



# Search Warrants: The Affidavit

*Gabriel Pell, Assistant District Attorney*

# Why is the affidavit so important?

- “Four Corners” Review
- Franks Hearing – preliminary showing that affiant police officer made a reckless or intentional **misstatement** of a material fact, or a reckless or intentional **omission** of a material fact that could undermine the probable cause finding (including exculpatory evidence) entitles defendant to a hearing.  
Franks v. Delaware, 438 U.S. 154 (1978)

# How NOT To Undercut Your Affidavit In The Eyes Of The Issuing Judge or Clerk

- Make it readable (use at least 12 pt. type and a professional font) and separate into numbered paragraphs.
- Establish a comfortable margin of PROBABLE CAUSE, but do not go overboard.
- Scrutinize your boilerplate language to make sure it applies to the investigation at hand.
- Be prepared with the appropriate attachments.

# Affidavit: Basic Components

- Affiant Bio/Training and Experience
- Assertion of Probable Cause and Brief Description of Place to Be Searched
- Basis of Probable Cause
- Request to Search
- Jurat and Signatures
- Addenda

# AFFIDAVIT: About the Affiant

- **Information about the Affiant**
  - Current Position
  - Years of Experience
  - Education
  - Relevant Prior Employment
  - Experience & Training
    - Relevant Crimes Investigated
    - Specialized Training
  - Number of Warrant Executions
  - Number of Warrants Authored

# AFFIDAVIT: Assertion of PC and Description of Place to be Searched

I submit that I have probable cause to believe the crime(s) of \_\_\_\_\_ has occurred and that evidence of that/those crime(s) will be found at/in \_\_\_\_\_,

which is located at \_\_\_\_\_.

My conclusion is based on the following paragraphs, which I learned through my own investigation and through consultation with other investigating officers.

## **\*\*PARTICULARLY DESCRIBE PROPERTY TO BE SEARCHED\*\***

The premises to be searched should be described with sufficient particularity to allow an officer who is unfamiliar with the property to locate and identify the premises with reasonable effort.

# AFFIDAVIT: Basis of Probable Cause

- The affidavit must establish PROBABLE CAUSE of each of the following things:
  - A crime has occurred
  - Evidence sought is related to criminal activity;
  - Evidence sought reasonably may be expected to be found in the place to be searched.
- THIS IS NOT A FISHING EXPEDITION!!
- Avoid conclusory language

# Basis of PC: Tell The Story

- The “Basis of Probable Cause” section is your opportunity to tell the story of your investigation
  - Chronology/Timeline of Events
  - Sub-headings for different phases of the investigation
  - Characters
  - Significant Events
- Don’t keep good (or bad) information to yourself: Include all key details



# AFFIDAVIT: Basis of PC NEXUS

An affidavit in support of the issuance of a search warrant establishes probable cause to search when there is **evidence that it was reasonably likely that the items specified in the affidavit could be found at the target location.**

Com. v. Gray 465 Mass. 330 (2013)

# AFFIDAVIT: Basis of PC STALENESS

- Affidavit must demonstrate that items sought will be in the place to be searched *at the time the warrant is executed*.
- Facts must be closely related to time of warrant's issuance.
- Less important when affidavit describes criminal acts that are *continuous and ongoing*

# AFFIDAVIT: Request to Search

Based on the above facts and circumstances, I seek permission to search \_\_\_\_\_, which is located at \_\_\_\_\_ (particularly described above in paragraph 2), in order to search for and seize the following items:

- X
- Y
- Z.

I also seek permission to seize any items showing custody, control and possession of the \_\_\_\_\_.

