

Writing Search Warrants

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Introduction

To the newly assigned drug enforcement agent or criminal investigator, the preparation of search warrants and search warrant affidavits can be a daunting proposition. Felony drug cases and other criminal cases often rise or fall based upon the careful review of the search warrant affidavit during a motion to suppress evidence.¹ Of course, the judge reviewing the warrant is doing so in the quiet of the courtroom having been presented legal briefs by both the state prosecutor and the defense attorney. Even though this same judge may have signed a number of warrants, perhaps in the middle of the night, and without closely reading the contents of the warrant, his *review of your affidavit now is much more cautious and critical* than the magistrate who may have issued the warrant weeks earlier.

The burden of proof² in a drug case

The actual guilt of a defendant in most drug cases is generally clear. In fact, drug cases are fairly simple, from a proof³ standpoint.

- ✓ It is either illegal drugs⁴ or it isn't and, the defendant either possessed the drugs or he didn't.

¹ motion to suppress. A request that the court prohibit the introduction of illegally obtained evidence at a criminal trial.

² burden of proof. The duty of affirmatively proving a fact or facts in dispute on an issue; the duty of establishing a fact or facts by the requisite amount of proof.

³ proof. The establishment of a fact by evidence; a logically sufficient reason for asserting the truth of a proposition (burden of proof).

⁴ controlled substance. Any type of drug whose possession and use is regulated by law, including a narcotic, a stimulant, or a hallucinogen.

- ✓ As an example, when officers enter a person's home and find an individual sitting near 10 kilograms of cocaine, it's pretty simple for the jury to determine if he or she was in violation of the law.
- ✓ But, no jury can convict the defendant if the court rules that they are not allowed to hear about drugs being found in the house because the search was "unlawful" (i.e., wrong, improper or illegal).
- ✓ A search warrant affidavit that is poorly drafted and fails to state the requisite probable cause will, in most cases, result in the suppression of the evidence obtained and a dismissal of the defendant's case.

Purpose

The purpose of this paper is to aid the new drug enforcement agent or criminal investigator who is not yet comfortable in drafting search warrants by walking him or her through the process. The examples that will be given are all narcotics related. The forms that I will use as examples will be generic and should fit the conventions of most jurisdictions and agencies.

The search warrant package

When we use the term "search warrant" we normally think of the entire "package". That package consists of the following:

1. the search warrant,
2. the affidavit that is prepared in support of the issuance of the search warrant, and
3. the return.

The search warrant

Because a search warrant “provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer “engaged in the often-competitive enterprise of ferreting out crime,” ... we have expressed *a strong preference for warrants* and declared that “in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail.”

United States Supreme Court, *United States v. Leon*, 468 U.S. 897, 913-14 (1984), *quoting U.S. v. Chadwick*, 433 U.S. 1, 9, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977).

The *search warrant*⁵ is the document that the magistrate issues to you, after review of the affidavit.⁶ The magistrate must be satisfied that your affidavit states adequate probable cause that a particular thing is presently located within a particular place.

Think of the warrant as a license to do a “home invasion robbery”. While this may seem flippant, it allows law enforcement officers to forcibly enter a person’s home, brandishing weapons, forcing the occupants to remain in the dwelling and not move, search for property that the officers don’t own and the occupant(s) possess, and then take the property from that location without the permission of the occupants. When “crooks” do something very similar, we call it a “home invasion robbery”. Accordingly, the only thing that separates the actions of police officers from those of “crooks” is the issuance of a search warrant, which legitimizes the entry into the location and the confiscation of property.

Hopefully, every search warrant is executed without injury to an officer or occupant. But, that possibility is always there. The magistrate should always keep those factors in mind when issuing a warrant.

⁵ search warrant. A written order issued by a judge or magistrate in the name of the government, directed to and authorizing a sheriff or other officer to search for and seize any property that constitutes evidence of a crime.

⁶ affidavit. A written or printed declaration or statement of facts made voluntarily and confirmed under oath or affirmation before a person authorized to administer the oath or affirmation.

No officer should be placed in harm's way by executing a search warrant that is not "legally sufficient".

And, no officer should present an affidavit to a magistrate that the officer knows does not contain adequate probable cause but also knows that this magistrate will "sign anything".⁷

Just because a magistrate signed the warrant does not mean that the search will hold up in court during a motion to suppress. And, the "good faith exception rule" will not save an affidavit that any "reasonably trained police officer" would know did not contain adequate probable cause, even if the magistrate decided that it did. If the magistrate was wrong, you lose!

When a search warrant is executed:

1. A copy of the warrant must be provided to the person in charge of the premises searched.
2. Or, if no one is there, a copy is to be left at the location.
3. In both cases, besides a copy of the warrant, you must also provide a listing of the property that you seized.

What is the purpose of giving a copy of the warrant to the person in charge? The warrant provides certain information that the person has a right to know.

First, it will tell them who you are, or will state what agency you are with.

Secondly, it will show the specific place to be searched.

Third, it will state what you are searching for.

And, lastly, it will have the signature of the magistrate that said you could go there and search that location.

⁷ The Leon Court reaffirmed the existing rule that, under the Fourth Amendment, "the courts must ... insist that the magistrate purport to 'perform his "neutral and detached" function and not serve merely as a rubber stamp for the police.'" *U.S. v. Leon*, 468 U.S. 897, 916, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). *Id.* at 914, quoting *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

The United States Supreme Court, in *Groh v. Ramirez*, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004), held that simply providing the person in charge of a premises subject to search due to a search warrant with a copy of the search warrant that did not state what the officers were searching for were subject to a federal civil rights suit.

It is highly recommended that you check and make sure that the search warrant form that your agency uses requires that you state, on the warrant, what you are searching for.

If your form states something like “and to search for and to seize property and items which are enumerated on the affidavit for search warrant, which is attached hereto and incorporated herein for all purposes”, you need to either change the search warrant for and list the property you want to seize *or* give a copy of the search warrant *and the affidavit* to the person in charge of the premises when you execute the warrant.

Otherwise, you may be subject to a lawsuit.

For purposes of this paper, I will use generic forms for the search warrant and the affidavit. Most states follow similar conventions.

THE STATE OF =X= §

COUNTY OF =X= §

SEARCH WARRANT

To the Sheriff or any Peace Officer of =X= County, =X=, or any Peace Officer of the State of =X=:

Whereas, the affiant whose name appears on the affidavit attached hereto is a peace officer under the laws of =X= and did heretofore this day subscribe and swear to said affidavit before me (which said affidavit is here now made a part hereof for all purposes and incorporated herein as if written verbatim within the confines of this Warrant), and whereas I find that the verified facts stated by

affiant in said affidavit show that affiant has probable cause for the belief he/she expresses herein and establishes existence of proper grounds for issuance of this Warrant;

Now, therefore, you are commanded to enter the suspected place, vehicles, and premises described in said affidavit, to-wit: =X= [*here should be set out the language in the affidavit that describes the place to be searched*] At said places you shall search for and, if same be found, seize and bring before me the property described in the affidavit which the suspected party, or others in control of the suspected place, are alleged to be concealing and to have in his/her possession in violation of the laws of the State of =X=, to-wit: =X= [*here set out the language in the affidavit that describes the property or evidence to be seized*]

*[*Here insert the paragraph marked below with an asterisk if applicable; do not include it unless the corresponding paragraph requesting a “no knock and announce” entry is also included in the affidavit.]*

Herein fail not, but have you then and there this Warrant within three days, exclusive of the day of its execution, with your return thereon, showing how you have executed same.

Issued this the ___ day of _____, ___, at ___ o'clock __. M., to certify which witness my hand this day.

