- a. A police officer asks a person if he will talk with him. What is this?
- b. A police officer asks a person if he will talk with him, and blocks the person's way. What is this?
- c. A police officer points a gun at a person and says, "stay where you are!" What is this?
- d. A police officer stops a motorist who has run a red light. The officer plans to warn the motorist and let him go, but does not tell him that. What is this?
- e. A police officer says, "Come to the police station, we want to talk to you." The person goes with the police to the station. Is this an arrest?
- f. A police officer says, "Will you please come to the police station with us." The person goes to the station. What is this?
- g. A police officer says, "Stop, I'm a police officer." The person stops. Is this a stop?
- h. A police officer says, "Stop, I'm a police officer." The person does not stop. Is this a stop or arrest?

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

I. How does the judge get involved?

1. When a police officer makes an arrest without sufficient probable cause, or a stop without sufficient reasonable suspicion, the general rule is that any evidence gathered as a result of that illegal action must be suppressed as “fruit of the poisonous tree.” This legal doctrine is known as the “exclusionary rule.”
2. You will be asked to address the validity of stops and arrests and searches and decide when to apply the exclusionary rule. The following describes the typical procedures that occur in making such a determination:
 - a. The defense submits a motion to suppress evidence based on its claim that the State gathered certain evidence as the result of an illegal stop, detention, or arrest. (Although we have not discussed search issues yet, the defense might also claim that an officer’s search of a person, item, vehicle, or house was unlawful.)
 - b. The judge sets an evidentiary hearing to hear the facts. In this type of pre-trial hearing, where the court is determining the admissibility of evidence, the rules of evidence do not apply.
 - c. Although the prosecutor needs to prove the lawfulness of the acquisition of evidence by a preponderance of the evidence, during most suppression hearings, the court requires the defense to come forward first and make an initial case.
 - The defense must come forward first if the evidence at issue resulted from a search or seizure that (1) was discoverable by the defense, (2) was observed by defense counsel at the time of the taking, or (3) was authorized by a warrant. These cover

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

- the vast majority of suppression hearings.
- If the evidence was obtained *with* a search or arrest warrant, the defense must present enough evidence to overcome the presumption of regularity that attaches to such searches.
 - If the evidence was obtained *without* a search or arrest warrant (i.e. warrantless), the State carries the evidentiary burden of establishing that the action was lawful. *State v. Hyde*, 186 Ariz. 252 (1996).
- d. If the defense fails to make its initial “burden of production,” the judge determines that the search or seizure was legal and finds the evidence admissible. The judge denies the motion and the hearing is over.
- e. If the defense presents a convincing initial case, the judge then hears from the State. The State must then prove, by a preponderance of the evidence, that the evidence was gathered lawfully (“burden of persuasion”).
- f. The judge then rules on whether the State has met its burden of proof. If the State has met its burden, the evidence is admissible. If not, the evidence derived from the illegal act is generally suppressed. Ariz.R.Crim.P. 16.2(b).

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

- g. A defendant does not need to testify at the suppression hearing. If he does, he is subject to cross-examination, but he does not waive his right to remain silent at trial. If he testifies at trial, his suppression hearing testimony will not be mentioned unless he testifies about the same matters at trial. Ariz.R.Crim.P. 16.2(a). (The rule requires the hearing judge to advise unrepresented defendants of the above.)

J. Activity: Probable cause

1. Purpose: to practice determining if probable cause for arrest exists.
2. Directions. As a group, read each of the following scenarios and determine whether “probable cause” existed for the arrest.

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SCENARIO 1

You are the trial judge. The case of *State v. John Smith* is set on your docket for bench trial next month. You receive a motion from the Defendant entitled “Motion to Suppress.” The motion asks you to prohibit the prosecutor from presenting at trial a **statement** the Defendant made at the scene of the alleged crime. The motion also asks you to prohibit the prosecutor from presenting at trial a **gun** that was found at the scene. You then receive the prosecutor’s response, which claims that the statements and the gun should be introduced at the trial because the police gathered all of that evidence lawfully. You set the case for an evidentiary hearing.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

At the hearing, you make the following findings of fact:

Officer Doe was in uniform at a local store. A store clerk said to the officer, "When you pulled up in your patrol car, those two men outside the store started acting nervous and then walked away, looking over their shoulders at you; it seems fishy to me." Officer Doe saw the two men walking away. The men did not appear to be engaged in any criminal activity.

Officer Doe got back into his patrol car and stopped the car near the two men. Officer Doe got out of the car and yelled in a loud voice, "Hey, can I talk to you?" The two men ignored him and continued walking, looking over their shoulders a couple of times. The officer yelled, in a louder voice, "Hey, I said can I talk to you?" However, the men continued walking. The officer then began walking behind the two men and yelled two more times, each time even louder, something to the effect of "Hey, I need to talk to you! Can I talk to you?" The men then stopped and walked back to the officer. The officer asked, "Can I see your identification, please?" and "What are the two of you doing?" The Defendant said, "**A little drinking and we're about to go shooting.**" The officer then asked, "Do you have any contraband or weapons on you?" The Defendant said "**No, I don't have a gun on me.**" The Defendant's friend said, "John, what about the piece?" The Defendant turned towards his friend and balled up his fists while raising his arms. The officer saw what appeared to be a handgun in Defendant's back waistband. The officer then asked, "Do you have a concealed weapons permit?" The Defendant replied, "No." The officer patted down the Defendant's pants and **retrieved the handgun** from Defendant's waistband. The officer then cited the Defendant for not notifying the officer he was carrying a concealed weapon when asked, a class 1 misdemeanor, and released him.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

In deciding whether to grant the motion to suppress, you must determine:

1. Whether a search and/or seizure occurred and
2. If so, whether the officer had the appropriate level of justification for the search and/or seizure.

State v. Wyman, 197 Ariz. 10 (App. Div.2 2000).

SCENARIO 2

You are the trial judge. The case of *State v. Linda Brown* is set on your docket for jury trial next month. You receive a motion from the Defendant entitled "Motion to Suppress." The motion asks you to prohibit the prosecutor from presenting at trial 1) a **statement** she made at the scene of the alleged crime, 2) **any observations the officers allegedly made** about her physical impairment at the scene, and 3) her **breath test results**. You then receive the prosecutor's response, which claims that all of the above evidence should come out at the trial because the police gathered it lawfully. You set the case for an evidentiary hearing.

At the hearing, you make the following findings of fact:

Officer Green was standing at the exit to a local housing subdivision, watching vehicles enter and exit the city's Holiday Festival taking place inside the subdivision. There was only one exit/entrance for the subdivision. A car stopped next to the officer as it was exiting the subdivision. The driver, Mrs. Black, told Officer Green, "There's a white or light-colored Jeep station wagon with wood-grain sides back there, being driven by a blonde woman. She's driving up onto the curb, she keeps stopping in the road for no apparent reason, and she's taking the corners really fast." The officer said, "Thank you," and the car went on its way. A few minutes later, another car stopped in front of the

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

officer. The driver, Mr. White, said, “Some lady is driving through the neighborhood like a maniac. She’s in a yellow station wagon with wood panels, hitting the curbs and driving all over the road. Here’s the plate number.” Mr. White handed the officer a piece of paper with a number on it and went on his way.

Then the officer immediately saw a pale yellow station wagon with wood-grain sides driving toward him. The plate matched the number on Mr. White’s paper. The officer noted no unusual driving movements or violations. The officer waved at the vehicle to the side of the road. The car pulled to the side of the road and stopped.

The officer walked up to the driver’s window and asked the driver, “Can I see your identification?” The driver, a blonde white woman, twice shifted into other gears before shifting into park. The driver, who is the Defendant, got out of the car. The Defendant asked, **“Why did you stop me?”** The officer answered that he had heard she was having trouble driving. The Defendant replied **“I’m fine. I just need to get home. I’m not feeling well. Why did you stop me?”** The officer repeated his answer. The officer then asked the Defendant if she would perform some field sobriety tests. She replied, **“I’m not taking any stupid tests. Why did you stop me, anyway?”** During this conversation, the officer noticed that the Defendant’s **eyes were bloodshot, her balance was unsteady, her speech was slow and slurred, and she smelled strongly of alcohol.** The officer placed the Defendant in handcuffs and drove her to the police station. There she agreed to take a breath test on an Intoxilyzer 8000 and the **results were .12.**

The officer cited the Defendant for driving under the influence and driving with a blood alcohol content over .08, both class 1 misdemeanors, and released her.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

In deciding whether to grant the motion to suppress, you must determine:

1. Whether a search and/or seizure occurred;
2. If so, what level of justification was needed to justify the search and/or seizure; and
3. Whether the officer had sufficient information to justify his actions.

Pharo v. Tucson City Court, 167 Ariz. 571 (App. Div.2 1990).

K. Summary: Consensual Encounters, Stops, & Arrests

1. Consensual encounter: An officer may walk up to any person without justification and speak to that person, as long as a reasonable person would feel free to disregard the police and go about his business.
2. Stop/Detention: An officer may stop an individual if he has reasonable suspicion that the person committed a traffic violation or a crime.
3. Arrest: To make a valid arrest, the officer must have probable cause, which is trustworthy information that is sufficient to lead a reasonable person to believe that a criminal offense has been committed and that the arrestee committed it.
4. Decisions must be based on an objective, not subjective, review of the facts.
5. Evidence gathered as the result of an invalid arrest must generally be suppressed under the exclusionary rule.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

6. Sometimes the exclusionary rule is inapplicable, such as when there is a dissipation of the taint from the illegal act, or the evidence would have been discovered inevitably or by an independent source. Some recent decisions have found the exclusionary rule inapplicable in circumstances where its deterrent purpose would not be served. *State v. Booker*, 212 Ariz. 502 (App. 2006) (Div. 1); *Hudson v. Michigan*, 126 S.Ct. 2159 (2006) (officer violated knock & announce rule, but evidence was not suppressed); *Herring v. United States*, 555 U.S. 135 (2009) (officer arrested defendant in good faith based on warrant in police computer that was later found to have been recalled).

III. CONFESSIONS

A. General Rules

No person shall be compelled in any criminal case to give evidence against himself.
U.S. Const., Amend V, A.R.S. Const. Art. 2 §10

“nor shall any State deprive any person of life, liberty, or property without due process of law”
U.S. Const., Amend XIV

1. One of the judge’s key responsibilities is to decide whether or not a confession or admission was obtained legally.
2. A “confession” is a full and complete admission of guilt as to all elements of the crime. An “admission” is a statement that is self-incriminating in nature, but which does not constitute a full statement as to all elements of the crime.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

3. There are generally two main inquiries when determining whether a statement was obtained constitutionally. First, the statement must be voluntary under *Miranda v. Arizona*. Second, the statement must be voluntary under the Due Process Clause, i.e., it must have been obtained voluntarily and not compelled by officers.
4. Confessions are *presumed* to be involuntary. If the State wants to present the Defendant's incriminating statements at trial, the burden is on the State to show that the Defendant's statements were made voluntarily, both under *Miranda* and the Due Process Clause. The burden of proof is by a preponderance of the evidence.

A. *Miranda* Rule

1. *Miranda v. Arizona*, 384 U.S. 436, 444-445 (1966)

[t]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from **custodial interrogation** of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, **we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way** Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

2. Before police begin “custodial interrogation,” they must advise the suspect that:
 - a. He (or she) has the right to remain silent.
 - b. Any statement he makes can and will be used against him in court.
 - c. He has the right to consult with a lawyer and to have the lawyer with him during questioning.
 - d. If he cannot afford to hire a lawyer, a lawyer will be appointed to represent him free of charge.
3. If there is no “custody” or no “interrogation,” *Miranda* warnings are not required. The person must be *both* “in custody” and being “interrogated” before warnings are required.
4. “Interrogation”: When police ask questions or do something they reasonably should know is likely to elicit an incriminating response, the situation is considered an interrogation.
5. When is someone in “custody?”:
 - a. The police have formally taken the person into custody; or
 - b. Under objective circumstances, a reasonable person would believe he or she was being arrested.
6. When determining whether or not a person was “in custody,” the judge must consider the totality of the circumstances. No single factor is necessarily determinative.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

7. What is an example of a situation in which a police officer is questioning a person but the circumstances do NOT indicate that the person is in custody?

8. What is an example of a situation in which a police officer is questioning a person and the circumstances DO indicate that the person is in custody?