# AFFIDAVIT: Request to Search

## **\*\*PARTICULARLY DESCRIBE THE EVIDENCE SOUGHT\*\***

- Essentially, need to limit scope of search and seizure to avoid fishing expeditions (i.e., no “including but not limited to...” language)
- Be specific and include ALL items you are looking for (E.g., “documents showing occupancy, custody, control of target premises”).
- **SMALLER ITEMS = GREATER SCOPE**
- No need to overreach. Items for which you lack PC but whose incriminating nature is readily apparent can be seized if in **PLAIN VIEW**

# AFFIDAVIT:

## Post-Request to Search Paragraphs

Manner of conducting the search:

- Photographing the Scene
  - For documentation, include paragraph in affidavit
  - For evidence gathering, include on face of warrant
- Requests for specialized equipment/personnel
- Request “Civilian Assistance” if you will use it.  
*CW v. Sbordone, 424 Mass. 802, 806 n.9 (1997).*

# AFFIDAVIT: Jurat & Signatures

Signed under pains and penalties of perjury this \_\_\_\_\_ day of \_\_\_\_\_, 2016

\_\_\_\_\_  
Your Police Department

Then personally appeared the above named \_\_\_\_\_  
and made oath that the foregoing affidavit by him/her  
subscribed is true

\_\_\_\_\_  
Justice/Clerk/Assistant Clerk

# Affidavit: Addenda

- The MDAO SW Team recommends using Addenda to the Affidavit to answer questions 3 and 4 on the standard “Application for Search Warrant” Form
- Question 3 – Describe the property to be searched for as particularly as possible: See Addendum A
  - ❖ Addendum A will be a recap of the Request to Search paragraphs along with any additional paragraphs about civilian assistance, documentation of the scene, service of the warrant by fax or email, non-disclosure, etc.
- Question 4 – Identify the exact location or description of the place(s) to be searched: See Addendum B
  - ❖ Addendum B will be a recap of the description of the premises/property/place to be searched that is included both at the beginning of the affidavit and in the request to search.

# AFFIDAVIT: Source of information

- The affidavit is usually based on statements from other people with information about a crime.
- The source could be a victim, a known and named source, a known but unnamed source, or a truly anonymous source.
- All information **MUST** be sourced.



# AFFIDAVIT: known, impartial witnesses

An impartial witness to a crime, that is, an individual whose identity is known or knowable, who is not paid to provide information, and whose statements appear to be based on personal observations or firsthand knowledge, is **presumed to be a reliable source of information.**

Com. v. Bowden, 379 Mass. 472, 476-477 (1980)

Com. v. Lee, 10 Mass. App. Ct. 518, 527 (1980)

# Affidavit: USE OF INFORMANTS

- Aguilar-Spinelli, two-pronged test applies when confidential informant information (information from an unnamed source) is used in establishing probable cause.
- Therefore, you must always demonstrate:
  1. Informant's basis of knowledge
  2. Informant's veracity/reliability

# Affidavit: INFORMANTS

## PRONG ONE: Basis of Knowledge

Can be satisfied in a number of ways, including:

- Personal Observations
- Statements of Target
- Detailed/Non-Public Information
- Controlled buy of narcotics or other contraband/evidence

# Affidavit: INFORMANTS

## PRONG 2: Veracity or Reliability

Again, may be satisfied in a number of ways:

- Informant, whose identity is known to affiant, makes a statement against penal interest
- Informant provided reliable info in the past
  - Reliability increases if information resulted in arrest/seizure
  - Must document specific nature of info provided

# Affidavit: INFORMANTS

## Corroboration of the Prongs

- Corroboration through independent tips or further police investigation may supplement informant's information
- Excellent for establishing first time informants.

NOTE: The corroboration has to be specific and not general in nature (many people entering the home for short intervals of time)

NOTE: Affiant should state any particular knowledge or training he may have had to justify his supporting observations.

# AFFIDAVITS:

## Known or Knowable Source

- In contrast to anonymous or confidential informants, courts are more willing to acknowledge that a citizen who reports a crime to a police officer either in person or through a traceable telephone call has put his or her anonymity at risk, and is therefore more reliable than a faceless informer. Thus, information gained even from witnesses who are unnamed – but who have nevertheless placed their anonymity at risk – is not subject to the same two-pronged *Aguilar-Spinelli* analysis

# Affidavit: VICTIM'S STATEMENTS

Because they have no apparent motive to lie to the police, victims of crime are generally presumed to be credible providers of information. Com. v. Paquette, 440 Mass. 121, 134 (2003). Therefore, in most instances, police may use the hearsay statements of crime victims to establish probable cause without first establishing the credibility of the person and the reliability of the statements.

