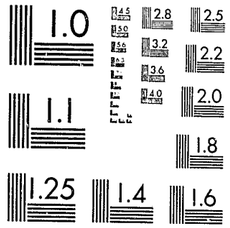

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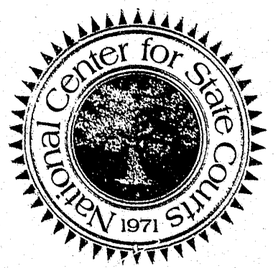
THE SEARCH WARRANT PROCESS:

Preconceptions, Perceptions, and Practices

An Executive Summary



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THE SEARCH WARRANT PROCESS:

Preconceptions, Perceptions, and Practices

An Executive Summary

Richard Van Duizend, L. Paul Sutton, and Charlotte A. Carter

This summary is based upon R. Van Duizend, L.P. Sutton, and C. A. Carter, The Search Warrant Process: Preconceptions Perceptions and Practices (to be published 1984), a report resulting from a three-year research project undertaken by the National Center for State Courts. That project was supported by a grant from the National Institute of Justice (Grant No. 80-IJ-CX-0086). The opinions expressed in this article are those of the authors and do not necessarily reflect the position of the National Center for State Courts nor of the United States Department of Justice, the Office of Justice Assistance, Research and Statistics, or the National Institute of Justice.

INTRODUCTION

Search Warrants: Definition and Purpose

A search warrant is an order issued by a judge authorizing a law enforcement officer, public health officer, beverage control officer or other official to enter into private property to search for and seize specified items or a specified individual. In some instances, it may authorize the officer or official to break into a residence, other building, ship or vehicle, or to search a person. A search warrant may be issued only:

> upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.[1/]

The search and seizure may be carried out over the objection of the person who owns or controls the property to be searched and the item to be seized.

The warrant requirement was included in the Bill of Rights, at least in part, in reaction to the use of broad "Writs of Assistance" by British customs officials prior to 1776.[2/] These writs, according to James Otis, "did not require an oath, allowed virtually anyone to search, did not require a return, and subjected any house to entry at will during the day."[3/] Thus, the drafters of the Fourth Amendment sought to limit the discretion of law enforcement officers to search and seize private property by:

- interposing an "orderly" review process by a "neutral and detached magistrate;"[4/]

- specifying that a search and seizure may be authorized only upon showing that there is at least probable cause to believe that "the item to be seized is located in a particular place;"[5/]
- mandating that the necessary information be presented under oath to the magistrate, to protect against the issuance of a warrant based on false or knowingly inaccurate statements;[6/]
- requiring that both the items to be seized and the place to be searched be described in some detail; and
- providing for a record that may subsequently be examined.

In addition, most states impose statutory limits on when and how warrants may be executed and require the filing of a detailed return, which includes a list of the items seized.

The overarching purpose of these limits was summarized by Justice Robert Jackson in an oft-quoted passage in Johnson v. United States.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.[7/]

Actual Practice: The Results of Prior Studies

Over the past 25 years, a number of examinations of search warrant practices and procedures have been conducted.[8/] They have suggested, among other things, that many of the suppositions regarding the Fourth Amendment warrant requirement may not be borne out in practice.[9/]

First, search warrants do not serve as a primary safeguard of privacy because they are sought in relatively few cases.[10/] Second, a serious question has been raised about the intensity and objectivity of the review, since search warrant applications appear to be rejected very infrequently by reviewing magistrates,[11/] a tendency that is heightened by judge-shopping practices[12/] and by the fact that many magistrates authorized to issue search warrants are neither lawyers nor required to have any legal training.[13/] A third factor that may cloud the review process is the frequent presentation by the applying officer of second-hand statements--hearsay--by anonymous informants.[14/] Fourth, warrants may broaden rather than limit the area to be searched in some situations.[15/] Finally, it has been suggested that, on balance, search warrants act as an impediment to law enforcement rather than as a protection of personal privacy[16/] due to the delay inherent in preparing and executing a search warrant, and the likelihood that the warrant may become a tangible target for attacks by defense counsel which may delay or thwart prosecution.