9. Are Miranda warnings required before the administration of field sobriety tests?

B. Exceptions to *Miranda*

1. **“Non-testimonial” evidence** – The *Miranda* safeguards only apply to “testimonial” evidence, so they don’t apply to a defendant’s physical characteristics, for example.
2. **Spontaneous statements** – Sometimes people blurt things out or make statements unsolicited by law enforcement. This is not considered to be the product of interrogation.
3. **Booking questions** – The law allows officers to ask people their name, address, and other identifying characteristics for booking purposes, without constituting interrogation.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

4. **Public safety questions** – Officers may ask questions of a custodial suspect that are necessary to ensure the public’s safety. For example, when officers arrested a murder suspect in a supermarket, but had not found the weapon, it was appropriate to ask where the weapon was located, to ensure no member of the public would be injured.
5. **Undercover officers** – The purpose of the *Miranda* rule is to provide safeguards during police questioning. When an inmate is talking to an undercover officer that he believes is a fellow inmate, for example, no *Miranda* warnings are required. However, after the defendant is charged and has an attorney appointed, other considerations may apply.

C. Waiver of the *Miranda* rights

1. A suspect may waive his/her *Miranda* rights after being informed of them, provided the waiver is made knowingly, intelligently, and voluntarily.
2. The suspect may waive rights by an express verbal waiver or by responding to questions after saying he understands his rights.
3. The State has the burden of proving that, given the totality of the circumstances, a waiver was knowing, intelligent, and voluntary. Factors to weigh may include the suspect’s:
 - a. English fluency or education level
 - b. Physical condition (ill, injured, intoxicated or in shock)
 - c. Age, mental acuity, etc.
 - d. Prior law enforcement arrests

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

D. Invocations of right to silence or right to attorney

1. At any time before or during an interrogation, the suspect may make a request to exercise his or her rights. If the indication is clear and unambiguous, the interrogation must cease.
 - a. A single request is sufficient.
 - b. Officers technically need not request clarification of ambiguous requests before continuing with questioning.
2. Right to remain silent
 - a. “I don’t want to talk about it.”
 - b. Officer must stop questioning, but may re-initiate questioning at a later time with fresh *Miranda* warnings and waiver.
3. Right to counsel
 - a. “I want a lawyer.”
 - b. All questioning must cease. Unlike when a suspect invokes his right to silence, officers may not re-approach the suspect and interrogate him about any crime once he invokes the right to counsel. However, if a defendant is released from custody, officers may re-initiate questioning if they wait 14 days and obtain a *Miranda* waiver. *Maryland v. Shatzer*, 559 U.S. 98 (2010).
 - c. If suspect invokes the right to counsel, he must be given reasonable opportunity to contact counsel.
4. Re-Initiation
 - a. As demonstrated above, it is important to know which right the suspect invoked, because different re-initiation rules apply for officers depending on which right is invoked.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

- b. However, a defendant can always re-initiate questioning with officers, regardless of which right he has invoked.
- c. When determining when a defendant is re-initiating conversation for purposes of the rule, consider whether the defendant is expressing a desire to speak about the case, as opposed to something more innocuous. (Compare: “Can I have a drink of water?” with “What’s going to happen to me now?”) *See Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

E. Voluntariness Rule (Due Process)

1. To be admissible, a confession or admission must have been voluntary, that is, not coerced or compelled by law enforcement.
2. The test is this: Under the **totality of the circumstances**, was the statement the product of free and rational choice?
3. What if the officers, when interrogating the suspect, promised leniency in charging or sentencing? Would the confession be admissible?

4. If the suspect was falling-down drunk at the time he confessed, would you consider that confession voluntary or involuntary?

5. What if the officers used trickery to get the suspect to confess?

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

6. What other voluntariness factors might the judge consider?

7. Would one factor alone convince the judge that a confession was involuntary?

8. If a statement is determined to be involuntary under the Due Process Clause, the statement is inadmissible and cannot be used against the defendant for any purpose, not even for impeachment.

F. Sixth Amendment Right to Counsel

1. The defendant's statement cannot be a product of a Sixth Amendment violation of the right to counsel. This is a separate consideration from *Miranda* and due process voluntariness.
2. The Sixth Amendment right to counsel attaches "at or after the initiation of adversary criminal proceedings – whether by formal charge, preliminary hearing, indictment, information or arraignment." *McNeil v. Wisconsin*, 501 U.S.171, 176 (1991); *see also Fellers v. United States*, 540 U.S. 519 (2004) (Sixth Amendment right to counsel attaches when "judicial proceedings have been initiated").

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

3. After the defendant's Sixth Amendment right to counsel has attached, officers may not then interrogate the defendant about offenses for which counsel has been appointed, unless the officers obtain a *Miranda* waiver. This *Miranda* waiver operates to waive the defendant's right to counsel under both *Miranda* and the Sixth Amendment. *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009). If a defendant has previously invoked his right to counsel under *Miranda* for an offense, however, police officers cannot reinitiate questioning, even about an offense unrelated to the subject of the representation, unless counsel is present. *Id*; *McNeil*, 501 U.S. at 177. Of course, a defendant can reinitiate questioning with police at any time, and without his attorney, if he wishes.

G. Exclusionary Rule

1. Statements:

- a. If the statement was obtained in violation of *Miranda*, it is not admissible in the State's case-in-chief, *but* it is admissible as impeachment if the defendant testifies at trial.

Note: If an otherwise inadmissible confession is permitted for impeachment, you must instruct the jury that the statements are being admitted for the limited purpose of impeachment and not as evidence of guilt. *State v. Huerstel*, 206 Ariz. 93, 107 (2003) (voluntary confession obtained in violation of *Miranda* may be used for impeachment).

- b. If the statement was obtained involuntarily in violation of the Due Process Clause, it is not admissible for any purpose, not even for impeachment.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

2. **Physical Evidence:**

Physical evidence discovered as a result of *Miranda*-violative statements that are otherwise voluntary should not be suppressed. *United States v. Patane*, 542 U.S. 630 (2004) (Court declined to suppress firearm).

H. **Voluntariness hearing**

1. If requested, or if an objection is raised, the Court must hold an evidentiary hearing to determine whether the defendant's self-incriminating statements were voluntary under the Due Process Clause.
2. If the defense alleges that the statements were made in violation of *Miranda*, the hearing must address *Miranda* issues as well.
3. The hearing is held outside the presence of the jury.
4. Just as with hearings involving search and seizure issues, the initial burden of production falls to the defense in most cases. If the defense meets its initial burden, then the State must prove by a preponderance of the evidence that the statements were gathered lawfully. The judge then decides whether the State has proven that the confession was voluntary.
5. It is important to be specific when finding that a statement was unlawfully obtained. Was it obtained in violation of *Miranda*, but otherwise voluntary under the Due Process Clause? (If so, the statement may still be admissible for impeachment, and any physical evidence discovered as a result of the violation will not be suppressed.) Was it overall involuntary under the Due Process Clause? (If so, it is not admissible for any purpose, and any physical

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

evidence discovered as a result of the statement must also be suppressed.) Be specific.

I. Activity: *Miranda* and confessions

1. Purpose: to practice ruling on *Miranda* & voluntariness objections.
2. Directions. As a group, read each scenario and determine what the judge should rule.

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SCENARIO 1

You are the trial judge. The case of *State v. Joe Baker* is set on your docket for bench trial next month. You receive a motion from the Defendant entitled “**Motion to Suppress; Motion for Voluntariness Hearing.**”

The motion alleges that the State coerced the Defendant’s confessions (in boldface, below) and asks you to prohibit the State from presenting the confessions at trial. You then receive the prosecutor’s response, which claims that the confessions were made voluntarily and should be permitted at trial. You set the case for a voluntariness hearing.

At the hearing, you make the following findings of fact:

Officer Smart investigated a report that a woman had been arguing with a man at a bus stop near the intersection of 7th Street and Marlette in Phoenix and that during the altercation the man punched her repeatedly, leaving injuries. The victim reported that after the altercation the man left the scene. She stated that she had never seen the man before the incident and did not know his identity, but she provided a detailed description of him. After a search of the area, the suspect could not be located.

Ten days later, police arrested a man matching the caller’s description and, saying nothing to him, brought him to the police station for a lineup. The victim picked the Defendant out of the lineup. Right after the lineup,

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

the Defendant was taken to an interview room at the station in handcuffs. The Defendant immediately **told Officer Smart that he had met a woman at a bus stop ten days ago, that they argued, that she was rude to him, that he punched her several times and then left the scene in a friend's Pinto.** Officer Smart asked the Defendant if he would write down the story he just told the Officer. The Defendant agreed. With one hand still handcuffed to a chair, he signed a statement that Officer Smart had typed.

The top of the statement read:

I, Joe Baker, do hereby swear that I make this statement voluntarily of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement I make may be used against me.

A full detailed confession followed on the statement. The Defendant was 23 years old, had been educated up to the eighth grade, had prior police contacts and was familiar with legal procedures, and was not under the influence of any substances at the time of the police contact. The prosecution has charged the Defendant with assault, a class one misdemeanor.

In deciding whether to grant the motion to suppress the confession for involuntariness, you should consider:

1. Whether an arrest occurred,
2. Whether custodial interrogation occurred,
3. Whether the confession was coerced by the State.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

SCENARIO 2

You are the trial judge. The case of *State v. Nancy Jones* is set on your docket for a pre-trial conference next month. You receive a motion from the Defendant entitled **“Motion to Suppress; Motion for Voluntariness Hearing.”** The motion asks you to prohibit the State from presenting certain statements the Defendant made (in boldface, below) during the investigation, due to involuntariness. You then receive the prosecutor’s response, which claims that the statements were made voluntarily and should be permitted at trial. You set the case for a voluntariness hearing.

At the hearing, you make the following findings of fact:

Officer Williams saw the Defendant’s car weaving inside its lane. The car did not leave its own lane, but continued to weave within the lane for two miles. Officer Williams put on her emergency lights and the Defendant pulled over and stopped.

Officer Williams asked the Defendant to step out of the car, and noticed that the Defendant swayed and had trouble balancing while she exited the car. At that point, the officer had decided to arrest the Defendant but did not tell the Defendant that she would be arrested. Instead, the officer asked the Defendant to perform a field sobriety test. The Defendant stated, **“There’s no way I could do a balancing test in this condition.”** As the Defendant attempted the test, the officer noticed several balancing problems and stopped the test when the Defendant almost fell over.

The officer then asked the Defendant whether she had any alcohol that evening. The Defendant replied **“Two beers and a few joints, but that was earlier.”** Officer Williams noticed slurred speech at this time. Officer Williams handcuffed the Defendant and took her in the patrol car to the police station.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

At the station, Officer Williams asked the Defendant if she would take a breath test and she agreed. The test came back negative for alcohol.

Officer Williams asked the Defendant if she “knew her rights” and the Defendant said yes. Officer Williams then asked if the Defendant would be willing to answer some questions and she said yes. Officer Williams asked if the Defendant felt like she was under the influence and she replied, **“I guess, barely.”** Officer Williams also asked what she had consumed that night that put her under the influence and she replied, **“A few hits of glass. Methamphetamine.”** The Defendant then agreed to take a urine test, which revealed metabolites of methamphetamine in the Defendant’s system.

The prosecution has charged the Defendant with driving under the influence and driving with unlawful drugs in her system, both class one misdemeanors.

In deciding whether to grant the motion to suppress the statements for involuntariness, you should consider:

1. Whether and when a seizure occurred,
2. Whether custodial interrogation occurred,
3. Whether the statements were coerced by the State.

Berkemer v. McCarty, 468 U.S. 420 (1984)

4. Finally, should the urine test be suppressed?

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SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

I. Summary: Confessions

1. Confessions are presumed involuntary.
2. The State must prove voluntariness of the statement under *Miranda* and under the Due Process Clause by a preponderance of the evidence.
3. *Miranda* must be considered for custodial interrogation cases. Consider whether any exceptions apply.
4. Consider invocations of rights and waivers, and any re-initiations.
5. Consider the exclusionary rule and determine which statements must be suppressed. Remember that physical evidence is not suppressed if discovered as a result of *Miranda* violations.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

IV. SEARCH AND SEIZURE WARRANTS

A. Jurisdiction for authorizing warrants

1. The Fourth Amendment grants a “reasonable” expectation of privacy, particularly in homes. The State cannot invade a home without a warrant, absent an exception to the warrant requirement.
2. The Fourth Amendment authorizes judges to issue search warrants only upon a finding that there is probable cause to believe the evidence sought is evidence of criminal activity and that the evidence is at the location sought to be searched.
3. Justices of the peace, municipal judges, superior court judges, and justices of the Supreme Court have the authority to issue search warrants. A judge may issue warrants for a search of premises outside his or her jurisdiction. A.R.S. § 13-3912, A.R.S. § 22-402. *But see* Op.Atty.Gen. No. 69-15 (city magistrate has authority to issue search warrant for premises outside of city over which he officiates, but statutory grounds stand on “less firm basis” than one to be exercised within city).