=X= [Title of Magistrate]

=X= COUNTY, =X=

****Knock and Announce Language for the Warrant****

I further find that affiant has established sufficient reason to believe that to knock and announce their purpose by the officers executing this warrant would be futile, dangerous, and otherwise inhibit the effective investigation of the offense or offenses related to the purpose of this warrant. Therefore, unless circumstances to the contrary are discovered prior to entry, you are hereby authorized to dispense with the usual requirement that you knock and announce your purpose before entering the suspected place to execute this warrant

The affidavit for search warrant

The “warrant provision” of the 4th Amendment states:

“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”.

The affidavit must meet that minimum requirement.

Some states, and the federal government, allow for “telephonic search warrants”, which authorizes a magistrate to ...

authorize to search a premise without requiring the officer to provide a *written* affidavit prior to authorizing the search.

But, this is done in rare situations when it would be impractical to require the officer to prepare the written documents, go to the judge, have him review it and then issue the warrant.

Even in those circumstances, a recording is made of the information the officer provides to the magistrate and it is followed up with written documentation of the probable cause provided to the magistrate prior to his authorizing the search.

While the Fourth Amendment does not require that the “*affiant*”⁸ on the affidavit swear out the affidavit before the magistrate, it is suggested that you do.

Having the “affiant” personally present his or her affidavit to the magistrate for review, prior to swearing to its content, often results in the magistrate pointing out deficiencies in the affidavit.

You can either re-write the affidavit or interlineate any corrections to the affidavit. If you interlineate, make sure that both you and the magistrate initial those changes prior to swearing to the affidavit.

Either way, it allows the officer to correct those insufficiencies and then present a good, sound affidavit to the magistrate

⁸ Affiant. Someone who makes and files an affidavit.

Said suspected place, in addition to the foregoing description, also includes all other buildings, structures, places and vehicles on said premises and within the curtilage, if said premises is a residence, that are found to be under the control of the suspected party named below and in, on, or around which said suspected party may reasonably reposit or secrete property that is the object of the search requested herein. Attached hereto as Exhibit A is a diagram illustrating the relative location of the place to be searched; it is to be considered as part of this affidavit as if written herein.⁹

2. Said suspected place is in the charge of and controlled by each of the following named and/or described suspected parties (hereafter called "suspected party," whether one or more), to wit: **=X=**

3. It is the belief of affiant that said suspected party has possession of and is concealing at said suspected place in violation of the laws of the State of **=X=**the following property: **=X=**

4. Affiant has probable cause for said belief by reason of the following facts and circumstances: **=X=**

Wherefore, affiant asks for issuance of a warrant that will authorize affiant and other peace officers to search said suspected place and premises for the property described above and seize same.

Affiant

SWORN TO AND SUBSCRIBED BEFORE ME BY SAID AFFIANT ON THIS
THE ____ DAY OF _____, _____.

=X= [Title of Magistrate]
=X= COUNTY, =X=

Note: Affiants are encouraged to include illustrative documentation such as diagrams and photographs that supplement the verbal description of the premises to be searched. The forms are recorded to include reference to these attached documents as a reminder to include them; if they are not included and attached, omit the last sentence of the suggested paragraph.

Optional “no knock and announce” paragraph for AFFIDAVIT FOR SEARCH AND ARREST WARRANT

When applicable to the circumstances, the affidavit may contain an additional paragraph requesting permission to enter the place to be searched without knocking and announcing authority and purpose. This paragraph must set out facts pertinent to the specific circumstances of the case under investigation that establish reasonable suspicion that knocking and announcing would be dangerous, futile, or would inhibit the effective investigation of the crime involved in the purpose of the search. [*See Chapter 9, “The Law from the Courts.”*]

If used, this paragraph should be inserted before the language that begins with “WHEREFORE ...”

6. Affiant requests authorization to enter the suspected place and premises without first knocking and announcing the presence and purpose of officers executing the warrant sought herein. As my reasons to believe that such knocking and announcing would be dangerous, futile, or would inhibit the effective investigation of the offense described in this Affidavit, affiant submits the following facts and circumstances: =X=

The return

When a magistrate issues a search warrant he wants to know when you executed it and what you took under the authority of this warrant.

The method of answering those questions is to make a “return”¹⁰ on the warrant.

¹⁰ *Return and inventory* requirements: most jurisdictions require law enforcement officers executing a search warrant to file a prompt return with the issuing or some other designated court, reciting when or if the search warrant was executed and including a detailed inventory of all of the items seized pursuant to the warrant.

- ★ The return tells the magistrate when you executed the warrant (to show that you did it within the statutory limits your state provides for executing a warrant) and what you took from the premises.
- ★ Some jurisdictions require that the return be sworn. Others do not.
- ★ After you have executed the warrant, you will list all of the property that you seized on the return and then take the warrant, the affidavit, and the return back to the magistrate who issued it.
- ★ The magistrate will file all of that with his clerk and keep it until it is required to be brought to court for any hearings.
- ★ It is highly recommended that you always keep a “certified” copy of the warrant, affidavit, and return, in your case file. That way, if the judge or his clerk loses what you returned to him you still have a certified copy, which is as good as the “original” for court purposes.

A copy of a generic return is set out below:

THE STATE OF =X= §

COUNTY OF =X= §

OFFICER’S RETURN AND INVENTORY

SEARCH WARRANT

BEFORE ME, THE UNDERSIGNED AUTHORITY, PERSONALLY APPEARED THE AFFIANT HEREIN, A PEACE OFFICER UNDER THE LAWS OF=X=, WHO, BEING DULY SWORN, ON OATH MADE THE FOLLOWING STATEMENTS:

My name is =X= and I am commissioned as a peace officer by =X=.

The attached Search Warrant came to hand on the day it was issued and it was executed on the ___ day of _____, _____, by arresting _____

and by conducting the search directed therein and by seizing during such search the following described property:

[Here should be listed and described all property taken from the premises searched. If practical, the property taken may be listed and described on as many separate documents as necessary and attached to this cover page with the following sentence in this space: All property seized is listed and described on the attached page(s) entitled "Exhibit A."]

Affiant

Note: In most states, the return does not have to be sworn to.

How to write an affidavit

The heart of the search warrant package is the *Affidavit*. No warrant shall, or at least should, issue unless the magistrate is presented an affidavit stating "probable cause" that a particular thing is in a particular place, at the time the warrant is requested, and law enforcement has the right to take that thing from that place.

Probable cause is not a certainty but it is more than a mere "suspicion". Probable cause has been defined as "a reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true."

As stated earlier, the affidavit must contain ...

- ★ the location to be searched;
- ★ who is in charge of the premises to be searched;

- ★ what you are looking for;
- ★ why he can't have it and you get to take it;
- ★ and, why you believe that it is at that location now.

I will take each of the four areas and provide examples of how to set out each with legal specificity.

The location to be searched

Of all of the things that must be in an affidavit, the easiest, I would think, is stating the location that you want to search. Generally, this is pretty simple. But, if the location ...

- ★ is in a rural area,
- ★ is a residence within a multi-residential building,
- ★ or is a building within a complex or compound of several buildings; this can be tricky!

One of the areas of attack that the defendant can bring on a search warrant is that *the location to be searched is not specific enough to satisfy the Fourth Amendment*.

- ★ The Fourth Amendment requires enough of a description of the premises to be searched to take away the chance that officers will crash into the wrong place.
- ★ And, when a court reviews the description in a Motion to Suppress, it is no comfort that you "hit" the right house.

The court will look at the description that you put in the affidavit and the warrant and ask if it is descriptive enough to ensure that an officer, who has never been to that place before, would be able to enter the correct location to search for the contraband.

Sometimes the address will be sufficient. If there is only one "123 Main Street" in your town, that should be sufficient.

