

CJ350: Criminal Justice Documentation
Search Warrant Drafting Handout

- (1) It is hoped that you remember the Constitutional requirements for a search warrant from CJ125 and subsequent courses. This handout is designed to refresh your memory.
- (2) You will recall that in order to obtain a search warrant, the police must submit an affidavit to a judicial officer (judge or magistrate). The purpose of an affidavit for a search warrant is for the police to PROVE to a MAGISTRATE that it is MORE LIKELY THAN NOT (better than even odds, 51% likely, etc.) that the evidence they are seeking is in the place they want to search.
- (3) Probable cause exists when prudent and cautious police officers have trustworthy information leading them to believe that evidence of crime might be obtained through a particular search (*Brinegar v. U.S.*, 1949). Courts should view the determination of probable cause as a “commonsense practical question” that must be decided in the light of the totality of the circumstances of an individual case. (*Illinois v. Gates*, 1983). The affidavit must contain a precise description of the place to be searched and of the things to be seized (**4th Amendment**). An affidavit cannot establish probable cause for issuance of a search warrant if it is based merely on the affiant’s suspicion or belief without stating the facts and circumstances that the belief is based on.
- (4) Lab-4 will require you to prepare an Affidavit and Application for a Search Warrant. Here are some things to bear in mind:
 - a. The magistrate can ONLY consider what is WRITTEN on your affidavit. He knows NOTHING about the case. You generally CANNOT stand there and explain it to him.
 - b. If your facts are vague, incomplete, make no sense, or assume that he knows the background to the case then you don’t get the warrant.
 - c. The BURDEN OF PROOF is on YOU. The defendant/suspect has the 4th Amendment on his side. You have NOTHING but the FACTS on your side. Why wouldn’t you try to explain the facts clearly and completely?
- (5) The following example may help you understand these requirements:
 - a. Suppose you wanted to borrow money from me. I don’t have to loan you the money. No law says I have to. In fact, I really don’t want to. However, I tell you that I will consider loaning you some money if you can explain in writing and in detail why you need it.
 - b. Under those conditions, I am sure you wouldn’t just put down something like: “Cause I need some money.”
 - You would go into detail as to the CIRCUMSTANCES surrounding why you need it.
 - Remember you can only explain this to me in writing. I am not going to give you any money unless I can understand your written explanation.
 - It helps if you can give me some outside proof of what you are saying. I may not believe you otherwise.
 - For example, if you write: “I only have \$10 in the bank and my \$800 rent is past due,” then ask yourself: “Why should my instructor believe me?”
 - Do you think it would help me to believe you if you wrote: “I only have \$10 in the bank (see attached Bank Statement from today) and my \$800 rent is past due (see attached letter from landlord from two days ago).”
 - If you are going to rely on what somebody else told you, then I need some form of proof that he/she is telling the truth and knows what he/she is talking about.
 - For example, if you write: “A guy I know is going to give me a job next week, so I will pay you back,” then again ask yourself: “Why should my instructor believe me?”
 - Do you think it help me to believe you if you wrote: “Roger Smith – who is the owner of Acme Auto Parts (see attached business card) has promised me a job starting next week. He promises to pay me \$10/hour. I know he really means it because he gave me a job in 2006 and right now they are shorthanded. If you would like to call him, his number is 757-555-1234. He told me he would be glad to talk to you.”

- It really is a game where many little threads of evidence tend to add up (this is what lawyers call “Totality of the Circumstances,”) or one big piece of evidence suffices.
 - Totality of the Circumstances: “I lost my job, I have \$10 in the bank, my electric bill is due, my rent is due, my car payment is due” => All of these add up to mean “please loan me money.”
 - One big piece of evidence: “I was arrested last night for trespass because I am homeless. I need money.”

(6) What can you search for? [i.e., what can you put in the “property to be seized” portion of the affidavit]. Only the things that probable cause allows:

- If you only have probable cause for specific contraband – then you can only search for that specific contraband.
- If you probable cause for fruits or instrumentalities of a crime – then you can only search for those fruits or instrumentalities.
- If you have probable cause for a criminal enterprise – then you can search for objects that are probably related to that specific criminal enterprise.