B. The judge’s responsibilities

1. The judge’s responsibilities include issuing search warrants, which involves the following:
 - a. Administer the oath or affirmation to the officer seeking the warrant.
 - b. Determine whether the officer has probable cause to conduct the search.
 - c. Define parameters of the search.
 - d. Issue the warrant for the specific search if it is determined to be legal.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

2. After a case is charged, the judge may need to rule on objections and motions to preclude evidence. These motions often require the Court to determine if the evidence was obtained as the result of a lawful search, with or without a search warrant.

C. Requirement for probable cause

1. A search based on a warrant is legal only when probable cause exists. What do we mean by that? The facts are sufficient to warrant a person of reasonable caution to believe that the seizable items were or are associated with suspected criminal activity and the items are presently located on the premises or person to be searched.
2. The “objective test” applies. Based upon the objective facts, what would a reasonable person believe?
3. The judge makes a decision by examining the totality of the circumstances.
4. We need facts, not conclusions or opinions.
 - a. Facts must have been legally obtained.
 - b. However, the facts offered in support of a search warrant need not be admissible; facts based only upon hearsay, for example, may be considered.
 - c. Facts may be based on information from an informant or other officers, if the information seems reasonably reliable.
 - d. Information must not be unduly “stale”; the need for the warrant and the facts contained in the affidavit must still be ripe.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

D. The scale of certainty

Read the story below. At what point would you, the judge, be willing to issue the warrant?

A police officer is seeking a warrant to draw blood from a suspect. The officer states under oath that:

- He was driving on 4th Street.
- He noticed a white sedan in front of him.
- He saw the sedan run through a stop sign without slowing.
- He saw the sedan weave outside of its lane two times.
- He stopped the sedan and spoke with the driver.
- He noticed the driver had bloodshot, watery eyes.
- He noticed the driver fumbling with his wallet.
- He noticed a strong odor of alcohol coming from the defendant's breath.
- The passenger in the vehicle says the defendant had lots to drink that night.
- The defendant refused field sobriety tests.
- The defendant refused to answer questions.
- The defendant refused to consent to a blood draw.
- Thirty minutes have passed since the stop.

E. Search warrant documents

1. **Affidavit** for a search warrant states the legal basis for the search, describes the persons and/or places to be searched, describes the

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

items to be seized, and states the facts establishing probable cause. The affidavit is sworn to by the peace officer before the judge and filed with the Court.

2. The **search or arrest warrant** is the order by the judge that authorizes the search or arrest and defines the parameters. A proper search warrant describes the persons and/or places to be searched, the time of day during which the search should be conducted, and the specific items to be seized. The search warrant is filed with the Court. The search must be conducted no more than 5 calendar days after issuance.
3. The **return** is the document completed by the officer who made the search. This document states that the search was made and describes the results of the search: when and where it was made and what was found. It is sworn by the officer before the judge and must be filed with the Court within 3 business days of the execution of the warrant.

F. Activity: Would you issue a warrant?

1. Purpose: To practice determining if you would issue a search warrant.
2. Directions: With your table group, read and discuss each scenario, and decide what you think the judge should do.

=====

SCENARIO 1

An officer requests a warrant to search the suspect's house for a stolen purse "or other items belonging to the victim." The officer states under oath that a woman has reported that the purse was missing. The purse had been left in a movie theatre near the suspect's house. She recently received her bank statement and saw that a check had been issued against her account

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

since the time the purse went missing. The officer confirmed with the bank that a check had been issued to a local shoe store and verified the signature on the check was slightly different than the account owner's. The suspect is an employee of the movie theatre, who was on duty during the time the purse was lost. Another employee of the theatre heard the suspect talking about being able to afford a new leather jacket now and noticed the suspect was wearing new shoes. The shoe store employees confirmed that the check was received in exchange for a pair of shoes but could not provide a description of the person who issued them the check. The officer got the suspect's address from the movie theatre's management.

SCENARIO 2

An officer seeks a court order for the name of the user associated with a certain cell phone number. He states under oath that the cell phone company has refused to release the needed information without a court order to do so. The officer states that a man has reported receiving a threatening call on his cell phone. The man said that he did not recognize the voice and had no arguments with anyone that he knew of. The caller allegedly said, "I know where you live and you better watch out." The call was received twelve hours earlier and no other threatening calls had been received since then. The man's caller ID gave a cell phone number but calls back to that number have gone unanswered throughout the day.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

G. Execution of the warrant

1. Officers must generally knock and announce before entering unless there are exigent circumstances or they have a “no knock” warrant. However, the Supreme Court has found that violating the “knock and announce” rule does not warrant suppression of evidence obtained with a valid warrant. *Hudson v. Michigan*, 126 S.Ct. 2159 (2006).
2. Officers may seize items in plain view while searching within the scope of a warrant for other items. They may also seize items reasonably related to the crime, although not listed. For example, when searching for drugs, they may seize weapons.

H. Exclusionary rule with regard to searches

1. Evidence directly obtained as a result of illegal searches and evidence obtained by using or exploiting the illegally obtained evidence generally is not admissible against the person whose reasonable expectation of privacy was violated. As noted earlier, sometimes the exclusionary rule is inapplicable, such as when there is a dissipation of the taint from the illegal act, or the evidence would have been discovered inevitably or by an independent source.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

2. The facts offered in support of a search warrant need not be admissible; facts based only on hearsay, for example, may be considered.
3. Challenges to warrants:
 - a. If a warrant is later found to have lacked probable cause, the evidence will not be suppressed if the officers acted in **good faith** by relying on a warrant they believed was valid at the time. *United States v. Leon*, 468 U.S. 897 (1984).
 - b. If a defendant claims that the warrant was based on intentional falsehoods made by the officer seeking a warrant, a hearing may be warranted. This is commonly called a **“Franks” hearing**, based on *Franks v. Delaware*. If a judge finds that the warrant contained information that the officer knowingly, intentionally, or with reckless disregard included in the warrant, then that information is removed from the warrant. If no probable cause exists without it, the warrant is invalid. No good faith exception applies in this circumstance.
3. In most cases, evidentiary hearings on suppression issues begin with the defense having the burden of production. If the initial burden of production is met, the State then has the burden of proving that its evidence was lawfully obtained, and must prove it by a preponderance of the evidence.
4. When hearing a case, the judge may have to decide whether or not evidence was legally obtained. This determination may require the judge to decide if a search warrant was necessary but not sought, if the search was properly conducted pursuant to a search warrant, or if a warrant exception existed.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

V. TELEPHONIC WARRANTS

A. By telephone or fax

1. Judges may issue search warrants to law enforcement officers by telephone or fax. The same legal authority controls the issuance of telephonic and in-person warrants.
2. The only differences are:
 - a. The call must be recorded.
 - b. A witness must be present to sign with the officer.
 - c. Documents may be faxed to the judge but all of the original signatures must be filed with the Court later.
3. The Benchbook provides a script for this procedure.
4. The LJ Reference Manual, chapter 18, provides information about warrants

B. Overview of the procedure

1. The law enforcement officer calls to request the telephonic warrant.
2. The judge or police office sets up the recording device and ensures it is operating properly. Recording is mandatory for all telephonic search warrants. A.R.S. § 13-3914
3. The officer needs to provide, over the telephone, the information required on the search warrant affidavit.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

4. The judge does the following by telephone:
 - a. Administer the oath to the law enforcement officer.
 - b. Determine the legal basis for the search.
 - c. Identify the places/persons to be searched.
 - d. Identify the items to be seized.
 - e. Determine the facts establishing probable cause.
 - f. If probable cause has been found, issue the warrant by telephone.

5. After the telephone call, the judge must complete the record.
 - a. May direct that the telephone call recording be transcribed. A.R.S. §13-3914(C).
 - b. Certifies the transcript, if the call is transcribed. A.R.S. §13-3914(C).
 - c. Files the transcript in court. A.R.S. §13-3914(C).
 - d. Causes an original warrant to be prepared and enters the exact time of the issuance of the duplicate original warrant on the face of the original affidavit. A.R.S. § 13-3915(D).
 - c. Upon return of the duplicate original warrant, causes the original warrant and the duplicate original warrant to be filed as provided for in A.R.S. § 13-3923. A.R.S. § 13-3915 (E).

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

VI. EXCEPTIONS TO THE WARRANT REQUIREMENT

The Fourth Amendment requires searches to be conducted only as authorized by a warrant. However, case law and statutes contain many exceptions to that general rule.

- The LJ Reference Manual, chapter 18, as well as the Search & Seizure Manual, provide more details about the situations when a search warrant is not necessary.

A. No Reasonable Expectation of Privacy (“Standing”)

The Fourth Amendment protects people, not places. It protects people by protecting only those places in which the person has a “reasonable expectation of privacy.”

- For example, an expectation of privacy would exist in a defendant’s small, enclosed backyard of his home surrounded by a 10-foot block wall and to which the front gate is locked. Officers could not scale the walls or break down the door without a warrant, unless there was an exception to the warrant requirement.
- However, there would be no reasonable expectation of privacy in the front door of a home or path leading up to it, if anyone could walk up and knock on the door. For this reason, police may conduct “knock & talks” by walking up to a house to speak to the occupants, if any salesman or other citizen would have the same access. No warrant or justification is required. However, the officer may not take a dog to sniff the area around the porch, for example. *Florida v. Jardines*, 133 U.S. 1409 (2013). *See also Collins v. Virginia*, 138 S. Ct. 1663 (2018) (driveway next to house was protected curtilage).

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

- If John gives Mary a package of tar heroin to hold in her purse, and her purse is searched by law enforcement, does John have standing to object to that search?

B. Abandonment

A person does not have an expectation of privacy in an item that he has abandoned by words or actions. Facts showing abandonment include running away from a vehicle containing contraband, throwing an item away while being chased, leaving a garbage can for pick-up at the curb, or denying any interest in the item when asked by law enforcement.

C. Search is Conducted By Private Person, Not Officer

Many searches are conducted by people who are private citizens and not acting as state agents. This type of search is not prohibited by the Fourth Amendment. A “state agent” includes a person who is acting at the request or suggestion of the police.

D. Plain View

A “search” only occurs when state actors pry into an area in which the suspect has a reasonable expectation of privacy, or manipulate an object to see it. Sometimes there is no “search” at all (i.e., dog sniff of outside of bag). If the object is not hidden and visible from a lawful vantage, there is no search and thus no violation of the Fourth Amendment. An object in plain view may be seized without a warrant if (1) the officer is in a lawful position to see the evidence and (2) on its face it is immediately apparent to the officer that the object has a relationship to criminal activity.

- For example, a license plate number on the back of a car or the tattoo on that person’s

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

bare arm would be considered in plain view, but a blood sample drawn from that person would constitute a search.

- If an officer walks by a house and from the sidewalk sees marijuana in plain view in the living room, may he go inside the house to get the marijuana without a warrant?

E. Exigent Circumstances and Emergency Aid

An exigent circumstance is one that calls for immediate action such that the police had no time to seek a warrant. Immediate action is required, for example, to protect the officer or another person (i.e. domestic violence victim), to offer emergency aid to someone in peril, to prevent escape during hot pursuit of a felon suspect, or to prevent the imminent destruction of evidence. The Court must balance the constitutional privacy interests of an individual against the urgency of the exigency presented.

F. Community Caretaking Function

The community caretaking exception permits an officer to stop or search when the officer “do[es] no more than is reasonably necessary to ascertain whether someone is in need of assistance or property is at risk and to provide that assistance or to protect that property. . . . The appropriate standard under the community caretaking exception is one of reasonableness: Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions?” *State v. Organ*, 225 Ariz. 43, 47, 234 P.3d 611 (App. 2010) (Div. 1) (officer conducted welfare check of stopped vehicle; defendant began driving slowly on shoulder without emergency lights; officer activated his emergency front lights to alert defendant he was an officer; officer walked over and received

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

answers from defendant that made him suspicious; Court stated that officer's initial stop was lawful based on community caretaking function). However, Arizona officers may not enter a home under this exception. *State v. Wilson*, 237 Ariz. 296 (2015).