But, as a safety valve, I always include a short physical description of the location, just to be sure.

Always double-check the numbers to be sure that you are correct.

Also, before you state that the location is in a particular city and county, check a map and be sure. If the location is in an unincorporated area of a county, say that.

Some examples

1. A typical **house** in a city:

“There is in Randall County, Minnesota, a suspected place and premises described and located as follows:

“123 Main St., Woodbury, Randall Count, Minnesota. Said location is more particularly described as a two-story, brick house with an attached two-car garage. The brick on the house is brown in color. The trim on the house is beige. The garage doors are also beige in color. The numbers “123” are affixed above the front door of the house on the doorframe. Also, in front of the house, at the curb, is a mailbox with the name “The Henderson’s” on one side and the numbers 123 on the other side.”

2. An **apartment**:

“There is in Lauderdale County, Mississippi, a suspected place and premises described and located as follows:

“1500 Harper Court Lane, apartment 219, Meridian, Lauderdale County, Mississippi. Said location is more particularly described as an apartment located within an apartment complex knows as the “Shadowcrest Apartments”. The complex is located at 1500 Harper Court Lane. The complex consists of several two-story, red brick buildings. Each building contains several, individual, apartments. Apartment 219 is located on the second floor of one of the two-story buildings. This particular building has the letter “B” on the side. The door to apartment 219 is the fifth door from the left as you face Building B. The numbers 219 are affixed on the front door.”

3. A **duplex**:

“There is in Polk County, Iowa a suspected place and premises described and located as follows:

1846 Johnson Drive, unit “B”, Des Moines, Iowa. This location is more particularly described as a two story, wood and shingle duplex

house. The house is dark gray in color with white trim. The house is on the south side of Johnson Drive, facing north. There are two, side-by-side mailboxes at the curb in front of the house. One mailbox has the letter "A" on its side and the other has the letter "B". As you face the house there are two entrances, one to each separate duplex residence. The entrance to unit "B", which is the residence to be searched, is on the west as you face the two doors. The letter "B" on the face of the door."

4. A **rural** location:

There is in Harris County, Texas a suspected place and premises described and located as follows:

Approximately 17 miles northeast of the City of Houston, a farm, including a residence, garage, equipment shed, and barn. The residence is a single story house with a detached, one-vehicle garage on the east side, white in color with a brown roof. The residence is constructed primarily of wood with painted wood siding on its west, north and east sides, and brick veneer on its out side. An entrance door is located on the south side of the residence, which is apparently the front of the house. On the north side of the house is a cement patio. Directly behind the house, approximately 50 yards to the north, is an equipment shed that is open on three sides. Inside the shed is a tractor. To the east of this shed is a barn.

To get to this location you proceed eastward from the city limits of Houston on U.S. Hwy 59 for approximately 12 miles to the intersection of U.S. 29 and FM 2992. From this intersection proceed northward on FM 2992 for 1.8 miles to its intersection with an unpaved private road that enters FM 2992 from the east. Approximately ½ mile to the east on this private road is the house, garage, equipment shed, and bar described above."

If you have access to a digital camera and can take a picture of the place to be searched, that is the quickest, easiest, and best description that you can have. If you can do that, I suggest:

There is in Kings County, Washington a suspected place and premises described and located as follows:

2267 Seaport Drive, Seattle, Kings County, Washington. A photograph of the location to be searched is embedded below:

Take the digital photo and embed it in the affidavit here. Also, be sure to embed it on to the warrant itself, too!

You can do the same with diagrams. Either draw a diagram on a separate sheet of paper and attach it as exhibit "A" or do the diagram on the computer and embed it below the street address like you would a photo.

If you are going to attach the diagram as an exhibit say something like this:

"There is in Lauderdale County, Mississippi, a suspected place and premises described and located as follows:

2650 Hamilton Drive, number 21, Meridian, Mississippi. Said location is a mobile home located within a complex of mobile homes located at 2650 Hamilton Drive. The specific home to be searched has been designated number 21 by the complex and it is a beige and white mobile home with a wood deck on the west side of the home. A map designating the exact location of the mobile home to be searched is attached hereto as Exhibit A to this affidavit and is incorporated herein, for all purposes.

Note: Make sure to write "Exhibit A" at the bottom of the map and attach it to the back of the affidavit. And, when you prepare the warrant, be sure to say the same thing, except, state "Exhibit A to this warrant and is incorporated herein for all purposes. Then, attach the map to the warrant, too.

Note: It is one thing to simply state, in the affidavit, the description of the place to be searched. But, you also need to tell the judge, in the affidavit, how you know that is the description of the place to be searched. Did you personally go out there and look at it? Or, did you personally take the embedded photo? You need to explain this in the "probable cause" portion of the affidavit. Not in this beginning first paragraph. I will show you how to do that later in this document.

Whose place is it?

The second section in the form affidavit states who is in charge of the premises to be searched. This is important for a couple of reasons.

First, anyone who is named or described in this section can be fully searched if they are at the location when you execute the warrant.

The second reason is that it names the person(s) who you expect to find there for raid planning purposes.

If you know the name and date of birth of the individual(s), put that in this section. If all you have is a first name or a nickname, put that in. If all you have is a physical description, put that in. If you have no name or description, just put "persons who are unknown to your affiant".

Some examples:

1. Said suspected place is in the charge of and controlled by each of the following named and/or described suspected parties, to wit: Fred Jones, a white male DOB; 5/18/67, Harriet Jones, a white female, DOB: 3/24/73 and others unknown to me.
2. Said suspected place is in the charge of and controlled by each of the following named and described suspected parties, to wit: A black male who is known only to me as "Tim" and who is described as about 40 years of age, 6'1", 220 pounds, a beard and mustache, and tattoos on both biceps.
3. Said suspected place is in the charge of and controlled by each of the following named and described suspected parties, to wit: a white male, whose name is unknown to me but who is described as approximately 30 years of age, 5'9", 150 pounds, stringy blond hair, tattoos on both arms, glasses and a scar on his left cheek.
4. Said suspected place is in the charge of and controlled by each of the following named and described suspected parties, to wit: person and persons who are unknown to me.

What you want to search for?

Now that you have told the judge *where you want to go*, you need to tell him *what you want to look for*. And, tell him why you get to take it and they don't get to keep it.

For instance, I have the right to have a computer in my home, but not if the computer is stolen.

I have the right to have certain controlled substances in my home, if my doctor prescribed them to me. But, I don't have the right to have controlled substances in my home that were not prescribed and I bought on the street in order to get "high".

When you are putting an affidavit together for a search warrant, you should always be *listing the smallest items that you have probable cause to search for and seize*. The reason is that the smaller the item the more places you can look.

An example would be in a murder case. I have drafted search warrants for weapons used in homicides and the homicide detective is focused on the weapon, only. He may have probable cause that the defendant has some marijuana in his house, too. But, the homicide detective isn't interested in that. He is only interested in getting the gun. If we draw a warrant to look for the gun, what if you see the gun the minute you go into the house? Your search is over. The warrant only authorized you to look for the gun and there it is!

Search warrants are specific. You can't get a "general let's just go in and look through everything and see if we find something interesting or illegal" search warrant.¹¹

Of course, if the homicide detective sees drugs "in plain view" when he enters the house he can seize what is in "plain view" and can get a search warrant to search the house for more drugs. But, if he had probable cause that there was marijuana in the house at the time I am drafting the search warrant for the murder weapon, I am going to include marijuana in the warrant, too. Now the officers can look everywhere in the house, look in drawers, clothing, shoeboxes, etc. ... even after they find the murder weapon. Who knows what else they will find. And, if he

¹¹ Traditionally underlying the application of the Fourth Amendment Warrant Clause has been a cognizance of the key role concerns about the oppressive use of "general warrants" played in American history and the extent to which the Bill of Rights was deliberately designed to prevent law enforcement abuses of discretionary authority exercised pursuant to warrants.

doesn't have probable cause that the defendant has drugs in his place, I will make sure to draft the warrant to look for the murder weapon *and any ammunition* that may be in the house, too.