Purpose of the Current Study

The study upon which this summary is based, was conducted in seven cities around the country. Project staff examined, among other things, the information on which search warrants were based, the sources of warrant applications, the types of offenses involved and materials sought, the administrative and judicial review procedures employed, and the disposition of cases involving evidence obtained with the aid of a search warrant. In so doing, the project sought to inform the debate over search and seizure policies and practices by presenting a

comprehensive picture of the search warrant process as it operates in urban jurisdictions today.

This summary is divided into four sections. The first describes the methods used in the study and some of the problems encountered in tracking cases and learning about actual practices. The second outlines the sequence of procedures used to apply for, review, execute, and file a search warrant. The discussion of this process is punctuated with descriptive data that highlight important characteristics of that process. The third section examines the extent to which search warrants succeed in performing the functions and providing the protections accorded to them in court opinions. The final section presents out conclusions and recommendations.[17/]

Section 1: Research Design

The operation and results of the search warrant process have not been the subject of empirical inquiry as frequently as other aspects of criminal justice. Our observations and experiences in developing the design for and conducting this study made the reasons for this lack of attention abundantly clear. We found many of the methodological problems that typically beset social science research to be especially troublesome when it came to investigating this particularly sensitive area of criminal justice administration. Some of the major problems we were able to anticipate. A few others were discovered along the way. A discussion of how we handled these difficulties in designing and carrying out the research is discussed in the course of the description of the research methods employed.

Site Selection

We identified a sample of jurisdictions (issuing at least 150 warrants annually) that varied sufficiently--both in terms of procedures employed and in terms of regional and geographical characteristics--to allow us to detect the widest possible spectrum of experiences regarding warrant review patterns. It was impossible, of course, to exert any experimental or even statistical "control" over extraneous factors and, thereby, to focus on the "effects" of key variables, such as the availability or nonavailability of telephonic procedures for obtaining warrants, or the presence or absence of prosecutorial screening. Such systematic controls would have required the use of hundreds of sites and the collection of mountains of data. Such an effort far exceeded our resources. We deemed it sufficient to ask local observers and practitioners to assess the probable effects of such variables, to compare responses across sites, and to weigh such considerations against the intelligence we were able to glean from our examination and systematic analysis of more than 900 warrant-based cases. This strategy allowed us to focus our inquiry on a clearly manageable number of carefully selected sites.

Seven sites were chosen. A few persons in some of the cities studied were willing to participate in the project only if they were assured anonymity or, in other instances, if their jurisdictions were not identified. Because identifying some individuals or jurisdictions might compromise the anonymity of those preferring to remain unnamed, the anonymity of all persons and jurisdictions is preserved throughout this summary. Accordingly, code names have been assigned to each of the sites.[18/]

Although our sample cannot be characterized as "representative" of American cities in any meaningful statistical sense, it is fair to say that the jurisdictions studied are sufficiently diverse that: (1) it is unlikely that any significant aspect of the process by which search warrants are handled in this country escaped our attention altogether; (2) we gained a sufficiently broad picture of the process to construct a useful "prototypical model" that roughly approximates the way the search warrant process operates in most jurisdictions; and (3) our conclusions about the strengths and weaknesses of the processes we observed are generalizable to warrant review procedures in most American metropolitan jurisdictions.

One site (River City) was selected as the focus of an intensive and comprehensive investigation. A member of the project staff established residence in that city for three and a half months, during which time project staff became intimately familiar with the search warrant process in the jurisdiction. In each of the six secondary sites (Harbor, Plains, Forest, Hill, Mountain, and Border Cities), a staff member spent approximately one week. These visits permitted us to examine several variations in the search warrant application procedures and check whether the insights gained and patterns observed in the intensive site were generalizable or unique. In each site we received excellent cooperation, particularly from court administrative personnel, law enforcement officials, prosecutors, and judges. Such cooperation was crucial, particularly in River City, since search warrant proceedings are extremely sensitive, and may occur at odd hours and with little or no notice.

Data-Gathering Procedures

In order to protect against collecting biased information as a result of seasonal variations, systematic differences between observed and non-observed proceedings, and systematic differences between selected and non-selected records, three data collection strategies were used: direct observation of warrant review proceedings, analysis of archival records, and interviews.