G. Protective Sweeps

Officers may conduct a protective sweep of a home incident to the arrest of a person inside (or just outside) the home, or if the officer has a reasonable belief that a person who could pose a danger to the officer is inside the home. When conducting the sweep, officers may only look in places where a person could be hiding (i.e., no dresser drawers).

H. Vehicle Search Based On Probable Cause

Because a vehicle is mobile, warrantless vehicle searches are permitted without a warrant. The State may search a vehicle without a warrant under this exception only when there is probable cause to believe the vehicle contains contraband or evidence of a crime. This search includes the entire vehicle and any containers in the vehicle. The search does not need to be contemporaneous (unlike the search incident to arrest exception).

I. Search of Person/Vehicle Incident to Arrest

A person may be searched without a warrant incident to, and contemporaneously with, a lawful arrest, which encompasses personal possessions and whatever is in the "wingspan" of the arrestee (purses, wallets, weapons, etc.)

Incident to a lawful arrest, an officer may search the passenger compartment of the vehicle contemporaneous with the arrest of a recent occupant. Such a search is permissible if either

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

(1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or (2) the officer has reason to believe that the vehicle contains evidence of the offense of arrest. *Arizona v. Gant*, 129 S.Ct. 1710 (2009). An officer cannot search a vehicle incident to citing and releasing for a speeding violation. *Knowles v. Iowa*, 525 U.S. 113 (1998).

Officers may seize a cellphone incident to arrest, but they cannot search the cellphone without a warrant or warrant exception. *Riley v. California*, 134 S.Ct. 999 (2014).

J. Inventory Search of Person or Vehicle

The State may conduct an inventory search of an impounded vehicle without a warrant as long as the search is conducted pursuant to departmental policies. An individual may also be inventoried without a warrant at the jail.

K. Consent

Officers may search a place or thing based on valid consent. First, the person must give clear consent. Second, the person must have actual or apparent authority to consent over the area or item searched. Third, the consent must be voluntary. The officers cannot exceed the scope of consent given, and must honor any narrowing or withdrawal of consent. Officers ordinarily can rely on consent given by an occupant of the residence, although another “present and objecting” co-occupant can prevent the officer’s entry by objecting at the time. This is a narrow exception.

L. Protective “Frisk” of Person/Vehicle

An officer may frisk a person without a warrant if he reasonably believes the person could have

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

a weapon. *Terry v. Ohio*, 392 U.S. 1 (1968). The officer then may pat down the person's outer clothing and remove an item that feels like a weapon or is "immediately apparent" to be contraband. *Minnesota v. Dickerson*, 113 S.Ct. 2130 (1994). The officer may also frisk a passenger during a traffic stop if there is a fear for safety. *Arizona v. Johnson*, 129 S.Ct. 781 (2009). In Arizona, an officer cannot frisk a person during a consensual encounter, i.e., when reasonable suspicion to stop is absent. *State v. Serna*, 331 P.3d 405 (Ariz. 2014). [That rule is different federally. See *United States v. Orman*, 486 F.3d 1170 (9th Cir. 2007).] An officer may also search the passenger compartment of a vehicle for weapons if he reasonably believes there could be a weapon in the vehicle (i.e., he sees the butt of a shotgun, or a bullet on the seat, etc.) *Michigan v. Long*, 463 U.S. 1032 (1983); *State v. Garcia Garcia*, 169 Ariz. 530, 531, 821 P.2d 191 (App. 1991).

M. Border or Checkpoint Searches

Because of the nature of the border and the customs duties, people and vehicles may be searched at the border without a warrant or probable cause or reasonable suspicion. Vehicles may be stopped at immigration or DUI checkpoints without individual reasonable suspicion; however, the vehicle may not be searched at a checkpoint unless an exception (like consent or probable cause) applies.

N. Other Reasonable Searches / Administrative

Some searches are permitted based on administrative authority, or because they are simply not unreasonable. Some searches in this category include regulatory inspection searches, border agricultural inspections, airport screenings, search of a jail cell, etc.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

O. Inevitable Discovery and Independent Source

Evidence need not be suppressed if discovered inevitably or based on independent information. For example, if an officer illegally enters a home, but a search warrant is obtained based on independent information, the evidence is not suppressed. *Segura v. U.S.*, 468 U.S. 796 (1984).

P. Examples

1. Police are booking a person they have lawfully arrested and taken into custody. May they search the defendant without a warrant?
-
-

2. A highway patrol officer stops a sedan on Interstate 10 for speeding. The officer smells a strong odor of marijuana coming from the back of the vehicle. May the officer search the trunk without a warrant?
-
-

3. An occupant gives the officer consent to enter the house. The officer then sees a kilo of cocaine on the kitchen counter. May the officer seize the evidence without a warrant?
-
-

4. An officer finds a cellphone incident to arrest. May he search it without a warrant?
-
-

Q. Activity: Was evidence obtained properly?

1. Purpose: To practice determining if evidence gathered as the result of warrantless searches is admissible.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

2. Directions: Read and discuss each scenario, and decide whether or not the judge should admit the evidence.

=====

SCENARIO 1

You are the trial judge. The case of *State v. John Green* is set on your docket for a jury trial next month. You receive a motion from the Defendant entitled “**Motion to Suppress.**” The motion alleges that the State will attempt to use blood test results (in boldface, below) at trial that were gathered unlawfully because the Defendant’s blood was drawn by the police without his consent and without a warrant. The motion asks you to prohibit the State from presenting the results at trial. You then receive the prosecutor’s response, which claims that the blood sample was lawfully collected because no warrant was necessary. You set the case for an evidentiary hearing.

At the hearing, you make the following findings of fact:

Deputy Hill was dispatched to the scene of a one-vehicle accident. When he arrived at the scene, he saw the Defendant sitting in the driver’s seat of a car that had obviously crashed into a telephone pole. The Defendant did not appear to be injured, but had very bloodshot eyes and a strong odor of alcohol.

The officer asked the Defendant if he was okay and the Defendant replied, “Go away.” The officer noticed that his speech was slurred. A nearby witness, who had called the police, told the officer she had seen the car crash into the pole and that the accident had happened only a couple of minutes before the officer arrived. The officer asked if the car was his and the Defendant did not respond. The officer asked for identification and the Defendant pulled his wallet out of his pocket and handed the wallet to the officer. The officer noticed that the Defendant’s movements were slow and clumsy. The officer asked if the Defendant if he would do some field sobriety tests and the Defendant said “No.” The officer

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

then handcuffed the Defendant and took him in the patrol car to the police station.

At the station, the officer read the Defendant his *Miranda* rights, told him he was under arrest for driving under the influence, and asked the Defendant if he would take a blood test. The Defendant said “No.” At that point, about thirty minutes had passed since the time of the accident. The officer wanted to get an accurate reading as close in time to the accident as possible, without further delaying the test. The officer was a certified phlebotomist. He told the Defendant, “Your time is up; I can draw your blood even without your consent.” The Defendant said “No you can’t.” The officer then strapped the Defendant’s arms to the chair and drew a blood sample. The sample was tested and revealed a **blood alcohol content of .210**.

The prosecution has charged the Defendant with extreme driving under the influence, a class one misdemeanor.

In deciding whether to grant the motion to suppress, you must determine:

1. Whether a search occurred and
2. Whether any warrant exceptions apply.

Missouri v. McNeely, 133 S.Ct. 1552 (2013); *State v. Nissley*, 241 Ariz. 327 (2017).

SCENARIO 2

You are the trial judge. The case of *State v. Richard Doe* is set on your docket for pre-trial conference trial next month. You receive a motion from the Defendant entitled “**Motion to Suppress.**” The motion alleges that the State gathered certain evidence (in boldface, below) in violation of the Defendant’s Fourth Amendment rights and asks you to preclude the evidence at trial. You then receive the prosecutor’s

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

response, which claims that the evidence was lawfully gathered because no warrant was necessary. You set the case for an evidentiary hearing.

At the hearing, you make the following findings of fact:

Officer Smiley was dispatched to the scene of a family fight. The dispatcher told the officer that a neighbor had reported hearing a male and a female voice yelling and pounding noises coming from the home in question.

When the officer arrived at the home, he noticed that the screen door was closed but that the wooden front door was standing open. The officer walked up to the door and looked inside. He could see the kitchen area, and noticed **broken glass on the floor, broken plates on the table, and what appeared to be blood smeared on one of the cabinets.** The officer banged on the door and said “police.” The Defendant came to the door. He had blood on his left hand. The officer asked what was going on and the Defendant replied, “I cut my hand on some glass. I’m fine.” The officer asked if he could come in and look around. The Defendant said “No, I said I’m fine.” The officer pushed the door open and went inside. In the living room, the officer saw **a woman with a bloody nose and drug paraphernalia on a table.** The woman told the officer that the Defendant had been using drugs all afternoon and punched her in the face when she told him to leave the residence.

The prosecution has charged the Defendant with assault and possession of drug paraphernalia, both class one misdemeanors.

In deciding whether to grant the motion to suppress, you must determine:

1. Whether a search occurred and
2. If so, whether any warrant exceptions apply.

SEARCH & SEIZURE WARRANTS; ARRESTS; CONFESSIONS

Participant Study Guide

Notes

State v. Linton, 146 Ariz. 184 (1985).

=====

R. Summary: Warrants & Exceptions

1. A search warrant may be issued only when the court finds probable cause to believe there is contraband or evidence of a crime at the premises to be searched.
2. When determining probable cause, the “objective test” applies. The judge decides if probable cause exists based on examining the totality of the circumstances.
3. Certain warrantless searches are permitted. If the State seeks to use evidence gathered as the result of a warrantless stop or search, the State bears the burden of proving that a warrant exception applies. If an illegality occurs, consider whether the exclusionary rule (i.e. “fruit of the poisonous tree” doctrine) applies.
5. The remedy for violations of search warrant requirements fall within the exclusionary rule. Consider whether good faith applies.

County of Maricopa, State of Arizona

Search Warrant # :
SW2021-077933

Agency Report # : *

The Agency Report Number must not be blank

Call Back #: *

THAT THE AFFIANT has probable cause to believe

That on or about: *

At *

or Between

in the County of: *

in the State of: *

06/29/2021



1238 PM

Yavapai

Arizona

the crime(s) of: *

was/were committed by the following person(s):

Name: *

Race: *

Sex: *

DOB:



Clear:



+ Add a Person

On the premise(s) known as:

Location : *

Do Not Print on Warrant

Clear:



[+Add a Place](#)

At least one of the check boxes below must be selected: *

- was (were) stolen or embezzled
- was (were) used as a means for committing a public offense
- is (are) being possessed with the intent to use as a means of committing a public offense
- are in possession of another to whom they may have delivered it for the purpose of concealing it or preventing it being discovered
- such person is the subject of an outstanding arrest warrant
- constitutes any evidence which tends to show that a particular public offense has been committed or tends to show that a particular person has committed the public offense

That said property, persons or things are described as follows: *

That the following facts establish probable cause for believing that grounds for issuance of a search warrant for the aforementioned property, persons or things exist: *

Wherefore Affiant requests that a warrant be issued commanding that a search be made in the daytime (between 6:30 AM and 10:00 PM local time) of the person(s) premise(s), building(s), vehicle(s) and/or other item(s) described herein for the property and things described herein, and that the same be retained in the custody of the Affiant or in the custody of the *

Yavapai County Sheriff

and disposed of according to the law, pursuant to ARS §13 - 3920 ⓘ

Special Service Requests

IN THE NIGHTTIME (warrant may also be served during the hours between **10:00 PM AND 6:30 AM** local time pursuant to A.R.S. §13-3917 ⓘ **(good cause having been shown below)**:

Request for an **UNANNOUNCED ENTRY** pursuant to A.R.S. §13-3915B ⓘ **(reasonable cause having been shown below)**:

REQUEST SEARCH WARRANT DOCUMENTS REMAIN SEALED pursuant to A.R.S. §13-3918 requirement ⓘ **(good cause having been shown below)**:

Affiant: Terpstra, Arie - 11196

Date: 06/29/2021 Time: 08:38 AM

By submitting an application for a search warrant through this electronic warrant system, I understand and agree that I must also submit the return for the warrant through this electronic system.

By clicking "Submit" below, I certify that the above information is true and correct to the best of my personal knowledge.