If I were drawing a search warrant for a stolen 40" Sony LCD television, I would also include the remote control, the connecting wires, and the instructions. When the officers enter the house and see the television on the stand they are just getting started and not ending the search.

Always try and allow you and your fellow officers to search in the most places by including the smallest items that you have probable cause to search for.

I also recommend that you consult your Code of Criminal Procedure for the categories of items that your state allows search warrant to be issued for. Then, when you state what you want to search for, you may want to also state the statutory authority to seize it.

Some examples:

1. Drug search warrant

"It is the belief of affiant that said suspected party has possession of and is concealing at said suspected place in violation of the laws of =X=the following property:

Controlled substances kept in violation of the laws of this state, namely cocaine; implements used in the commission of the offense of possession and delivery of controlled substances, to wit: drug paraphernalia and evidence of cocaine trafficking including but not limited to, scales, containers, packaging materials, sealing devices, as well as documentary, electronic and digitally stored records of sales, receipts, purchases, customers and suppliers. These documents can be either hand written, typed, or digitally stored within digital storage devices including, but not limited to, computers, mobile digital devices such as iPads or similar digital devices, cellular telephones, thumb drives, external hard drives, compact discs, and stored with "cloud" storage devices and systems.

2. Stolen property

"It is the belief of affiant that said suspected party has possession of and is concealing at said suspected place in violation of the laws of =X=the following property:

One 40-inch Sony LCD Bravia television with serial number 122997866. This television was stolen from John Smith on or about January 20, 2015 in St. Paul Minnesota."

3. Murder weapon

"It is the belief of affiant that said suspected party has possession of and is concealing at said suspected place in violation of the laws of =X=the following property:

One caliber .45 Colt semi-automatic pistol with a chrome frame and an ivory handle. This weapon was used in the shooting death of Tom Hadley in Meridian Mississippi on or about January 6, 2015.

The *probable cause*¹² portion

Now, comes the work! It is fairly easy to tell the judge where you want to go, whose place it is, and what you want to look for. But, before he gives you a warrant, you need to convince him or her that there is *probable cause* that the items you want to look for are at that location *now!*

Remember, probable cause isn't a certainty. You are simply trying to convince the magistrate that "more likely than not" this specific stuff (i.e., a specified material substances, properties, documents, or miscellaneous objects) is in this particular place today.

Probable cause comes from different sources. A listing of the most common sources would include:

1. Personal knowledge of the "affiant"
2. Information received from other peace officers

¹² Constitutional requirement: The Fourth Amendment specifically requires that "no Warrants shall issue, *but upon probable cause.*"

3. Information received from an informant, including ...
 - a. a reliable and credible informant
 - b. a first-time informant
 - c. a "solid citizen" who wishes to remain anonymous
 - d. a person who wishes to remain anonymous and who has given statements "against penal interest"
4. Named individuals

I will go through each of these sources and demonstrate how you might want to state them in your affidavit.

1. Personal knowledge of the affiant

You are the *affiant* in an *affidavit* because you are the one swearing to the facts.¹³ The easiest form of probable cause is when you, personally, were inside of the place you want to get a search warrant for and you personally saw the contraband that you want to go back to search for and to seize. This is normally when the "affiant" (the officer) was inside of the location in an *undercover capacity* and didn't want to make an arrest at that point in time.

The magistrate always begins his review of an affidavit believing you. You are a peace officer and, therefore, a reliable and credible person. If you weren't reliable and credible you need to quit your job as a police officer and start selling used cars.

To write this probable cause you need to be sure to list the following:

- a. when were you in the location?
- b. what did you see, specifically?

¹³ The Fourth Amendment specifically requires that "no Warrants shall issue, but upon probable cause, *supported by Oath or affirmation.*"

- c. what did you hear, if anything, about the contraband that you saw?
- d. how were you able to recognize the item(s) as contraband?

Example:

"Affiant has probable cause for said belief by reason of the following facts and circumstances:

[1] Within the past 24 hours of the making of this affidavit I was personally inside of a house located at 123 Main St., Johnston, Randle County, Minnesota. This house is a single story, grey frame house with a detached one-car garage. The numbers 123 are painted on the curb in front of the house.

[2] I was in the house in an undercover capacity acting as if I was a user of drugs interested in buying crack cocaine. I met the occupant of the house, a white male, who identified himself to me as Jim and who is about 35 years of age, 5' 7," 200 pounds, long black hair, dark horn rimmed glasses, and a tattoo on his left hand.

[3] I told "Jim" that I wanted to buy two "rocks" of crack cocaine and he went into the kitchen of the house and returned to the living room and handed me two "rocks". He told me that he had plenty and to come back if I needed any more.

[4] I left the location and returned to the Johnston Police Department where I field-tested the "rocks" and the reaction for each was positive for cocaine."

Note: I have stated to the magistrate where I was, when I was there, whose place it is, what was inside, how I know it was cocaine, and that there is still cocaine inside. That is all I need for probable cause.

2. Information received from other peace officers:

This is another easy recitation of probable cause. Remember, the magistrate begins his review of your affidavit believing what you are telling him. But, while he believes you when you tell him that someone else told you something, he also needs to have a reason to

believe that "someone else". When that "someone else" is a peace officer he is also a credible source and everything that the other officer told you will be accepted by the magistrate because it comes from a "credible source".

There are a couple of ways to state this type of probable cause.

One way is to simply name the officer and his status as a police officer.

The other is not to name him but still state in the affidavit that he is a peace officer. Even though you don't tell the magistrate the officer's name, the fact that you tell the magistrate that this information was given to you by another police officer is sufficient to pass the "credibility test".

Example:

Below is an example of how to tell the magistrate that you received information from another officer but you don't identify the officer in your affidavit.

[1] "Earlier today, I spoke with a fellow officer of the Des Moines Police Department. This officer works undercover and the officer's name and identity shall remain unnamed throughout this affidavit for reasons of personal safety and security as well as not to compromise an on-going narcotics investigation.

[2] This officer told me that the officer was inside of 123 Main St. in Johnston, Randle County, Iowa within the past 24 hours of the making of this affidavit.

[3] The officer described the location to me as a single story, red brick house with white trim. The house has an attached two-car garage and the numbers 123 are on the door-frame to the left of the front door as you face the residence.

[4] The officer told me that the officer met with a white male, who identified himself as Jim and who is about 35 years of age, 5' 7," 200 pounds, long black hair, dark horn rimmed glasses, and a tattoo on his left hand.

[5] "Jim" sold the officer several rocks of "crack cocaine." The officer told me that he brought the "rocks" back to the Des

Moines Police Department and field tested them. The officer told me that the reaction of the field test was positive for cocaine.

[6] The officer also told me that Jim told the officer that he had plenty and to come back if the officer needed any more."

3. The "reliable and credible" informant

Most drug search warrants are based on information that comes from an informant. And most informants are not presidents of your local civic association. So, why would a judge issue a search warrant that is based on information that was provided to you by some ex-convict, drug-using loser who only snitches off drug dealers that he owes money to? Because this same informant has given you information on several past occasions regarding the unlawful possession of drugs and each time that he gave you this information you were able to prove that the information was true.

President Lyndon Johnson said: "You can't polish a turd". Well, maybe that is what we are doing here.

Be accurate in the affidavit about what you say regarding the informant.