Direct Observation: In the intensive site, 84 presentations of a search warrant application to a magistrate were observed. Our intent was to learn as much as possible about the neutral, objective review that is the centerpiece of the warrant requirement. Although it had been hoped that such observation would take place in each site, it was found logistically impossible to do so and still accomplish the other objectives in the secondary sites in the time available.

Analysis of Archival Data: Information was collected from archival criminal justice records in all seven jurisdictions. The aim was to identify a specific number of instances in which a search warrant was issued (within a specific time frame), to examine closely the basis for the warrant, and to track the case to determine what had been seized and the consequences of the seizure in terms of a criminal prosecution.

Although the same set of data elements were sought in each of the jurisdictions, the protocol for the archival search varied slghtly across the seven cities. The archival collection was, of course, the most extensive in River City, where every warrant approved by a magistrate during 1980 was examined, and an attempt was made to identify and track any resulting criminal cases through to disposition and appeal. The

warrants, affidavits, and returns from the observed application proceedings were tracked as well.

In the comparison sites it was determined that a sample of approximately 75 warrants per site--representing from 8 to 50 percent of the number of search warrants issued annually in the six sites--would be not only feasible to collect but also adequate to determine whether patterns observed in River City were present elsewhere. Samples of records in each of the six cities were drawn from logs or files covering January 1 to June 30, 1980. This period was selected as being old enough to allow for the disposition of all but the most protracted criminal cases; recent enough to be relevant and interesting; and broad enough (1) to accommodate a sample of 75 cases (even in the smallest of the comparison sites) and (2) to reduce the possible biases of seasonal patterns of crime or criminal investigation.

In order to track a warrant through to the filing and disposition of a criminal case it was necessary to link the search warrants in our sample to an actual criminal case. Two methods were used to do this. The first, which proved to be the common denominator of the search process in every study site, involved the tracking of the names of all suspects identified in the affidavit or return for the warrant through computerized misdemeanor and felony court docket information. Whenever there was a "match," the docket number assigned to the case was used to retrieve the actual case file. These files were the source of all information about processing (including motions) and disposition of the case.

The second method involved the use of a Master Search Warrant Log maintained by a court clerk to locate the docket number assigned to a case. Two sites (River and Hill City) had such a log. In both cities, the log was used in addition to the name-tracking method.

Although both methods were pursued as diligently as possible, it should be noted that neither was foolproof. Indeed, there are several ways that a criminal case resulting from a warrant might have been missed. In some instances, there were no names listed in the affidavit or return. In others, the person named was not the one charged. In still others, the affidavit contained only a nickname or alias that could not be traced or matched to a valid identity. Finally, it is possible that some search warrants were never properly filed or logged. Linking the records, in some instances, required substantial assistance from local personnel, perseverance, and luck. What biases may have been introduced into the data as a result of which problems are unascertainable.[19/]