MARICOPA COUNTY SUPERIOR COURT JURISDICTION SPECIAL WARRANT

ISSUANCE of Special Warrant at (Initial Appearance Court)

SPECIAL WARRANT NUMBER:	SW 2021 - 006836
--------------------------------	-------------------------

AFFIANT NAME:		BADGE NUMBER:
AGENCY:		TIME:

INDICATE TYPE OF ISSUANCE (ISW)	
	WALK-IN
	FAX/ELECTRONIC

CAPTION:	
	IN RE THE MATTER OF SEARCH WARRANT (951)
	IN RE THE MATTER OF PEN REGISTER/TRAP AND TRACE (952)
	IN RE THE MATTER OF ORDER FOR ELECTRONIC COMMUNICATIONS DATA RECORDS (956)
	IN RE THE MATTER OF TRACKING DEVICE SEARCH WARRANT FOR A COMMUNICATIONS DEVICE (954)
	IN RE THE MATTER OF CELL SITE SIMULATOR DEVICE SEARCH WARRANT (955)
	IN RE THE MATTER OF TRACKING DEVICE SEARCH WARRANT FOR A VEHICLE (958)
	IN RE THE MATTER OF ORDER TO OBTAIN PHYSICAL EVIDENCE OR PHYSICAL CHARACTERISTICS (959)
	IN RE THE MATTER OF (957)

ORDERED BY THE COURT:	
	SEAL ALL SEARCH WARRANT DOCUMENTS PER REQUEST OF OFFICER/STATE AS ORDERED BY THE COURT.
	SEAL ALL ISSUANCE DOCUMENTS PURSUANT TO A.R.S. 13-3918.

IT IS FURTHER ORDERED THAT ALL WORKSHEETS IN THIS CASE ARE NOT TO BE SEALED UNLESS SPECIFICALLY ORDERED BY THE COURT.

Nighttime

No Knock

DATE	TIME Hours	JUDGE OR JUDGE PRO TEM
------	---	------------------------

Please forward these documents immediately to the following address:
 Clerk of Superior Court, Special Warrant Desk
 175 W. Madison St., ECC/RCC 4th Floor; Telephone: (602) 506-7754
 Issuance Worksheet Form LRD 09/21/17

Superior Court of Arizona

In and For Maricopa County

AFFIDAVIT FOR SEARCH WARRANT

SEARCH WARRANT #

AGENCY REPORT #

YOUR AFFIANT, [REDACTED] a Peace Officer in the State of Arizona, being first duly sworn, upon oath, deposes and says:

That on or about 4/13/2021, between 2:00 PM and 12:00 AM, in the County of Maricopa, State of Arizona, the crime(s) of: Narcotic Drug Sales A.R.S. 13-3408A2, Dangerous Drug Sales A.R.S. 13-3307A2 was/were committed by the following person(s):

Name: [REDACTED]	Race: [REDACTED]	Sex: [REDACTED]	DOB: [REDACTED]
Name: [REDACTED]	Race: [REDACTED]	Sex: [REDACTED]	DOB: [REDACTED]

On the premise(s) known as:

On the premise of [REDACTED] a single story cream colored stucco home with brown trim. The house is located on the north side of the street with a south facing front door with a cream colored security screen. The house has a cream colored garage door, a light colored shingle roof with solar panels installed over the garage area. The front sidewalk, directly in front of the house is a painted white background with the [REDACTED]

There is now being possessed or concealed certain property, person(s), or thing(s) which:

- was (were) stolen or embezzled
- was (were) used as a means for committing a public offense
- is (are) being possessed with the intent to use as a means of committing a public offense
- is (are) in possession of another to whom they may have delivered it for the purpose of concealing it or preventing it being discovered
- constitutes any evidence which tends to show that a particular public offense has been committed or tends to show that a particular person has committed the public offense
- such person is the subject of an outstanding arrest warrant

Superior Court of Arizona

In and For Maricopa County

AFFIDAVIT FOR SEARCH WARRANT

SEARCH WARRANT #

AGENCY REPORT #

That said property, person(s) or thing(s) are described as follows:

• On the person of [REDACTED]

• On the person of [REDACTED]

- A usable amount heroin and opium based illegal drugs and illegal opioids (i.e oxycodone, fentanyl, etc)
- A usable amount of methamphetamine
- A usable amount of heroin
- Any and all other types and forms of illegal drugs
- Paraphernalia used to smoke, ingest, or inject methamphetamine, heroin or any other illegal drugs.
- Paraphernalia used to facilitate the sale of illegal drugs to include safes, ledgers, packaging material, books, records, receipts, notes, ledgers, and other papers relating to the transportation, ordering, possession, sale, transfer and importation of illegal drugs
- Communications equipment such as; cellular telephones and computers, which may contain information pertaining to co-conspirators, sources of supply, customers, financial institutions, and other individuals or businesses with whom a financial or drug relationship may exists. Including the means to manipulate any device found to further the investigation.
- Any safes or lock boxes, locked or unlocked, and the ability to manipulate
- Indicia of occupancy, residency, rental and/or ownership of the premises described herein, including, but not limited to, rental, purchase or lease agreements.
- Any firearms and any and all items relating to a firearm, including but not limited to holsters, cases, and or ammunition. Also any records or receipts pertaining to firearms and or ammunition.
- United States Currency and coins

That the following facts establish probable cause for believing that grounds for issuance of a search warrant for the aforementioned property, persons or things exist:

Affiant [REDACTED] Training and Experience

I, your Affiant, Officer [REDACTED] have been a police officer for over 4 years with the City of Phoenix. I am currently assigned to the Neighborhood Enforcement Team out of the Black Mountain Precinct. Myself and other officers assigned to this detail are responsible for the investigation and resolution of neighborhood marijuana, narcotic, and dangerous drug activity observed in high volume areas for drugs use and drug sales. Your affiant has received training in the recognition and detection of illicit drugs to include marijuana, narcotics, and dangerous drugs from the Arizona Law Enforcement Academy. Your affiant has been involved in many arrests of subjects using, possessing, and selling illicit drugs including marijuana, dangerous, and narcotic drugs. Your affiant is also currently a certified controlled substance officer and have experience with identifying and testing of drugs from subjects using, possessing, and selling illicit drugs including marijuana, dangerous, and narcotic drugs.

Superior Court of Arizona

In and For Maricopa County

AFFIDAVIT FOR SEARCH WARRANT

SEARCH WARRANT #

AGENCY REPORT #

I, your affiant, obtained related information from Office [REDACTED] on April 14, 2021 pertaining to an investigation being conducted by the 21X squad out of Black Mountain Precinct for the residence located at [REDACTED] with regards to narcotic drug and dangerous drug sales. The information related to your affiant is as followed.

Summary

Officers from the Black Mountain Precinct Neighborhood Enforcement Team began conducting surveillance on the house located at [REDACTED] due to a high volume of drug activity and multiple recent recovered stolen vehicles. During the surveillance officers observed multiple vehicles and subjects arrive at the house, stay for a short period then leave. Many of the subjects would wait out front prior to being let in through the side gate. This behavior is commonly observed in drug sales investigations.

On March 31st, 2021, officers observed a vehicle which left the house located [REDACTED] and the driver was contacted. The driver stated they arrived at the residence to purchase drugs, but they were unsuccessful in making a purchase. They have purchased drugs from [REDACTED] in the past and has seen him with a large quantity of illegal fentanyl pills.

On March 31st, 2021, officers conducted a traffic stop on a vehicle leaving the residence located at [REDACTED]. The driver was found to be in possession of a large quantity of fentanyl pills and methamphetamine.

On April 13th, 2021, two traffic stops were conducted with two different vehicles observed arriving at the house and staying for a short period of time before leaving. The first subject indicated they arrived at the house to purchase methamphetamines, which they have done in the past, but was told to return later. The second subject was contacted a short time later after they were observed at the house. That subject stated they purchased two fentanyl pills from [REDACTED] and previously purchased from him in the past.

Narrative

2021-463291

On March 24th, 2021, at approximately 1200 hours a vehicle was observed at the house located at [REDACTED]. A subject exited the house and got into the driver's seat. The vehicle proceeded to the Circle K located at [REDACTED] where they picked up a second subject then continued to the [REDACTED]. Unmarked units watched the vehicle park and the driver began to smoke a pill from a piece of tin foil. The subject was contacted seated inside the vehicle. Upon speaking with the subject, they stated they stopped by the house located at [REDACTED] to purchase fentanyl pills from [REDACTED] which they have done multiple times in the past. They stated [REDACTED] did not have any pills at this time, but [REDACTED] usually has a few hundred

Superior Court of Arizona

In and For Maricopa County

AFFIDAVIT FOR SEARCH WARRANT

SEARCH WARRANT #

AGENCY REPORT #

pills in his possession for sale.

2021-491284

On March 29th, 2021, at approximately 1300 hours, officers observed a vehicle parked in front of [REDACTED]. A subject exited the house and entered a vehicle. A traffic stop was conducted on the vehicle and inside, officers located a safe disguised as a book. The key to the safe was located on the driver's key chain. Inside the safe officers located 43 blue pills believed to be fentanyl along with 39.4 grams of methamphetamine.

2021-576007

On April 14th, 2021, at approximately 1230 hours, [REDACTED] was conducting surveillance on a known drug house located at [REDACTED] when he observed a sedan pull up to the front of the house. A subject exited and attempted to make contact at the fence on the east side of the property. A few minutes later a female opened the gate and the subject entered. The subject exited the house approximately five minutes later and left in his vehicle. The vehicle was followed to the Circle K on [REDACTED] Drive, then continued until it turned south on [REDACTED]. The vehicle was pulled over for multiple driving infractions, i [REDACTED]

Upon contacting the subject, she admitted to having a meth pipe in her purse, which was later located with a large amount of methamphetamines burnt to the sides. The subject said they originally went to the house to purchase methamphetamine, but the occupants said they currently did not have any to sell, but might have some later. The subject has purchased from the occupants of the house in the past.

2021-576043

On April 13th, 2021, at approximately 1400 hours, a subject was observed entering the east gate of the property located at [REDACTED] which was opened by the same female subject as earlier. The subject entered the rear yard then returned to the front approximately five minutes later and quickly began walking west. The subject was observed meeting up with a second subject and walked over to the Circle K, located at [REDACTED] is already positioned in the parking lot in an unmarked vehicle. The second subject was observed ducking down near a water dispensing machine and appeared to be attempting to light an object in his hand. Both subjects were contacted, and officers observed a piece of tin foil along with a glass "tooter", which is a commonly known street term as type of drug paraphernalia used for smoking illicit drugs. On the tin foil were two half-burnt blue pills, which the subjects admitted to being fentanyl pills.

[REDACTED] spoke with the subject that was observed exiting the house and they stated they entered the house to purchase illegal drugs. They stated they purchased two fentanyl pills for \$10, which were then given to the second subject at the [REDACTED]. The

Superior Court of Arizona

In and For Maricopa County

AFFIDAVIT FOR SEARCH WARRANT

SEARCH WARRANT #

AGENCY REPORT #

subject stated they purchased the pills from [REDACTED] the subject stated they have purchased multiple times from the house located at [REDACTED] they stated [REDACTED] commonly has 100 or more fentanyl pills, along with methamphetamine and heroin. The subject also stated [REDACTED] is known to carry a firearm.

It is your affiant's experience the persons who sell and use illegal drugs often have items of drug paraphernalia in their current residence or on their persons, used to smoke, ingest, or injects the illegal drugs. They also commonly have scales, ledgers, or packaging material used to weigh, account for, or package for sale or use the illegal drugs. Subjects who transport, sell, or distribute illicit drugs also have U.S. currency or other forms of currency in their possession as proceeds from their illegal transactions. These subjects often arm themselves with weapons in order to protect themselves from others who may be involved in illegal drug trafficking. They use cellular phones and electronic communication devices to coordinate their illegal transactions. It is also your affiant's experience that persons who sell or use illegal drugs, as well as other individuals, frequently have in their residence or on their persons, canceled letters, envelopes, water bills, utility bills, or other records that tend to show ownership or control of a residence or specific rooms, safes or other compartments within said residence.

Night time,

Your affiant requests the option to serve the search warrant, should the need be requested for the service of the warrant by the Phoenix Police Special Assignments Unit during night hours. Phoenix SAU, due to the safety of the officers serving the warrant and/or the public around the residence, may request to serve the warrant during night hours. Due to the fact that there are cameras on the exterior of the property along with the heavy foot and vehicle traffic occurring during the evening hours. There is a high violence potential with the occupants inside the residence, as [REDACTED] known to be armed. Allowing a night time service of this warrant would make it safer for the citizens inside the residence and the officers serving the warrant.