The idea of showing his credibility through his past performance suggests that he has given you good, substantive, information that led to the seizure of drugs and the arrest of individuals.

It does not mean that the informant provided you with generally known factual information.

I had an officer write a search warrant affidavit based on information he received from an informant.

He stated, in the affidavit, "I have received information from this same informant on three previous occasions regarding the unlawful possession and sale of controlled substances and on each of these three past occasions the information this informant provided was shown to be true and correct".

This suggested to the magistrate that issued the warrant that this informant was the basis of three previous seizures

and arrests. When I got the case to prosecute, I believed that too.

When we had a Motion to Suppress hearing the officer testified that the "three previous occasions" consisted of one interview, on the night that the search warrant was issued. The officer said that the three occasions were (1) she told me that cocaine came from Columbia; (2) she said that people often snorted it or shot it intravenously, and (3) that Frank Montalbano (the defendant) had some in his house.

That was it. That was also the end of the case. The officer simply misstated facts in the affidavit that, had the truth been known, the judge would not have issued the warrant. If the truth had been known, the judge would never have found the informant to be credible.

So, be careful, be truthful, and understand what makes an unnamed informant a "credible source".

Basically, it is when you have an informant that has given you information on several past occasions. You then corroborated the information through other means. Maybe you have written search warrants in the past based on this informant's information. If that is true, say it.

Example:

"Affiant has probable cause for said belief by reason of the following facts and circumstances:

[1] Within the past 24 hours of the making of this affidavit, I personally spoke with a confidential informant. For reasons of personal safety and security, this informant will remain unnamed throughout this affidavit.

[2] I have received information from this informant on several past occasions and the information that this informant has provided to me has always shown to be true and correct.

[3] I have executed search warrants that were based on this informant's information and on each occasion, I have found illicit drugs consistent with the information the informant provided.

[4] I have also arrested individuals for drug offenses based on information provided by this same informant where they were subsequently charged and convicted for violations of the drug laws.

Note: This is an example of how to state facts in an affidavit based on assumptions. If your situation doesn't fit the examples, then don't use those examples. For instance, the statement that you have arrested, charged, and convicted should only be put in the affidavit if that is a true statement. Otherwise, leave it out.

[1] The informant told me that, within 36 hours of the making of this affidavit, the informant was inside 123 Main St., Houston, Harris County, Texas.

[2] The informant said that the informant spoke with a white male, approximately 30 years of age, black hair, black goatee, whose name is Bill Jackson.

[3] He said that Jackson lives at that address and is selling methamphetamine out of that house. The informant said that the informant has been at the location several times in the past two weeks and on each occasion Jackson had methamphetamine there for sale.

[4] I am aware that the informant has been a user of methamphetamine and is able to recognize it when the informant sees it.

[5] The informant said that Jackson had several ounces in the house when the informant was in the house this last time.

[6] I drove by 123 Main St. and observed that it is a single story, white frame house with black trim. There is a detached garage that is on the east side of the house. The numbers 123 are over the front door of the house and are also painted on the curb in front of the house.

[7] I then contacted Reliant Energy Company and learned from their business records that the utilities at 123 Man St. are billed to William Jackson at that address.

[8] I have also checked the records of the Houston Police Department and found that William Jackson, a white male, DOB: 4/12/76 has been arrested for possession of controlled substances in 2005 and he showed his address to be 123 Main St.”

4. The “first time informant”

In the example above, I was able to set out an affidavit that would support the issuance of a search warrant based on information that an unnamed source provided. Even though I didn’t tell the judge who this source is, I did give the judge a reason to believe him. I did that by setting how I have used him in the past and that his past information was always good. What if you have a “first time” informant? Here is someone who is giving you information that someone has drugs in his house but you have never received information from this person before. Further, this person does not want his name anywhere in an affidavit. He doesn’t want the crook to know that he “snitched him off.”

The question is can you get a search warrant based solely on this person’s information? The answer is no! That is not to say the information is of no use, but you are going to have to go out and independently corroborate a lot of what the informant is telling you.

There are several ways to “prop up” the information.

One is the *conduct of physical surveillance*. If you see a lot of folks driving up to the house, going to the front door, going inside and then leaving in a couple of minutes, that is typical drug house activity. That is not enough, but it is getting you closer.

What about a *trash run*? If you find drug paraphernalia in the trash that the target put out for collection, we are getting there.

Maybe, you *traffic stop* one of the customers after he drives off from the house. If you do all of that, you have probable cause.

And, this "first time" informant has given you "one prior occasion" when his information was "true and correct".

A couple more like this and this informant will be good enough to write an affidavit based only on his information.

How do you write an affidavit with this first time informant?

Example:

"Affiant has probable cause for said belief by reason of the following facts and circumstances:

[1] On January 23, 2009, I personally spoke with a confidential informant. I will not identify this informant for reasons of personal safety and security.

[2] This informant told me that George Duncan, a white male, approximately 40 years of age, was selling cocaine out of his house located at 123 Main St., St. Paul, MN.

[3] The informant said that the informant had been in the house several times when Duncan was in possession of cocaine and has watched Duncan sell cocaine to individuals inside of that location. The informant said that the informant had been in the house within the last 24 hours of the making of this affidavit and saw cocaine on that occasion.

[4] Based on this information, on January 24, 2009, I personally went to 123 Main St. and saw that it is a two-story, white frame house with an attached one-car garage. There is a porch at the front of the house with several potted plants on it. The numbers 123 are above the front door on the doorframe. Also, there is a mailbox in front of the house, at the curb. The numbers 123 are on the mailbox.

[5] I also saw a 2003 Ford F-150 pickup truck parked in the driveway. The vehicle had Minnesota license 35 BNN. I contacted the Minnesota State Police and learned from their official records that this vehicle is registered to George V. Duncan at that address.

[6] I established surveillance and watched the house for several hours. During that time I saw a number of people drive up to

the front of the house and go to the front door and knock. They would be allowed into the house but would stay for a very short time and then leave.

[7] I have been a police officer for the past 7 years and have been assigned to the Narcotics Division for the past 4 years. I have received specialized training in the investigation of narcotics cases from the Minnesota Bureau of Apprehension, the U.S. Drug Enforcement Administration, and the St. Paul Police Department. I have also participated in a number of narcotics investigations. I have learned from both my training and my past experiences that it is common for persons who sell drugs from a location to have persons enter and stay for short periods of time. What I observed at this location was consistent with what I have seen in the past when investigating drug houses.

[8] I recorded the license numbers of the vehicles that they used and checked their registrations. I found that several of them were registered to individuals who had prior arrests for various drug offenses.

[9] I watched as a white male, who fit the description of George Duncan as given to me by the informant, take several trash bags from the house and place them at the curb for collection. I took the two bags back to the police station and inspected the contents. I found several plastic wrappers that had a small amount of white powder in them.

[10] I field-tested the powder and the powder tested positive for cocaine.

[11] I also found several sheets of paper with writing on them. The writing appeared to me, based on my training and experience, to be a listing of drugs given to various persons and money that each person owed for the drugs."

5. The "solid citizen" who wants to remain anonymous

Judges issue search warrants all day long when they are based on reliable and credible informants. But, those same judges would never let any of those informants into their own homes or, for that matter, into their own chambers. The only place these informants belong, for the most part, is sitting at the defendant's table in the courtroom. If

judges will give you a warrant based on their information, why wouldn't they accord the same reliability to a person who ...

- ★ has no criminal record,
- ★ actually has a real job,
- ★ is a home owner,
- ★ raising a family, and
- ★ is just like you and me?