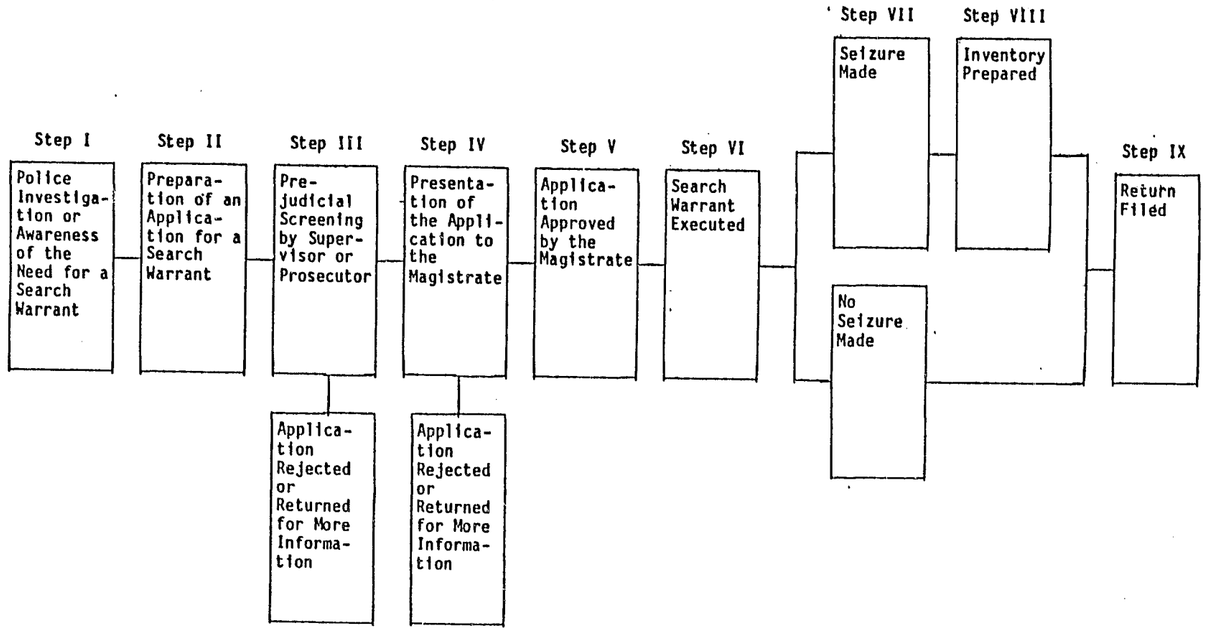
The data sought for each case in the sample included the time and date of and participants in the review proceeding; the area to be searched, the items sought, and the alleged crime(s) involved; the basis for the application and the information provided to support the statements of any confidential informants; whether the application was approved or denied; the time, date, and results of the execution of an approved warrant; whether any arrests were made, charges filed, and convictions obtained relating to the warrant; and whether any motion and appeal was filed relating to the warrant and, if so, its outcome.

Interviews: The third data source tapped in our investigation of search warrant processes turned out in many respects to be the most revealing. Due to the unique nature of this inquiry, it became clear that some of the most interesting and relevant material would come from the knowledge and perceptions of the participants in the process rather than from statistical inferences. In all seven jurisdictions we sought the reactions and counsel of those most intimately involved in the search warrant process--law enforcement officers, prosecutors, defense attorneys, magistrates, trial court judges, and court administrative personnel. Not surprisingly, many of the respondents we talked with had progressed through several careers (e.g., from prosecutor, to defense attorney, to judge) and could address the warrant questions from diverse perspectives. Most of the respondents were remarkably candid. Both open-ended and closed-ended questions were asked in each interview. The interviews averaged an hour in length. Transcripts or detailed summaries of each interview were prepared.

Section 2. The Search Warrant Process

Although the particular steps that are followed in obtaining and executing a search warrant may vary from one jurisdiction to the next, it is nevertheless both possible and useful to posit a prototypical search warrant application process. Such a conceptual model is presented in Figure 1. This model serves two purposes. First, it outlines the procedural milestones that every jurisdiction may logically and legally include in its own warrant application system. Nine such milestones (steps) are noted, beginning with the investigation disclosing the need

Figure 1
Conceptual Model of the Search Warrant Process



for the search warrant and running through application preparation and review, execution of the warrant, and submission of the warrant return. Second, as the model outlines the significant behavioral aspects of the search warrant review process, it simultaneously tracks those logical junctures at which some tangible record of proceedings might conceivably be generated. Where notable variations (e.g., telephonic applications) distinguish the approach of a particular jurisdiction, the model will easily accommodate, even facilitate, their recognition and discussion. It should be noted that the model more accurately represents the steps in the warrant process than it does the steps at which some tangible record documents the process. This discrepancy (between the occurrence of an event that objectively must have happened in the past and the absence of tangible evidence of that event's occurence) has proven, in some instances, to be a significant impediment to research regarding the search warrant process.

This section will review each of the nine steps in the search warrant application process as it was observed in general and as it operates in the project sites. It will then examine the series of reviews to which a search warrant may be subjected following initiation of a criminal proceeding.