# Affidavit: victim with motive to provide false information

If a victim appears to have a motive for providing false information, however, police are advised to rely on the hearsay information only if it satisfies the two-prong Aguilar-Spinelli test, the same test that Massachusetts courts apply in evaluating the reliability of a confidential informant's statements. See United States v. Ventresca, 380 U.S. 102, 108-109 (1965).



# Affidavit:

## Unnamed or Unknown Source

Hearsay statements from anonymous and unidentifiable “tipsters,” or those from informants, i.e., persons who confidentially provide information to police or provide information either for compensation or to escape prosecution, are automatically suspect. Thus, unless an informant’s statements satisfy the *Aguilar-Spinelli* test, the statements alone cannot serve as the basis for probable cause

# TIPS ON SPECIFIC TYPES OF SEARCH WARRANTS

# Cell phones

- Cell phones contain a lot of information that can be very helpful in investigating crimes.
- In Riley v. California, the U.S. Supreme Court held that a warrant is required to search a cell phone
  - “many of the more than 90% of American adults who own cell phones keep on their person a digital record of nearly every aspect of their lives”

# To search a phone – must establish a nexus between the phone and the crime

- Commonwealth v. Broom, 474 Mass. 486 (2016): warrant for defendant's cell phone was not supported by PC - “probable cause requires a substantial basis ... for concluding that the items sought are related to the criminal activity under investigation”
- The affidavit in Broom discussed affiant’s knowledge about cell phones and the conclusion that the phone would likely contain information pertinent to the investigation but did not have **particularized evidence suggesting the content of the defendant’s phone was likely to contain information linking the defendant to the victim’s killing.**

# SEARCHING PHONES

- That a person is suspected of committing a crime and that person has a cell phone **IS NOT SUFFICIENT** to search the phone.
- Boilerplate language about cell phones is not sufficient for a warrant. We must explain how the phone was used in connection with the crime.
- Compare Commonwealth v. White, 475 Mass. 583 (2016), with Commonwealth v. Holley, 478 Mass. 508 (2017)

# GPS warrants

- A warrant is needed to install a GPS tracking device on a vehicle.
- Commonwealth must establish PC to believe that a particularly described offense has been, is being, or is about to be committed, and that GPS monitoring of the vehicle will produce evidence of such offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit such offense.
- The monitoring period must be no longer than **15 days** from the date of the warrant's issuance.

# Drug Distribution Warrants

- Controlled buy satisfies both prongs of Aguilar-Spinelli
- Nexus is particularly important when seeking to search a suspected dealer's home for drugs
  - Single roundtrip observation of controlled buy, without more, is insufficient. Commonwealth v. Escalera, 462 Mass. 636 (2012)
- Very important to describe residence/location with particularity
- MDAO SW Team recommends minimum of 3 controlled buys with continuous surveillance, esp. if that's the only evidence that the drug distribution operation is tied to the home, before conducting a residence search for drugs.

# Drug Warrants

- Typical items seized should include:
  - Drugs & paraphernalia for weighing/bagging
  - Materials & equipment used in the processing, delivering and dispensing of that drug
  - Ledgers, U.S. currency, safes, safe deposit keys
  - Documents showing custody/control of premises
  - Cell phones (if you believe dealer uses it to facilitate sales)



# Drug Warrants – Sample Language

In my training and experience, I know that:

- (a) Drug distribution is sometimes conducted as a cash and carry business, and at other times, drugs are bought and sold on credit. In either event, the distribution of drugs is a cash business, and distributors of drugs often deal in large sums of money. This necessitates the distributors to be in the possession of, or have ready access to, large amounts of money.
- (b) Because drugs are often bought and sold on credit, distributors frequently maintain written records of the drugs bought and sold, the identities of the persons who have purchased or sold the drugs, and monies due to, or owed by, them.
- (c) Distributors of drugs often maintain books, records, receipts, invoices, notes, ledgers, money orders, bank records, and other papers relating to their transporting, ordering, sale, and distribution of controlled substances.
- (d) Persons involved in the distribution of controlled substances often conceal their distribution records, controlled substances, and money in secure locations such as their residence or safety deposit boxes located outside their residences. This is particularly true when the distributor operates his illegal drug business from his residence.
- (e) Distributors of drugs also often keep paraphernalia related to the distribution of drugs, such as cutting agents, rolling papers, pipes, scales, packaging materials, and weights, in their residence to conceal their illegal activities. If they use safety deposit boxes to hold records of their drug transactions, they also often keep the keys to such boxes in their residences. This is particularly true when the distributor operates his illegal drug business from his residence.

# Child Pornography Warrants

- Images/videos forming the basis for probable cause must be described with particularity
- Open/Unsecured Wireless Networks
- Staleness issues relaxed due to nature of material
- Common items seized include:
  - Computers (desktops, laptops, tablets, smart phones)
  - Digital storage devices
  - Wireless routers

# Child Pornography Warrants

- Explain what you know about the habits of child porn collectors— e.g. that they keep large amounts of CP, treasure their collections, and tend to keep them for long periods of time— in order to establish PC and combat staleness.

LANGUAGE TO COMBAT STALENESS: “I know, based on my training and experience, that individuals who are interested in sexually explicit images of children, either in the nude or engaged in sexual acts, are likely to value and store their collections. These individuals often keep these images of children so they can view them repeatedly in the future. These depictions tend to be extremely important to such individuals and are likely to remain in the possession of or under the control of such an individual for extensive time periods, perhaps for a lifetime. As a pattern of behavior, these individuals often store more than one image, video clip, and depictions of child pornography on their computer systems and laptops. It is not uncommon to find hundreds, or even thousands of images, video, and depictions of child pornography stored electronically inside computer systems, personal laptops, zip drives, CD’s, and other forms of electronic media storage devices. These subjects may also possess images of child pornography in the form of photographs, publications, and other non-electronic methods, and these are usually kept in their homes.”

# Sample Language for Computer SW: CAN RECOVER DELETED DATA

I have also learned that a computer's storage media (e.g., hard drive) is capable of storing thousands of computer files and that such files remain resident in the computer's storage media even if they have been "deleted." This is so because a computer does not erase the files from its hard drive when a user "deletes" a file; rather, the computer simply marks that area of its storage media as available to be overwritten with new data if necessary. Typically, space that is consumed by "deleted" data is not overwritten until all other unconsumed space is first written to or consumed. This fact is important in law enforcement because it means that so-called "deleted" files or data are, in fact, often still present on the computer's storage medium (i.e. floppy disk, hard drive, tape drive, etc.) and can be (and have been) recovered months, years, and even decades after their deletion if the integrity of the computer system is maintained. I also know that addresses to websites and images viewed on an individual's computer (via the internet) are automatically stored in the computer's temporary internet files or on the cache file, browser history, and internet history. The automatic storage allows the user to load the pictures quicker and more efficiently if the user seeks to view the images again (via the internet). A computer forensic specialist can usually recover stored images and stored history from the computer's storage files by performing a forensic examination of the computer. Hence, it is not at all uncommon to be able to "undelete" files or data years after their deletion date. Moreover, the larger the capacity of the computer's hard drive to store data, the more likely it is that previously "deleted" data has not yet been overwritten and is still recoverable. Furthermore, the target of this investigation, Mr. Suspect, is not aware of the ongoing investigation. Therefore, it is likely he has not sought to destroy any evidence.

# Sample Language for Computer Warrants, Cont.

- I have also learned that transferring data files between computers or onto storage devices such as disks or flash drives is a simple task that takes little time.

Therefore, once a file is on one computer at a given location – particularly a home – I submit that there is probable cause to believe that it could be moved to any storage device or other computer at that same location.