Well, judges will issue warrants based on information that those people provide. You just have to explain to the judge why he should believe them. If you can name them, then do so. There is a presumption of credibility when you name the source of the information. But, some citizens don't want to be identified in a search warrant affidavit. They may be the across the street neighbor to the defendant. They may work with the defendant. There could be a lot of reasons why this person doesn't want to be identified. But this person has good information. How so we use this person's information in an affidavit without naming him?

Example:

"Affiant has probable cause for said belief by reason of the following facts and circumstances:

[1] On March 21, 2009, I personally spoke with a confidential informant. This was the first time that I have spoken with this informant.

[2] I have determined the following regarding this informant. I have checked the records of the National Crime Information Center, the Mississippi State Police, the Meridian Mississippi Police Department and the Lauderdale County Sheriff's Department. I have learned from all of those agencies that they have no record of this person ever being arrested, charged or convicted of any criminal offense.

[3] I have also determined that this individual is gainfully employed and is a homeowner in Lauderdale County. I have

also learned that this individual is raising a family and is active in his community's affairs.

[4] This individual told me the following:

[5] This individual said that the individual had heard from various other members of the community that Harry Smith, who lives at 123 Main St., Meridian, MS, was selling marijuana from his home. The individual said that the individual had been watching Smith's house and has seen a number of people coming and going from there. The individual said that none of them stayed over a couple of minutes. The individual said that he had actually spoken with a couple of young people that he saw leaving the house and they told him that they went there to buy their marijuana. They admitted to the individual that they smoked marijuana and Smith was the person they got it from.

[6] The individual told me that this conversation took place with 24 hours of the making of this affidavit.

[7] The individual also told me that he had spoken to Smith on several occasions and that the individual could smell the distinct odor of marijuana on Smith. Also, the individual said that Smith appeared to be under the influence of marijuana.

[8] The individual told me that the individual was able to detect the odor of marijuana because the individual had been around marijuana in the service and in college.

[9] I went to 123 Main St. and saw that this is a single-story brown brick house with dark brown trim. There is an attached two-car garage and the numbers 123 are on the mailbox at the curb in front of the house.

[10] I also noticed several people arrive, over a couple of hours. They would drive up, go to the front door, enter the house, and then leave in a very short time.

[11] This pattern is consistent with what I have seen in numerous past drug investigations over the last 9 years in the Narcotics Division. I have learned from my training and experience that individuals who buy drugs from a location will

normally stay a very short time in the location as they only want to get the drugs, pay for them and leave to go and use the drugs.

[12] I contacted Mississippi Power and Light and learned from their records that the utilities at 123 Main St. are billed to Harry Smith at that address. "

6. A person who gives a "statement against penal interest"

At first, it seems odd that someone who admits to being a crook would be considered a credible person. But, the courts have said just that.

Basically, the way the judges look at it is "If they guy will admit that he did something that he could get in trouble for, he is probably telling the truth about everything else".

Why would anyone lie by admitting some crime they committed if they hadn't really committed that crime? If someone was going to lie, it makes more sense they would lie by telling someone that they didn't commit a crime rather than tell them that they did commit a crime.

I have drafted a number of affidavits based on information that was provided by a person who also made a statement against penal interest. And, I didn't have to name them. I did set out in the affidavit what the statement was that was against their penal interest. Remember, that is what makes the person credible, so make sure you set out the statement against penal interest that the person made in the affidavit.

Some of the situations that I have dealt with are persons who are co-defendants and who admit that they "robbed the bank along with Fred Smith and Smith has the money at his house". Or, it might be someone who gets caught with drugs and admits that he is a drug user and buys them from Fred Smith. In that case, I have the officer get the guy to do a controlled buy from Smith and use that, along with his statement, as the probable cause.

Example:

"Affiant has probable cause for said belief by reason of the following facts and circumstances:

[1] On February 5, 2015, I personally spoke with a confidential informant. This informant admitted to me that the informant was a burglar and had burglarized several homes in Harris County, Texas.

[2] He went with me and pointed out several of the houses and I confirmed from the records of the Harris County Sheriff's Department that burglary reports had been filed by the owners of those homes stating their homes had been burglarized in the time frame that the informant told me he committed those crimes.

[3] This informant also admitted to me that he was addicted to crack cocaine and that he would buy his cocaine from Rick Hernandez.

[4] The informant said that Hernandez lives at 123 Main St., Houston, Harris County, Texas and that the informant had been in this house within the past 24 hours of the making of this affidavit.

[5] I went to 123 Main St. and saw that this is a single-story brown brick house with dark brown trim. There is an attached two-car garage and the numbers 123 are on the mailbox at the curb in front of the house.

[6] I also noticed several people arrive, over a couple of hours. They would drive up, go to the front door, enter the house, and then leave in a very short time.

[7] This pattern is consistent with what I have seen in numerous past drug investigations over the last 9 years in the Narcotics Division. I have learned from my training and experience that individuals who buy drugs from a location will normally stay a very short time in the location as they only want to get the drugs, pay for them and leave to go and use the drugs.

[8] I contacted Reliant Energy Company and learned from their business records that the utilities for 123 Main St. are billed to Richard Hernandez at that address."

If the judge that you are taking the affidavit to is new or you feel may have a problem with an affidavit based on the statement of a person

who also says that he is a crook, I suggest "spoon feeding"¹⁴ the judge. In other words set out in the affidavit those statements against his penal interest that he made to you. Then tell the judge, in the affidavit, why the judge can rely on those statements for probable cause.

Example of "spoon feeding" the judge

"Affiant has probable cause for said belief by reason of the following facts and circumstances:

[1] On February 5, 2015, I personally spoke with a confidential informant. This informant admitted to me that the informant was a burglar and had burglarized several homes in Shelby County, Alabama.

[2] He went with me and pointed out several of the houses and I confirmed from the records of the Shelby County Sheriff's Department that burglary reports had been filed by the owners of those homes stating their homes had been burglarized in the time frame that the informant told me he committed those crimes.

[3] This informant also admitted to me that he was addicted to crack cocaine and that he would buy his cocaine from Rick Hernandez.

[4] The informant said that Hernandez lives at 123 Main St., Birmingham, Shelby County, Alabama and the informant said that he had been in the house within the past 24 hours of the making of this affidavit and that Hernandez had cocaine in the house at that time.

[5] This source, having made statements to me that are against his penal interest by admitting his commission of several offenses, is considered a reliable and credible source of information for purposes of a search warrant affidavit under the case law of this state and of the federal courts.

¹⁴ Spoon-feed: to present (information) so completely as to preclude independent thought <spoon-feed material to students> b: to present information to in this manner.

(I don't recommend that you highlight and underline it. I only did that to show you what I meant by "spoon feeding.")

7. A named source of information

Naming the source of your information makes the source "credible." The idea is that when a person will allow you to let the world know that he or she gave you the information they risk their safety because the person whose house is searched and who goes to jail knows who gave the information to the police that made all of that happen. So, anytime the source will let you name him or her in the affidavit, then do it. Even if the person is an ex-con or a drug user, he is still considered "credible" because you have named and indentified him in the affidavit.

Now, if I can say something good about them, I will. But, if I can't then I only name them and throw in their DOB. That is enough to satisfy the case law requirements for credibility.

Example:

"Affiant has probable cause for said belief by reason of the following facts and circumstances:

[1] On March 22, 2009, I personally met with Frederick Simmons, a white male, DOB: 5/20/48. Simmons told me that

Note: If Simmons was a solid citizen I would say:

"On March 22, 2009, I personally spoke with Fred Simmons, a white male, DOB: 5/20/48. Simmons related the following to me (then I set out all that he told me).

[2] I have personally checked the records of the National Crime Information Center, the Minnesota Bureau of Apprehension and the St. Paul Police Department and determined that Simmons has no criminal record.