No Knock,

Members of the Phoenix Police Department conducted an investigation, including interviews, which have identified subjects inside the residence located at [REDACTED]. The occupants of the residence have a history of violent criminal behavior, felony warrants, illegal drug activity, with at least one known occupant having a history of being armed with a deadly weapon. [REDACTED] lead guilty to two different [REDACTED]

The request for an unannounced entry is a tactical decision, which in this case will allow the tactical team to safely secure an opening into the residence without identifying their physical position outside, allowing verbal announcements to be made. The opening to the residence will ensure a clear avenue of verbal communication to the subjects inside the residence. The intent of the unannounced entry is to avoid close

Superior Court of Arizona

In and For Maricopa County

AFFIDAVIT FOR SEARCH WARRANT

SEARCH WARRANT #

[REDACTED]

AGENCY REPORT #

[REDACTED]

interaction of subjects inside the residence (likely to be armed) and officers at the front door or a window. Instead, to de-escalate the search warrant service by establishing contact from a position of distance from the residence and avoiding an immediate confrontation. A dynamic entry into the residence is not planned unless the occupant's actions dictate.

The unannounced entry warrant initiates the de-escalation process from the onset and reduces close quarter confrontation between officers, non-suspects, and suspects which are known to be armed. It creates time and distance to establish communication and avoid misidentification.

Wherefore your affiant prays that a search warrant be issued commanding that an immediate search be made of the persons and premises and building herein for the property, persons and things herein described, and that the same be retained in the custody of Affiant or in custody of the agency which Affiant represents and disposed of according to law, pursuant to A.R.S. 13-3920.

Wherefore Affiant requests that a search warrant be issued commanding that a search be made in the daytime (between 06:30 AM and 10:00 PM local time) of the person(s) premise(s), building(s), vehicle(s) and/or other item(s) described herein for the property and thing(s) described herein, and that the same be retained in the custody of the Affiant or in the custody of the Phoenix Police Department and disposed of according to the law, pursuant to A.R.S. §13-3920.

Superior Court of Arizona
In and For Maricopa County

AFFIDAVIT FOR SEARCH WARRANT

SEARCH WARRANT #

AGENCY REPORT #

Special Service Requests:

- Affiant further requests authority to serve the warrant in the nighttime (permitting the warrant to be served during the time between 10:00 PM and 06:30 AM local time pursuant to A.R.S. §13-3917, good cause having been shown below):

Due to the fact that there are cameras on the exterior of the property along with the heavy foot and vehicle traffic occurring during the evening hours. There is a high violence potential with the occupants inside the residence, a [REDACTED] known to be armed. Allowing a night time service off this warrant would make it safer for the citizens inside the residence and the officers serving the warrant.

- Affiant further requests authority to conduct an unannounced entry pursuant to A.R.S. §13-3915(B) (reasonable cause having been shown below):

The unannounced entry warrant initiates the de-escalation process from the onset and reduces close quarter confrontation between officers, non-suspects, and suspects which are known to be armed. It creates time and distance to establish communication and avoid misidentification [REDACTED]

- Affiant further requests that the search warrant documents remain sealed after the return of the warrant pursuant to A.R.S. §13-3918 (good cause having been shown below):

- Seal All Issuance Documents Pursuant to A.R.S. §13-3918.
 Seal All Search Warrant Documents Per Request of Officer/State as Ordered By The Court.

Superior Court of Arizona

In and For Maricopa County

AFFIDAVIT FOR SEARCH WARRANT

SEARCH WARRANT #

AGENCY REPORT #

Pursuant to Maricopa County Superior Court Local Rule 4.10, [REDACTED] do solemnly swear or affirm that the information located on this affidavit is correct and complete, and that I have personal knowledge of the information on this affidavit.

Affiant: /s/ [REDACTED]

Date: [REDACTED]

Time: [REDACTED]

Subscribed and sworn to me this [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
Maricopa County Superior Court

REQUEST FOR EXPEDITED REVIEW OF SEARCH WARRANT OR COURT ORDER

For the following reasons it is requested that the attached affidavit be reviewed as expeditiously as possible. (Check all that apply)

- This request is related to a homicide investigation that is currently and actively being pursued.
- This request is related to an officer involved shooting investigation that is currently and actively being pursued.
- Numerous law enforcement officers are standing by and are unable to proceed further or return to service until this request has been reviewed and acted upon.
- Public right of ways have been closed and cannot be opened until this matter has been resolved.
- Persons have been displaced from their homes or other structures and cannot be allowed to return until this matter has been resolved.
- Other as listed below.

SEVERE WEATHER IS AFFECTING THE INVESTIGATION

Signature of requesting supervisor: _____

[REDACTED SIGNATURE]

Contact phone number of supervisor: _____

[REDACTED PHONE NUMBER]

POLICE DEPARTMENT
CITY OF PHOENIX, ARIZONA

SEARCH WARRANT

COUNTY OF MARICOPA, STATE OF ARIZONA

WARRANT NUMBER: [REDACTED]

IR NUMBER: [REDACTED]

TO ANY PEACE OFFICER IN THE STATE OF ARIZONA:

Proof by affidavit having been made this day to me by Detective [REDACTED] I am satisfied that there is probable cause to believe that:

On the person(s) of:

[REDACTED]
birth [REDACTED] brown eyes and
brown hair, date of birth 10/29/1983

On the premises known as:

[REDACTED] Phoenix, Arizona. A single-family, two story home of stucco construction,
painted tan in color, with dark brown roof tiles, which is located on the [REDACTED]
[REDACTED] are affixed to facade of the home, to the right of the
garage door

In the vehicle(s) described as:

[REDACTED] Arizona license plate [REDACTED] VIN [REDACTED]
registered to [REDACTED]

[REDACTED], Arizona Temporary license plate [REDACTED] VIN # [REDACTED]
registered to [REDACTED]

In the City of Phoenix, County of Maricopa, State of Arizona, there is now being possessed or concealed certain property, persons or things described as:

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- Any and all firearms to include but not limited to semiautomatic handguns, pistols, shotguns and rifles.
- Any live and/or spent ammunition, bullets and casings.
- Any holsters or gun cleaning supplies.
- Examination and collection of biological evidence, consisting of, but not limited to bloodstains, body fluids, tissue and hair, along with the use of blood detection reagents and alternative light sources.
- Any items of clothing, possibly containing blood and/or biological evidence.
- Any documentation which would tend to show ownership of any firearm(s) found in the residence.
- Buccal swab for DNA analysis, fingerprints, palm prints and photographs of [REDACTED] and [REDACTED]
- Evidence such as photographic documentation of the scene, measurements, swabs for DNA collection, latent fingerprint, footprint, handprint and shoe print lifts
- Illicit drugs, to include marijuana, methamphetamine, cocaine and cocaine base; pills, tablets, or capsules with "M30" marking; prescription medication, to include Xanax
- Paint samples from the [REDACTED] to be used for comparative analysis.
- Any and all cellular phone(s), tablets, laptop/desktop computers and all electronic data stored within the devices described in the following list:
 - A. Call logs, to include incoming, outgoing, and missed calls.
 - B. Short message service (SMS or text messages), Multimedia message service (MMS), and attached multimedia files, to include incoming, outgoing, and drafts.
 - C. Secondary Short message service (SMS or text messages) applications to include KIK, TextPlus, and other similar services.
 - D. E-mails, to include incoming, outgoing, and draft messages.
 - E. Pictures and all ExIF (Exchangeable Information Format) information to include geotagging information (global positioning satellite (GPS) location of the picture).
 - F. Videos and geotagging information (global positioning satellite (GPS) location of the video).
 - G. Audio files to include any voicemail stored on the device and voice notes.
 - H. Secondary phone number accounts such as Skype, Line 2, and other applications that can assign a second roaming phone number.
 - I. WiFi network information, to include service set identifier (SSID or network name) and global positioning satellite (GPS) information of the network Global positioning satellite (GPS) directions.
 - J. Calendar information, including synchronized calendars.
 - K. Internet history and usage to including websites visited, search terms, and cookies.

- 1 L. And any account information, settings, and saved usage information for any and all installed applications, also known as "apps" on the device.
- 2 M. Any data stored or maintained on any phone accessory such as a memory card and/or a subscriber identity module (SIM) card contained within the phone.
- 3
- 4 N. Fingerprints, palm prints, DNA and or any other biological evidence from the outside or inside of the listed device.
- 5 O. Global positioning satellite (GPS) location stored within the device.
- 6
- 7

8 which property, persons or things,

- 9 Was / Were stolen or embezzled.
- 10 Was / Were used as a means for committing a public offense.
- 11 Is / Are being possessed with the intent to use as a means of committing a public offense.
- 12 Is / Are in possession of _____ to whom it was delivered for the purpose of concealing it or preventing it from being discovered.
- 13 Constitutes evidence tending to show that a public offense has been committed or tending to show that _____ and _____ have committed the offense.
- 14 Such person is the subject of an outstanding arrest warrant.
- 15

16 Such public offense being **Murder in the First Degree and Drive by Shooting** which occurred on or about the
17 _____ 2020, at _____

18 YOU ARE THEREFORE COMMANDED

- 19
- 20 In the DAYTIME (excluding the time period between 10 PM and 6:30 AM)
- 21 OR
- 22 In the NIGHTTIME (good cause therefore having been shown)

23 x For the reasons set forth in the Affidavit, a "no knock exception" is granted.

24 Police Officers have secured this residence at approximately _____ hours. This investigation is ongoing, and
25 the scene contains valuable biological evidence that will degrade with time. The person or persons who live
26 inside or would normally have access to this residence are being prevented from entering. To greatly lessen the
27 inconvenience to the occupants of the residence, and to facilitate the seizure of biological and physical evidence
28 in order to properly identify and charge the suspect(s) responsible.

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To make a search of the above named or described person(s), premises, and vehicles for the herein above described persons, property or things, and if you find the same or any part thereof, to retain such in your custody or in the custody of the Phoenix Police Department, as provided by A.R.S. 13-3920.

Return this warrant to me within three (3) business days of the date thereof, as directed by A.R.S. 13-3918.

Pursuant to 13-3920, I hereby authorize release of any property seized that is no longer needed for criminal prosecution, to the person/s from whom it was seized or who is identified as the lawful owner, unless such property is contraband or otherwise prohibited.

Given under my hand and dated this [REDACTED] day of [REDACTED], 2020.

[REDACTED]

JUDGE, JUSTICE OF THE PEACE, OR MAGISTRATE
OF _____ COURT

[REDACTED]

POLICE DEPARTMENT
CITY OF PHOENIX, ARIZONA

AFFIDAVIT FOR SEARCH WARRANT

COUNTY OF MARICOPA, STATE OF ARIZONA

WARRANT NUMBER: [REDACTED]

IR NUMBER: [REDACTED]

Your Affiant, Detective [REDACTED], a Peace Officer in the State of Arizona, being first duly sworn, upon oath, deposes and says:

That on or about the [REDACTED] 2020, in the County of Maricopa, State of Arizona, the crimes for **Murder in the First Degree and Drive by Shooting** were committed by suspects unknown.

That the Affiant has probable cause to believe that

On the person(s) of:

[REDACTED] state of
birth [REDACTED]
[REDACTED] state of birth [REDACTED]

On the premises known as:

[REDACTED] Phoenix, Arizona. A single-family, two story home of stucco construction, painted tan in color, with dark brown roof tiles, which is located on the [REDACTED] [REDACTED] affixed to façade of the home, to the right of the garage door

In the vehicle(s) described as:

[REDACTED] Arizona license plate [REDACTED] VIN [REDACTED] registered to [REDACTED]

[REDACTED] Arizona Temporary license plate [REDACTED] VIN # [REDACTED] registered to [REDACTED]

1 In the City of Phoenix, County of Maricopa, State of Arizona, there is now being possessed or concealed certain
2 property, persons or things which:

- 3
- 4 Was / Were stolen or embezzled.
- 5 Was / Were used as a means for committing a public offense.
- 6 Is / Are being possessed with the intent to use as a means of committing a public offense.
- 7 Is / Are in possession of _____ to whom it was delivered for the purpose of concealing it or
8 preventing it from being discovered.
- 9 Constitutes evidence tending to show that a public offense has been committed or tending to show
10 that _____ and _____ have committed the offense.
- 11 Such person is the subject of an outstanding arrest warrant.