# Request for Assistance of Computer Forensic Specialist

- It is necessary to have the assistance of a qualified computer forensic specialist to execute the seizure and search of any computer systems or digital media in a secure forensics environment without altering evidence or compromising the ability to operate the computer. A computer forensic specialist is needed because of the intense technical knowledge that is required to successfully execute a search of a computer system or digital media. A forensic computer specialist may also minimize the intrusiveness of the search. It is essential to rely on the knowledge and experience of these forensic computer specialist(s) during the search of the computer system. Therefore, I am requesting assistance from the Middlesex District Attorney's Office computer forensics investigators. This affiant believes the forensic computer specialist, whether law enforcement or civilian, will have the necessary expertise and knowledge in executing searches for computerized data and will materially aid me in properly obtaining and examining the "sought after information" contained inside any computerized devices or digital media. Any civilian specialist's participation in the execution of the warrant will be limited to the technical aspects of performing the search and seizure task.

# SWs in Sexual Assault Cases



- **Description of Items to Be Searched Particularly Important**
- **SAMPLE NEXUS LANGUAGE:** “I know, based on my training and experience, that sexual assault crimes may leave behind evidence of blood and/or other physiological fluids. I also know through my training and experience that sperm, seminal fluid, vaginal fluid, and blood can transfer from a person’s body to physical items such as clothing or bed linens during vaginal intercourse and that sperm and blood can be forensically detected and recoverable for weeks, months or even years after placement even if the materials have been washed.”
- Consider requesting permission to photograph and/or videotape the layout of the house as it may corroborate the victim’s statements.



# Body Fluid Extractions (Blood & Buccal Swab)



- Search warrant is one vehicle that may be utilized, but is rare given the requirements.
- Be sure to explain how the fluid will be used – e.g. to compare against the rape kit, etc.
- Suspect is entitled to **notice & an opportunity to be heard** by a judge regarding the intrusiveness of the test. *In re Lavigne*, 418 Mass. 831, 834-836 (1994). See also *CW v. Maxwell*, 441 Mass. 773, 777-778 (2004) (summarizing requirements for warrants and orders for physical testing of suspects at different stages of investigation and prosecution).
- Police seeking to conduct any sort of invasive search of a person's body are advised to first consult with an Assistant <sup>40</sup> District Attorney.





# HOSPITAL SEARCH WARRANTS

## POSSIBLE ITEMS TO BE SEIZED FROM HOSPITAL

- Copies of medical records re: suspect's hospitalization
- Copies of test results of suspect's blood/urine sample
  - Can get actual sample if you act quickly and file preservation request
- Clothing that patient was wearing on the date of admission
- Written procedures for blood draw/buccal swab/etc.
- Request permission in your affidavit for "civilian assistance" from Hospital employees- it would be virtually impossible to execute these types of warrants without them.



# Firearm Search Warrant



- Does the suspect have a License to Carry? Check the NCIC database. Check BOP to see if there are any felony convictions, which prevent suspect from legally possessing a firearm.
- Language to Combat Staleness: “I know that people who illegally possess firearms usually keep those firearms hidden in places where they have access to them. I also know, based on my training and experience, that it is difficult to obtain an illegal firearm and it is also the type of weapon that a person is unlikely to get rid of, and for those reasons, illegally possessed firearms are kept for a significant amount of time.”
- In addition to the firearm, remember to request permission to search for and seize **ammunition and documents evidencing the purchase, sale, or transfer of the firearm/ammunition.**



# Warrants for recordings where only one party consents



- Massachusetts requires both/all parties to consent to record a conversation. To record with only one party's consent you need a warrant.
- Rule is from *CW v. Blood*, 400 Mass. 61 (1987)
- Only a Superior Court judge can issue a “Blood” SW
  - PC that suspect committed a **designated offense** under G.L. c. 272, s. 99 – typical use is organized crimes investigations
  - PC to believe consenting party will engage in oral communications in the next 14 days and that those communications will constitute evidence of, or lead to evidence of, “designated offense(s)”

# QUESTIONS?