[3] I have also determined that Simmons is gainfully employed and is buying a home in Woodbury, MN."

Now, I have named him and I have shown that he is a "good guy". If he isn't such a "good guy" then I only name him. Either way I have a credible source, for purposes of the affidavit.

Some special situations

1. Affidavit based on a drug dog

If you are drafting an affidavit based on a drug dog alert you need to make the dog an "expert." Don't just say: "Officer Gibson, the dog handler, told me that his drug dog "Fido" alerted on the house." The judge has to know that "Fido" knows the smell of drugs. Here is how to say it (assuming that you have already set out what you know and you are now at the point of talking about the drug dog):

[1] "I then contacted Officer John Gibson of the Richland Police Department. Gibson is assigned to the Narcotics Division.

[2] Gibson is the assigned "handler" for "Fido". "Fido" is a drug detection dog with the Richland Police Department. Gibson told me that he has been the assigned handler for Fido for the past four years. He said that "Fido" is certified by the National Drug Dog Detection Association in the detection of the odors of several controlled substances, including heroin, methamphetamine, cocaine, and marijuana. Gibson said that "Fido's" certification number is E5574.

[3] Officer Gibson walked "Fido" over to a box that was wrapped in brown wrapping paper and had a FedEx sticker pasted on the box showing that this box was to be delivered to "John Smith" at "126 Main St., Houston, Texas. I watched as Fido stopped at the box and sat still and stared at the box. Officer Gibson told me that Fido's actions when he got next to the box are consistent with the way he reacts when he detects the scent of marijuana, cocaine, methamphetamine and heroin. Gibson told me that in his opinion, based on Fido's "passive alert" that this box contained one or more of those controlled substances.

When you are looking for documents and other “paraphernalia”

Normally, an informant will tell you there are drugs in a house but seldom do they see money, packaging materials, scales, customer lists, telephone numbers of sources and buyers. They just see the dope that they buy and leave with.

If you are asking the judge to look for “paraphernalia” you have to set out probable cause that it is there, along with the drugs. This is where you make yourself the expert. What you are doing is telling the judge why you expect to find stuff in the house that the informant didn’t see.

You expect to find it because you have seen it in past cases where you ran search warrants and you have been trained to know that this “extra stuff” should be there.

Example:

Assume that you have already set out all of the information that the informant gave to you. You have described the place to be searched and have stated what you found out from the light company or other source to corroborate whose place it is. All you told the judge, basically, is that the informant told you there is dope in the house. Now you have to explain why the other stuff is there, too. You do that by making yourself an “expert”. Brag on your training and experience.

Here is an example:

[1] I have been a police officer with the Houston Police Department for that past eleven years. I have been assigned to the Narcotics Division for the past six years.

[2] During my tenure as a police officer I have received specialized training in the investigation of controlled substances cases. Since my assignment to Narcotics, I have received additional training in the investigation of controlled substances offenses from the DEA, the Houston Police Department, The Texas Department of Public Safety, the Regional Counterdrug Training Academy and the Midwestern Counterdrug Training Center.

[3] I have also participated in a number of investigations regarding the possession and sale of controlled substances

including executing search warrants at locations where individuals keep and sell drugs.

[4] I have learned from my training and I have personally seen when executing those search warrants that persons who possess and sell controlled substances will normally have, in addition to the drugs, the following items:

(LIST ALL OF THE OTHER THINGS THAT YOU WANT TO SEARCH FOR)

What if this is your first narcotics case?

Assume you have a reliable and credible informant who tells you there are drugs in a particular house.

You are able to set out the "reliability" of the informant but you want to look for the "paraphernalia" and you haven't had any training yet and this is the first drug warrant that you are going to go out on.

What do you do?

You find an expert and tell him about your case and let him tell you why he thinks "paraphernalia" is in the house.

Here is an example:

Assume that you have set out all the informant said, that you saw the house and have described it, and you have determined who lives there. Here is an example of how to say it in an affidavit:

[1] I am newly assigned to the Narcotics Division and I have not participated in previous investigations. I personally spoke with Sgt. S.D. Plaster, who is my supervisor in the Narcotics Division.

[2] I know that Sgt. Plaster has been assigned to Narcotics Division for the past nine years as a supervisor and has participated in a large number of investigations and executed numerous search warrants at locations where drugs are kept and sold.

[3] I am also aware that he has received specialized training in narcotics investigations from DEA, the Houston Police Department, the Texas Department of Public Safety, and has

instructed at several narcotics schools hosted by the Midwestern Counterdrug Training Center.

[4] I told Sgt. Plaster the information that I had received from the informant and what I had personally observed while I was watching the location.

[5] Sgt. Plaster told me that, based on his training and his experience, coupled with the facts of this case, it was his opinion that, in addition to the drugs that the informant said would be inside the location the following additional items would also be there:

(LIST ALL OF THE OTHER STUFF YOU WANT TO LOOK FOR)

Explaining why you described the location to be searched in paragraph 1 the way that you did:

Remember, everything that you set out in the first three numbered paragraphs of the affidavit (where you want to go and search, whose place is it, and what you want to search for) must be supported within the probable causer portion, paragraph #4. So, after you have taken care of the other issues that we have set out, please remember to explain to the judge how you know that the place to be searched is located at the address set out in paragraph 1 and why it looks like you described it, in paragraph 1.

An example might be: "I personally drove to 123 Main St., Austin, Travis County, Texas and I observed that it is (copy the description that you set out in paragraph 1 and drop it in here).

Or: "I personally drove to 123 Main St., Austin, Travis County, Texas and I took a photograph of that location. It is the photograph that I have embedded in paragraph 1 of this affidavit."

Conclusory statements

The most common problem with search warrant affidavits is "conclusory statements." That happens when the affidavit contains a statement of fact but does not say how the "affiant" learned of that fact.

For instance:

“Surveillance determined that Fred Farley left apartment 348 at 9:30 this morning”.

OK! There is a fact, but the judge has no idea how you learned of that fact. Who is “surveillance”? Someone had to tell you that. Say who it was.

Example:

“I personally spoke with Detective Tom Daily. Daily told me that he was watching the front of apartment 348 this morning at 9:30 when he saw Fred Farley leave that apartment. Daily said that he recognized Farley from his driver’s license photograph that we received from the Mississippi Highway Patrol.”

Now the judge knows where you got the information from and why he should believe the source of that information.

Another example:

“I have determined that this informant is reliable and credible.”

Fine, but how did you do that? Tell the judge.

“I have received information from this same informant on several past occasions and on each past occasion the information was proven to be true and correct. I have executed search warrants that were based on this informant’s information and have found drugs as described by the informant.”

Now the judge knows why the informant is reliable and credible.

Remember, the affidavit will contain either information based on what you personally saw, smelled, heard, or it will have information that someone else saw, smelled, heard and told you about. If the latter is the case, be sure to tell the judge in the affidavit who (either named or unnamed) gave you that information.

Knock and announce

The Supreme Court, in *Wilson v. Arkansas*,¹⁵ a 1995 opinion, held that whether police *knock and announce*¹⁶ their presence before executing valid search warrants was part of the Fourth Amendment's "reasonableness" clause.

In that case, Wilson [defendant] made a series of drug sales to an Arkansas State Police informant and threatened the informant with a gun.

When the police went to his house to execute a search warrant they found the front door open. They opened an unlocked screen door and entered, identified themselves as police officers and told Wilson that they had a warrant.

The U.S. Supreme Court held that the "knock and announce" principal is a constitutionally based requirement in assessing whether entry into a premises to conduct a search and seizure is reasonable.

The idea is to give the occupant of the premise an opportunity to let you in prior to officers forcing their way in, escalating the chance of damage to property or injury to an occupant.