12 That said property, persons or things are described as follows:

- 13 Any and all firearms to include but not limited to semiautomatic handguns, pistols, shotguns and rifles.
- 14 Any live and/or spent ammunition, bullets and casings.
- 15 Any holsters or gun cleaning supplies.
- 16 Examination and collection of biological evidence, consisting of, but not limited to bloodstains, body fluids,
17 tissue and hair, along with the use of blood detection reagents and alternative light sources.
- 18 Any items of clothing, possibly containing blood and/or biological evidence.
- 19 Any documentation which would tend to show ownership of any knife found in the residence.
- 20 Buccal swab for DNA analysis, fingerprints, palm prints and photographs of _____ and
21 _____
- 22 Illicit drugs, to include marijuana, methamphetamine, cocaine and cocaine base; pills, tablets, or capsules
23 with "M30" marking; prescription medication, to include Xanax
- 24 Paint samples from the _____, to be used for comparative analysis.
- 25 Evidence such as photographic documentation of the scene, measurements, swabs for DNA collection, latent
26 fingerprint, footprint, handprint and shoe print lifts, which are necessary to adequately diagram the scene.
- 27 Any and all cellular phone(s), tablets, and laptop/desktop computers and all electronic data stored within the
28 devices described in the following list:
- A. Call logs, to include incoming, outgoing, and missed calls.
- B. Short message service (SMS or text messages), Multimedia message service (MMS), and attached
multimedia files, to include incoming, outgoing, and drafts.
- C. Secondary Short message service (SMS or text messages) applications to include KIK, TextPlus, and

other similar services.

- D. E-mails, to include incoming, outgoing, and draft messages.
- E. Pictures and all EXIF (Exchangeable Information Format) information to include geotagging information (global positioning satellite (GPS) location of the picture).
- F. Videos and geotagging information (global positioning satellite (GPS) location of the video).
- G. Audio files to include any voicemail stored on the device and voice notes.
- H. Secondary phone number accounts such as Skype, Line 2, and other applications that can assign a second roaming phone number.
- I. WiFi network information, to include service set identifier (SSID or network name) and global positioning satellite (GPS) information of the network Global positioning satellite (GPS) directions.
- J. Calendar information, including synchronized calendars.
- K. Internet history and usage to including websites visited, search terms, and cookies.
- L. And any account information, settings, and saved usage information for any and all installed applications, also known as "apps" on the device.
- M. Any data stored or maintained on any phone accessory such as a memory card and/or a subscriber identity module (SIM) card contained within the phone.
- N. Fingerprints, palm prints, DNA and or any other biological evidence from the outside or inside of the listed device.
- O. Global positioning satellite (GPS) location stored within the device.

REGULAR INFORMATION OR INFORMANT FORM

That the following facts establish probable cause for believing that grounds for issuance of a search warrant for the aforementioned property, persons or things exist;

CHECK ONE:

- Your Affiant learned the information in the following manner.
- Your Affiant received information from a confidential informant.

The information is as follows:

*** No-knock Clause ****

Due to the violent nature of the offender and the high probability of the destruction of drug evidence,

1 this warrant will be executed by members of the Special Assignments Unit (SWAT) and a no-knock
2 clause is being requested.

3 *** Statement of Probable Cause ***

4
5 On February 23, 2020, at approximately 0817 hours, Phoenix officers responded to an emergency call
6 of an unknown trouble at [REDACTED]. When they arrived, they located [REDACTED]
7 [REDACTED] deceased in the driver seat of his vehicle, which was stopped on the east
8 side of [REDACTED] just south of [REDACTED].

9 Several rounds had been fired through the front window on the driver side; [REDACTED] was struck
10 multiple times in the head and killed. During an examination of the passenger compartment of
11 [REDACTED] several blue "M30" pills were found, along with a piece of foil
12 that contained a burnt white residue and glass pipes commonly used to ingest illicit drugs. A bag of
13 partially eaten food from Carl's Junior was also located inside the vehicle. An examination of the
14 exterior of the [REDACTED] noted the presence, of what appeared to be, fresh damage to the front passenger
15 side fender that included a broken headlight covering. There was also maroon paint transfer on the rear
16 passenger side fender.

17 Surveillance video from a residence at [REDACTED] was reviewed, and [REDACTED]
18 vehicle was observed traveling north past the house, with a [REDACTED] following at
19 approximately three car-lengths. The shooting occurred off-camera a few moments later.

20 The closest Carl's Junior to where [REDACTED] was killed was located at [REDACTED].
21 Officers responded to this location and reviewed surveillance video, which showed the red [REDACTED]
22 parking near the front of the restaurant. The occupants of the vehicle remained in the passenger
23 compartment and were not visible.

24 Surveillance video was reviewed from the Premier Inn, which was located at [REDACTED]
25 Street (approximately one-half mile north of the Carl's Junior). A camera affixed to the front of the
26 hotel captured [REDACTED] as it traveled west along [REDACTED] with the [REDACTED]
27 [REDACTED] following behind. [REDACTED]

1 A surveillance camera located on the southwest corner of [REDACTED], located at [REDACTED]
2 [REDACTED] was reviewed and captured both vehicles as they traveled north on [REDACTED] from
3 [REDACTED]. As the [REDACTED] entered the view of the camera, it was noted the vehicle appeared
4 entirely stock and the front passenger side window was rolled down, revealing, what appeared to be, a
5 passenger in the front seat. [REDACTED] was shot and killed a few moments later.

6 During an interview with [REDACTED] family, it was determined he was possibly using and selling
7 prescription narcotics, specifically, M30 pills (either oxycodone, or fentanyl disguised to look like
8 oxycodone). His brother [REDACTED] reported that approximately one month prior,
9 [REDACTED] had "ripped off" a drug dealer named [REDACTED] who lived in the area of [REDACTED]
10 [REDACTED]. Per [REDACTED] drove a red vehicle and alluded to [REDACTED] that
11 the city was small, and he would find him eventually.

12 An LG cellular phone was found in [REDACTED]'s possession when he was removed from the vehicle,
13 however, it appeared his service had been disrupted on February 21, 2020, for non-payment. A data
14 extraction was completed on the device on February 24, 2020. During a review of [REDACTED]
15 contact list, the phone number [REDACTED] was located under the name [REDACTED]. Call logs
16 and text message data were also reviewed, however, there did not appear to be any correspondence
17 between [REDACTED].

18 The phone number assigned to [REDACTED] was run through various criminal databases and came back to a
19 male named [REDACTED] with a date of birth of [REDACTED] home
20 address was listed as [REDACTED], however, the address of [REDACTED] was also
21 documented.

22 Research was conducted on the [REDACTED] and a maroon [REDACTED] came back
23 registered to the residence in the name of [REDACTED], date of birth [REDACTED].
24 The [REDACTED] had been photographed several times by license plate readers between the months of
25 December 2019 and January 2020. After reviewing a photograph of the rear portion of the [REDACTED] I
26 noted it matched the suspect vehicle. [REDACTED] appears to be [REDACTED] girlfriend, as there
27 are pictures of the two of them together on [REDACTED] public Facebook page.
28

1 On February 25, 2020, at approximately 0945 hours, surveillance units located the maroon [REDACTED]
2 backed into the driveway of a residence, located at [REDACTED]. Criminal history for the
3 location from September of 2019 showed a male with the last name of [REDACTED] resided at the home.

4
5 Surveillance was also established at [REDACTED] and a white [REDACTED] with Arizona
6 license plate [REDACTED] was observed parked in the driveway. The vehicle came back registered to
7 Airport Rent a Car, which was located at [REDACTED].

8 On February 26, 2020, at approximately 1500 hours, [REDACTED] was observed entering the
9 [REDACTED] and driving away from the residence. He was the sole occupant of the vehicle. [REDACTED] was also
10 observed driving the [REDACTED] on February 27, 2020, at approximately 1940 hours.

11
12 On March 4, 2020 at approximately 0620 hours, the [REDACTED] was located at [REDACTED]
13 [REDACTED]; this is the same location [REDACTED] was believed to have been followed from
14 prior to being shot to death.

15 On the same date, at approximately 0730 hours, the [REDACTED] returned to the [REDACTED]. A
16 Hispanic female, believed to be [REDACTED] exited the car and was observed wearing a black fast
17 food uniform that included a T-shirt with [REDACTED] across the front. (There is a [REDACTED] restaurant
18 inside the main convenience store at the [REDACTED].)

19 On March 5, 2020 and March 6, 2020, investigators reviewed surveillance video from inside [REDACTED]
20 [REDACTED] and the convenience store from the day of the homicide. At approximately 0615 hours,
21 victim [REDACTED] entered [REDACTED] through an exterior door, placed an order for food, and upon
22 receiving the order, exited the restaurant into the convenience mart, via the [REDACTED], which was
23 adjoined to [REDACTED].

24
25 At approximately 0722 hours, a Hispanic female dressed in a black [REDACTED] who appeared to
26 be [REDACTED] entered [REDACTED] and placed an order. Approximately one minute later, a
27 maroon [REDACTED] traveled south through the lot and parked in front of the restaurant. [REDACTED] looked in
28 the direction of the car, retrieved her cellular phone and began typing. After she received her order,

1 [REDACTED] exited the store and walked in the direction of the [REDACTED], the passenger side of which was not
2 visible in the video. Approximately 30 seconds later, the vehicle backed out and traveled north through
3 the [REDACTED] parking lot.

4 On March 12, 2020, investigators received T-Mobile Call Detail Records (CDR) for [REDACTED]
5 [REDACTED] phone. The records contained cell tower location information, along with the IMEI
6 number for [REDACTED]'s device, which was determined to be an iPhone 8. Cell tower data showed
7 [REDACTED] phone geolocated to a tower in the area of [REDACTED] at 0706 hours. This
8 was approximately twenty minutes before [REDACTED] was murdered. The data also showed
9 [REDACTED] device communicating with phone number [REDACTED] at approximately 0911 hours.
10 This was the first communication on [REDACTED] device following the homicide. Research was
11 conducted on this phone number and it was determined a male named [REDACTED] had listed it
12 on previous occasions. [REDACTED] home address was documented as [REDACTED], which
13 was the location [REDACTED]'s maroon [REDACTED] had been located following the homicide.

14 On March 20, 2020, [REDACTED] Facebook records were reviewed. Several photographs of,
15 what appeared to be, prescription and illicit drugs had been posted, along with dollar amounts and
16 weights. These photographs included apparent marijuana; THC-infused vaping cartridges; blue pill bars
17 with the number "B707" (Alprazolam) and light blue pills marked with "M30" (Oxycodone or
18 Fentanyl).

19 In addition to the pictures of illicit drugs, photographs of various firearms, including AR-15-style rifles,
20 a black double barrel shotgun, black Sig Sauer .40 caliber pistol, Smith & Wesson 9mm pistol, Glock
21 9mm and .40 caliber pistols, a FN 5.7 caliber pistol and a chrome Taurus revolver were also observed.

22 During a review of the messenger section of the records, it was noted several people had contacted
23 [REDACTED] to purchase drugs. The following are a few of the messages that were observed between
24 August of 2019 through February of 2020:

25 August 7, 2019:

26 Buyer: you got some x (ecstasy) pills or molly bruh?

27 October 7, 2019:

1 Buyer: I need 150

2 AV: Can you pull up to my crib I'll do 4.25 a pop

3 October 8, 2019:

4 Buyer: What you on with?

5 AV: Tree (marijuana) white (possible cocaine) bars (Xanax)

6 Buyer: X? (Ecstasy)

7 AV: Out m

8 December 20, 2019:

9 Buyer: Can I swoop up a gram and possibly a cart?

10 Buyer: Can I pick up some bud rq

11 AV: Yup

12 Buyer: You have wax or carts (marijuana)

13 AV: only fire tree bro

14 AV: And white (possible cocaine)

15 January 30, 2020:

16 Buyer: Do you have any bud (marijuana)

17 AV: Yup

18 Buyer: How much for 8th

19 AV: I have some for \$15 some for \$20 and some for \$25

20 February 8, 2020:

21 Buyer: Can you do a qp (quarter pound) for 400

22 AV: This one I would have to do \$520

23 Buyer: Fasho (for sure)

24 February 16, 2020:

25 Buyer: yoo my guy got perks (Percocet)?

26 AV: Just sold my last 30 until tomorrow

27 February 16, 2020:

28 Buyer: Coke

AV: Not m only ecstasy

During several of these transactions, various buyers asked [REDACTED] for his address and he provided

[REDACTED]

1 On February 13, 2020, [REDACTED] set up a meet with a user named [REDACTED] in the area of
 2 [REDACTED]. When [REDACTED] arrived, he sent [REDACTED] a message asking where
 3 he was. [REDACTED] responded by sending a picture of a woman, who appeared to be [REDACTED]
 4 sitting in the passenger seat of a maroon sedan (believed to be a [REDACTED] with the caption "Right across
 5 from subway").

