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California Criminal Investigation

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Chapter 27 Search Warrants

The Basics

Definitions

Search warrant: A search warrant is a court order directing officers to search a certain person, place, or thing for specific property; and if such property is found, to bring it to the court or retain possession on the court's behalf.^[1]

Affidavit: A search warrant affidavit is a document signed under penalty of perjury containing the facts upon which probable cause is based and a description of the place to be searched and the evidence to be seized.^[2]

Affiant: A search warrant affiant is the person who writes and signs the affidavit. Although affiants are usually peace officers, anyone can be an affiant.^[3] If possible, the affiant should be the officer who is "most directly involved in the investigation and most familiar with the facts stated in the affidavit."^[4]

Magistrate: In the context of search warrants, "magistrate" is synonymous with "judge."^[5]

Probable cause: See Chapter 30 Principles of Probable Cause (Definitions)

Search: A "search" is an interference with a legitimate privacy interest.^[6]

Seizure: A "seizure" of property occurs when there is "some meaningful interference with an individual's possessory interests in that property."^[7]

Particularity and breadth: There has been confusion as to the meaning of these terms and whether they are separate requirements. They are.^[8]

Particularity: The term "particularity" refers to the requirement that the warrant clearly state what places may be searched and what things may be seized.^[9]

Breadth: The term "breadth" refers to the requirement that that the warrant authorize a search of only those places and things for which probable cause exists.^[10]

When warrants are required: Warrants are mainly required to search homes, businesses, and other structures in which the occupants reasonably expected privacy.

^[11] Primary exceptions: Consent, exigent circumstances, probation and parole searches.

The Affidavit

Requirements: The affidavit must contain the following:

(1) **Statement of probable cause:** This is the main portion of the affidavit, the one containing the facts upon which probable cause is based.^[12]

(2) **Description of the place to be searched:** Although a description of the place to be searched must appear on the warrant, it should also be included in the affidavit because the description must be given under oath. See "The warrant" (Description of place to be searched), below.

(3) **Description of the evidence to be seized:** Although a description of the evidence to be seized must appear on the warrant, it should also be included in the affidavit because the description must be given under oath. See "The warrant" (Description of the evidence), below.

(4) **Evidence classification:** See "The warrant" (Evidence classification).

Using attachments: One of the most efficient ways of including information in an affidavit is to incorporate documents that already contain that information; e.g., witness statements, transcripts of statements, prior affidavits, police reports, autopsy reports, rap sheets, business records, maps, photographs.^[13]

Attachments become part of affidavit: The information in a properly attached document becomes part of the affidavit.^[14]

Attachments become part of warrant: A document that was properly attached to an affidavit may also become part of the warrant (and may therefore expand or restrict the scope of the search) if the attachments were physically attached to the warrant and were available for reference to the search team.^[15]

How to incorporate: To incorporate an attachment, the following is required:

(1) **Give notice:** There must be language in the affidavit giving notice that the attachment is being incorporated by reference; e.g., "The autopsy report, identified as Exhibit 4, is attached hereto and incorporated by reference."^[16]

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Notes

^[1] USSC: *Steagald v. US* (1981) 451 US 204, 213 ["A search warrant is issued upon a showing of probable cause to believe that the legitimate object of the search is located in a particular place."]. CAL: Pen. Code §§ 1523, 1536; *P v. Fisher* (2002) 96 CA4 1147, 1150 ["A search warrant is not an invitation that officers can choose to accept, or reject, or ignore, as they wish, or think, they should. It is an order of the court."]. ALSO SEE *Srgo v. US* (1932) 287 US 206, 210 ["The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment"]; *McDonald v. US* (1948) 335 US 451, 455 ["We are not dealing with formalities. The presence of a search warrant serves a high function."].

^[2] CAL: Pen. Code § 1527 ["The affidavit or affidavits must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist."]; Code Civ. Proc. § 2003 ["An affidavit is a written declaration under oath, made without notice to the adverse party."]. OTHER: *US v. Perez* (5C 2007) 484 F3 735, 740 ["The information necessary to show probable cause must be contained within a written affidavit given under oath"]. ALSO SEE *P v. MacAvoy* (1984) 162 CA3 746, 755 ["There is a fundamental distinction between a warrant and the underlying affidavit, and the affidavit is not necessarily a part of the warrant"].

^[3] CAL: *P v. Bell* (1996) 45 CA4 1030, 1055.

^[4] QUOTE FROM *Bennett v. City of Grand Rapids* (5C 1989) 883 F2 400, 407.

^[5] USSC: *Shadwick v. City of Tampa* (1972) 407 US 345, 348 ["The Court frequently has employed the term 'magistrate' to denote those who may issue warrants."]. CAL: *O'Neal v. Superior Court* (1986) 185 CA3 1086, 1094 ["A magistrate has the limited functions of issuing arrest warrants, fixing and granting bail to arrestees, conducting preliminary examinations of defendants charged with felonies, and conducting peace bond proceedings."]; Pen. Code §§ 807, 808; *P v. Fleming* (1981) 29 C3 698, 703, fn.3; *P v. Dantzier* (1988) 206 CA3 289, 294. ALSO SEE *P v. Ruiz* (1990) 217 CA3 574, 586 ["[T]he office of magistrate is a different office from that of judge. Consequently, judicial officers acting as magistrates act independently from the jurisdiction of the court on which they sit. Magistrates derive their powers and jurisdiction from the Constitution and act of the Legislature."].

^[6] USSC: *Kyllo v. US* (2001) 533 US 27, 33 ["[A] Fourth Amendment search does not occur—even when the explicitly protected location of a house is concerned—unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable."].