But, the Court did recognize three *exceptions to the knock and announce requirement*:

1. Apprehension of peril
2. A useless gesture
3. The destruction of evidence

In order to satisfy the "reasonableness" requirement when you want to make an entry without knocking and announcing:

first ... you have to either address the issue in the warrant itself or if the warrant doesn't contain a "no knock" provision, you

¹⁵ *Wilson v. Arkansas*, 514, U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995).

¹⁶ Knock-and-announce rule. The requirement that the police knock at the door and announce their identity, authority, and purpose before entering a residence to execute an arrest or search warrant.

must articulate (if required) why the situation that you found, at the time you approached the premises with the warrant, fit one of the above exceptions.

The better approach, when you can, is deal with this in the warrant itself.

The *apprehension of peril exception* applies when the officers have a reasonable belief that announcing their presence prior to entry would increase the chances of injury to themselves or to others.

The state of Wisconsin tried to make this exception statutory by placing in their Code of Criminal Procedure that the very nature of executing search warrants at locations where drugs are kept and sold is so dangerous that officers are never required to knock and announce prior to entry.

This case went to the Supreme Court in *Richards v. Wisconsin*¹⁷ in 1997.

The Court held that you cannot take a “blanket approach” to knock and announce by delineating general categories of warrants that never require knocking and announcing. You must state facts specific to this particular situation that justify a “no knock” entry.

This is also required for the other two exceptions of “a useless gesture” and “the destruction of evidence.”

From 1995 until 2006, defendants could file for suppression of evidence if a warrant was executed at their premise and the officers did not knock and announce prior to entry.

The burden was on the state to show that the officers did knock and announce, the warrant contained a “no knock” clause dispensing with the knock and announce requirement, or the situation at the scene was such that knocking and announcing first would have been a useless gesture, would have created a perilous situation, or would have resulted in the destruction of evidence prior to the officers entry into the location.

¹⁷ *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997).

But, in June, 2006, the Supreme Court issued its opinion in *Hudson v. Michigan*.¹⁸

While the Court did not repeal the rule itself, it did hold that the traditional remedy for police violation of the knock and announce rule, namely exclusion of the evidence at trial, was no longer required.

But, this did not mean that a defendant could not file a civil action, such as a federal 1983 suit against officers who entered their home with a search warrant without complying with the “knock and announce rule.”

The point is that you need to deal with “knock and announce” even though it will not affect the admissibility of evidence that you seize during the execution of a warrant.

You never know what may happen when you kick in a person’s door.

What if a small child were on the other side of the door and was struck in the head by the door as it flew open? If your search warrant didn’t have authority to dispense with the knock and announce requirement, or if the warrant didn’t have such a provision and you couldn’t justify failing to knock and announce, you could face substantial financial exposure in a civil suit.

Bottom line: Always deal with knock and announce.

To get a “no knock” provision in a search warrant you must, in the affidavit, set out “reasonable suspicion” why knocking and announcing first would create one of the three exceptions.

Some examples might be that:

You noticed outside video surveillance equipment

Your informant told you that the defendant had guns in the house and told the informant that he would kill any cops who tried to come into his house

¹⁸ *Hudson v. Michigan*, 126 S. Ct. 2158, 165 L. Ed. 2d 56 (U.S. 2006).

There are cases where the officers had executed a search warrant at the same location a year earlier and the defendant ran to the back of the house and tried to flush the drugs down the toilet.

Clearly, if the search warrant is for a murder weapon and the defendant is in the house to be searched, there is sufficient reasonable suspicion of danger to you or others. Heck, he already killed one person with the weapon.

If you want “no knock” covered in the warrant be sure to:

1. Set out your facts in the affidavit showing reasonable suspicion that one of the three exceptions would be present in this particular case.
2. Make sure that you add a paragraph to the warrant itself stating that you are dispensed from the knock and announce requirement.

Remember, if you fail to put the facts in the affidavit, there is nothing to support the warrant saying that you don't have to knock and announce. And, if the affidavit supports a “no knock” entry but you fail to put it on the face of the warrant ... you are not covered!

Example of stating it in the affidavit:

“In addition to the facts that I have set out as probable cause for the issuance of a search warrant, I have learned additional information that would show reasonable suspicion that knocking and announcing our presence prior to entry into the aforesaid premises would create a situation that would result in danger to the officers executing the warrant or to others inside of the premises, that the evidence searched for would be destroyed or that knocking and announcing would be a useless gesture.

That information is: [Now write the facts that show why knocking and announcing first would create one or more of those situations].

Example:

[?] When I personally drove by the aforesaid location I saw two video cameras that were installed on the outside of the house at either front corner facing out towards the street.

[?] I am familiar with this sort of equipment having seen it used at other locations where drugs are kept and sold.

[?] These cameras provide security to those inside of the location by allowing them to see anyone approaching the house from the street. This provides them with valuable time to secure weapons to use against intruders, or to hide and destroy contraband prior to entry by the police.

Another example:

[?] The informant in this case also told me that he saw several firearms inside of the location.

[?] These included both long rifles and handguns.

[?] The informant said that Fred Jones told him that he kept the weapons at close hand and would use them against any intruders into his home, including law enforcement officers.

The additional language that you need to put on the warrant itself should read:

[?] I further find that affiant has established sufficient reason to believe that to knock and announce their purpose by the officers executing this warrant would be futile, dangerous, and otherwise inhibit the effective investigation of the offense or offenses related to the purpose of this warrant.

[?] Therefore, unless circumstances to the contrary are discovered prior to entry, you are hereby authorized to dispense with the usual requirement that you knock and announce your purpose before entering the suspected place to execute this warrant.

This should be the last paragraph in the warrant, above the judge's signature block.

Some final thoughts on writing search warrants

1. Be accurate in what you say. Remember, this is a sworn affidavit. Intentionally misstating something can get you charged with perjury. If you misstate something unintentionally, you haven't committed a crime but the judge may throw out the warrant because facts in the affidavit are not true.
2. Make sure that someone else reads over your affidavit and the warrant *before* you take it to the judge. Judges can get in a hurry or, frankly, just sign whatever you put under their nose. Don't rely on the judge to catch a mistake. You need to make sure it is right before you leave your office to take it to the judge.
3. Don't write a novel. Just tell the judge the facts that are important for probable cause. Keep it simple, accurate, and chronological.
4. Be sure that the street address, the municipality (if the location is within a city) and the county are correct.
5. Describe the location so that someone who has never been there before would go to the right house and, if it is a duplex, enter the correct door.
6. Always list the smallest items of contraband that you have probable cause to look for in the house. That allows you to look in more places.
7. List the names and/or descriptions of the people you expect to find at the location so that you can search them, if they are there.
8. Don't be conclusory in your statement of probable cause. Make sure that you tell the judge not just what you know, but also how you know it. And, if you learned it from someone else, why that person is reliable and credible.
9. If a source of information will let you name them in the affidavit, do it. That makes them a credible source.

10. If a source of information doesn't want to be named but is a "solid citizen", show that in the affidavit. That makes them a credible source.
11. If you aren't sure if you should put something in the affidavit or not, put it in. You cannot have too much probable cause.
12. Take your time writing the affidavit. Once the judge signs it and you execute it, it is too late to make any corrections.
13. Make sure the warrant has the same wording as the affidavit for the place to be searched and the things to be seized.
14. Get someone to read it over before you take it to the judge. A new set of eyes will find mistakes that you will miss.

The right of the people to be secure in their person, houses, papers,
and effects, against unreasonable searches and seizures,
shall not be violated.

Constitution of the United States, Fourth Amendment, 1791

Nor shall any person
be deprived of life, liberty, or property,
without due process of law.

Constitution of the United States, Fifth Amendment, 1791