6 On March 30, 2020, during a further review of [REDACTED] Facebook records, a message exchange was
 7 observed between [REDACTED] and a user named [REDACTED] on January 15, 2020, at approximately
 8 0348 hours (adjusted for UTC time). [REDACTED] sent [REDACTED] the following messages: "Bro please tell me
 9 you know where that nigga [REDACTED] lives" and "you use to pull up with him he drives a blue [REDACTED]
 10 (victim drove a blue [REDACTED]). On January 17, 2020, [REDACTED] sent [REDACTED] the following messages:
 11 "aye bruhh know who ur talking about can u come to my house and I'll show u were he lives" and "he
 12 staying in [REDACTED] I know what house too. Lmk (let me know) if u trying to go I'll show u bruhh". (It
 13 was later determined [REDACTED] is a neighborhood in Phoenix, which included victim [REDACTED]
 14 [REDACTED] residence of [REDACTED].

15 At approximately 1404 hours on January 15, 2020, [REDACTED] sent a user named [REDACTED] a
 16 message that read "yeah that's my fault bro I just been trying to bounce back since I got those bad ones
 17 niggas been acting brand new and than last night this nigga ran off with 120 blues (believed to be M30
 18 tablets) and I left my strap upstairs fuckin lackin". [REDACTED] brother informed investigators
 19 during his interview that [REDACTED] had shorted a drug dealer named [REDACTED] approximately one
 20 month prior).

21 On April 14, 2020, surveillance units observed the Maroon [REDACTED] backed into the driveway
 22 of [REDACTED] along with a dark gray [REDACTED] which was parked next to it. Both
 23 vehicles are registered to [REDACTED].

24 (INFORMANT ONLY)

25 Your Affiant believes the informant to be reliable because:

26 Your Affiant believes the information given him is reliable because:

27 Your Affiant believes that the following information demonstrates good cause for permitting this warrant to
 28 be served between 10:00 PM and 6:30 AM:

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Police Officers have secured this residence at approximately _____ hours. This investigation is ongoing and the scene contains valuable biological evidence that will degrade with time. The person or persons who live inside or would normally have access to this residence are being prevented from entering. To greatly lessen the inconvenience to the occupants of the residence, and to facilitate the seizure of biological and physical evidence in order to properly identify and charge the suspect(s) responsible.

Wherefore, your Affiant prays that a search warrant be issued commanding that an immediate search be made of the persons, premises and buildings, and vehicles described herein for the property, persons and things described herein, and that the same be retained in the custody of your Affiant or in custody of the agency which your Affiant represents and disposed of according to law, pursuant to A.R.S. 13-3920.

Phoenix Police Department

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2020.

JUDGE, JUSTICE OF THE PEACE, MAGISTRATE

OF _____ COURT

Potential consensus items.

	<u>Generally.</u>
1.	<u>Discretion:</u> A magistrate has discretion to issue a no-knock (i.e., an unannounced entry) or nighttime search warrant. Issuance is not mandatory. The magistrate’s decision to issue a no-knock or nighttime warrant should be based on an overall showing of good and sufficient reasons. When presented with an application for a no-knock or nighttime search warrant, a magistrate’s primary consideration should be whether authorizing an unannounced entry or nighttime service will enhance the safety of officers and civilians.
2.	<u>Safety:</u> A magistrate’s primary consideration for issuing a no-knock or nighttime search warrant should be whether authorizing an unannounced entry or nighttime service would protect officer and civilian safety. <u>Whether a magistrate should authorize a no-knock or nighttime search warrant to prevent destruction of evidence is a secondary consideration that the magistrate must weigh against safety.</u> Whether a magistrate should authorize a no-knock or nighttime search warrant to prevent destruction of evidence is a secondary consideration that the magistrate must weigh against safety.
3.	A magistrate should have discretion on whether to issue a no-knock or nighttime search warrant. Issuance should not be mandatory.
4.3.	<u>Facts:</u> An application for a no-knock or nighttime search warrant must include reliable, fact-specific information. <u>A magistrate should give more weight to detailed facts, including reliable hearsay, than to general, conclusory allegations.</u>
	<u>Unannounced (“no-knock”) entry.</u>
5.4.	<u>Investigation:</u> An application for an unannounced entry must include an explanation of the agency’s investigative activities and information the agency has gathered that specifically support the request for a no-knock entry. [See further the Maryland legislation, at page 23 of the ISW May 14 meeting packet.]

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<p>6.5.</p>	<p>Occupants: An application for a no-knock search warrant should address, to the extent possible, the identity or characteristics of the occupants of the place to be searched. (E.g., the number of occupants, criminal records, ages, disabilities, children, pets, etc.)</p>
<p>7.6.</p>	<p>Safety factors: An application for a no-knock search warrant should address applicable safety factors. “History” as used in factors (d), (e), and (f) is not limited to conviction of a criminal offense. <u>Safety factors include but are not limited to the following:</u> <u>Safety factors include:</u></p> <ul style="list-style-type: none">(a) The nature of the underlying charges that the items sought in the search warrant would support.(b) Weapons that the requesting agency reasonably believes are at the place to be searched, <u>and if known, the type and number of weapons, and whether an occupant has previously used a weapon during criminal activity or threatened the use of a weapon.</u>(c) Gang or group affiliations of <u>Whether the occupants the alleged criminal activity is related to a criminal street gang (see A.R.S. § 13-105).</u>(d) (d) <u>Any occupant’s history of violence of any occupant, including but not limited to - violence or threats of violence against a law enforcement officer. “History is not limited to conviction of a criminal offense; it may include charged or uncharged criminal offenses, warrant information, reputation or character for violent conduct, and other reliable information.</u>(e) Actual threats of violence, or a history of violence, against a law enforcement officer by any occupant.(f) Any occupant’s history of violating A.R.S. Title 13, Chapter 24 (“obstruction of public administration”) or Chapter 25 (“escape and related offenses”).(g) (e) Particular characteristics of the exterior or interior of the place to be searched, such as the presence of gates, locks, alarms, <u>guard</u>

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	<p><u>dogs, security screens or window bars, security cameras or other security devices</u>, explosives, fortifications, or booby traps, or other dangerous conditions.</p> <p>(+) <u>(f)</u> The number and nature of calls for law enforcement service at the place to be searched.</p> <p>(+) <u>(g)</u> The presence at the place to be searched of a hostage or any persons held against their will.</p> <p>(+) <u>(h)</u> Whether any occupant of the place to be searched is experiencing a mental health crisis;</p> <p>(+) <u>(i)</u> Reasons why less invasive knocking and announcing methods would be unavailing dangerous or ineffective.</p> <p>(+) <u>(j)</u> Any other relevant information.</p>
<p>8.</p>	<p>The factors specified in number 7 are not exhaustive. The magistrate's decision to issue a no-knock warrant should be based on an overall showing of good and sufficient reasons.</p>
<p>9.7.</p>	<p>Destruction of evidence: An application based in part on a danger of evidence destruction should describe such evidence and explain why imminent destruction of the evidence is likely or possible or likely absent if the officers' entry is announced-an unannounced entry.</p>
	<p><u>Nighttime service.</u></p>
<p>10.8</p>	<p>Explanation: An application for nighttime service of a search warrant should explain why daytime service would not be reasonable or feasible.</p>
<p>11.9</p>	<p>Question: Should any of the foregoing requirements (e.g., numbers 1 through 4 and 10) exempt applications in DUI cases requesting a blood draw, where warrants are frequently served at night and blood alcohol evidence is evanescent? (Also, is officer or civilian safety a factor when serving a search warrant to take blood?)</p>

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	<u>Exceptions: Nighttime service of a warrant for the extraction of blood alcohol evidence, or to place a tracking device, is presumptively permitted but is subject to item 1.</u>
	<u>Approval.</u>
12.1	<u>Approval. An application for a no-knock entry or nighttime service must-should show that the application has been approved by an attorney advisor, a command level officer, or the highest-level officer supervisor who is available, or. The application need not contain written approval, but whether approval was given orally or in writing, the application should identify the approving officer and the approving officer's rank. If the application does not include such approval, it must indicate-describe the efforts to obtain approval and why such approval was not requested or-obtained, or why approval was not requested. The application must identify the approving attorney or officer and the approving officer's rank.</u>
	<u>Data.</u>
13.1	<u>Data: Search warrant application forms and returns should be modified to allow tracking of no-knock and nighttime warrants.</u>

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Potential consensus items.

	<u>Generally.</u>
1.	Discretion: A magistrate has discretion to issue a no-knock (i.e., an unannounced entry) or nighttime search warrant. Issuance is not mandatory. The magistrate’s decision to issue a no-knock or nighttime warrant should be based on an overall showing of good and sufficient reasons.
2.	Safety: A magistrate’s primary consideration for issuing a no-knock or nighttime search warrant should be whether authorizing an unannounced entry or nighttime service would protect officer and civilian safety. Whether a magistrate should authorize a no-knock or nighttime search warrant to prevent destruction of evidence is a secondary consideration that the magistrate must weigh against safety.
3.	Facts: An application for a no-knock or nighttime search warrant must include reliable, fact-specific information. A magistrate should give more weight to detailed facts, including reliable hearsay, than to general, conclusory allegations.
	<u>Unannounced (“no-knock”) entry.</u>
4.	Investigation: An application for an unannounced entry must include an explanation of the agency’s investigative activities and information the agency has gathered that specifically support the request for a no-knock entry. [See further the Maryland legislation, at page 23 of the ISW May 14 meeting packet.]
5.	Occupants: An application for a no-knock search warrant should address, to the extent possible, the identity or characteristics of the occupants of the place to be searched. (E.g., the number of occupants, criminal records, ages, disabilities, children, pets, etc.)
6.	Safety factors: An application for a no-knock search warrant should address applicable safety factors. Safety factors include but are not limited to the following:

	<p>(a) The nature of the underlying charges that the items sought in the search warrant would support.</p> <p>(b) Weapons that the requesting agency reasonably believes are at the place to be searched, and if known, the type and number of weapons, and whether an occupant has previously used a weapon during criminal activity or threatened the use of a weapon.</p> <p>(c) Whether the alleged criminal activity is related to a criminal street gang (see A.R.S. § 13-105).</p> <p>(d) Any occupant’s history of violence, including but not limited to violence or threats of violence against a law enforcement officer. “History is not limited to conviction of a criminal offense; it may include charged or uncharged criminal offenses, warrant information, reputation or character for violent conduct, and other reliable information.</p> <p>(e) Particular characteristics of the exterior or interior of the place to be searched, such as the presence of gates, locks, alarms, guard dogs, security screens or window bars, security cameras or other security devices, explosives, fortifications, booby traps, or other dangerous conditions.</p> <p>(f) The number and nature of calls for law enforcement service at the place to be searched.</p> <p>(g) The presence at the place to be searched of a hostage or any persons held against their will.</p> <p>(h) Whether any occupant of the place to be searched is experiencing a mental health crisis;</p> <p>(i) Reasons why knocking and announcing would be dangerous or ineffective.</p> <p>(j) Any other relevant information.</p>
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7.	Destruction of evidence: An application based in part on a danger of evidence destruction should describe such evidence and explain why imminent destruction of the evidence is likely or possible if the officers' entry is announced.
	<u>Nighttime service.</u>
8.	Explanation: An application for nighttime service of a search warrant should explain why daytime service would not be reasonable or feasible.
9.	Exceptions: Nighttime service of a warrant for the extraction of blood alcohol evidence, or to place a tracking device, is presumptively permitted but is subject to item 1.
	<u>Approval.</u>
10.	Approval. An application for a no-knock entry or nighttime service should show that the application has been approved by a command level officer or the highest-level officer supervisor who is available. The application need not contain written approval, but whether approval was given orally or in writing, the application should identify the approving officer and the approving officer's rank. If the application does not include such approval, it must describe the efforts to obtain approval and why approval was not obtained, or why approval was not requested.
	<u>Data.</u>
11.	Data: Search warrant application forms and returns should be modified to allow tracking of no-knock and nighttime warrants.