In presenting data that summarize experience across cities, the mean percentage for the seven cities is presented rather than the percentage of the total number of cases. This procedure is dictated by the highly disproportionate number of cases in the sample from River City: 489 out of the total of 928, or 53 percent. The mean percentage has the effect of weighting each city equally in arriving at a summary statistic to

represent the "average" experience across all seven. The procedure creates, however, an awkward wording problem. In the text, the mean percentage may occasionally be discussed in a way that could be interpreted as referring to 20 percent of the 928 cases in the sample as a whole. We have tried to avoid such confusion, but, for the record, when discussing the data across cities, the raw percentage is never reported.

Step I: Police Investigation or Awareness of a Potential Search and Seizure Incident

As noted in the introduction, past studies have suggested that search warrants have been sought in relatively few cases.[20] According to our data, obtaining a search warrant is still a relatively rare phenomenon although more frequent than in pre-Mapp days.[21] The vast majority of searches are conducted without a warrant, usually with the consent of the suspect (or someone in legal control of the area to be searched) or incident to the arrest of the suspect. Delay and inconvenience were widely cited as the principal basis for officers' reluctance to seek a search warrant. Said one detective in Mountain City:

> . . . [Y]ou see, search warrants are double the time, sometimes triple the time that you take on arrest warrants, and arrest warrants are long enough. Arrest warrants, you figure a half a day.

According to the officers we spoke with in Harbor, Mountain, and Plains Cities, many searches are actually conducted pursuant to the consent of the person searched. In Mountain City, we were told that 98 percent of the searches were by consent; in Plains City, we were told 10 percent. Indeed, listening to some law enforcement officers would lead

to the conclusion that consent is the easiest thing in the world to obtain. As one Mountain City detective explained, you just make an offer that cannot be refused:

> [You] tell the guy, "Let me come in and take a look at your house." And he says, "No, I don't want to." And then you tell him, "Then, I'm going to leave Sam here, and he's going to live with you until we come back [with a search warrant.] Now we can do it either way." And very rarely do the people say, "Go get your search warrant, then."

"Consent to a search must be voluntarily given, and not the result of duress or coercion, express or implied."[22/] We were assured that consent searches using these procedures nearly always stood up under challenge in court. But, at least one senior Plains City police officer doubted that the city's consent form would ensure that a consensual search would be sustained if the voluntariness of the consent were questioned, and several Mountain City judges we spoke with expressed uncertainty over the degree to which consents to search were truly voluntary. One told us:

> I always wonder about actual consent. Of course, the officer is going to say, "Oh, yes, this person consented. I told him he didn't have to do it." And the defendant's going, "Yeah, sure," sarcastically. They always bother me--consent searches--because I don't know how the individual could really give informed consent.

Another judge put his finger on the problem when he said, "The very fact that you've got three 250-pound guys standing there with badges and guns on [means] the person isn't going to say 'No.'" In other words, some situations get dangerously close to being inherently coercive.

A number of officers apprised us that another effective way to avoid the hassle of getting a search warrant was to execute an arrest at a time the suspect is likely to have the sought-for evidence within the area of

immediate control. These items can then be seized, incident to the arrest.[23/]

> [It] depends on what you're looking for.... If you think it's going to be in the car, you'd like to arrest the guy in the car, because then you've got the car. You can do an inventory search of the car; you can have it impounded. If you get him at home, you are kind of precluded from doing too much. I mean, you go in and you arrest him, and you start going through bed linen and stuff like that, you know you're going to be thrown out of court. It comes down to just how important the piece of evidence is you're looking for.

Not only are search warrants sought in relatively few investigations, but also, the number of law enforcement officers who seek warrants is quite limited. Our interviews with law enforcement officials suggest that search warrants are primarily the province of detectives or officers assigned to specialized investigative units rather than of officers on routine patrol. When a uniformed officer finds that a search which may need a warrant is called for, the usual practice is to call a supervisor or specialized investigation unit to obtain advice on whether a warrant is required, and if so, to obtain assistance in procuring one.

Step II: Preparation of an Application

Once a police officer decides a search warrant is necessary, the usual procedure is for the officer to go back to the stationhouse and prepare the application, affidavit, and warrant. We found three alternatives to this operating procedure. In a few jurisdictions (e.g., Mountain City and suburban areas surrounding Plains City), the search warrant application documents are prepared for the officer by a deputy prosecutor on the basis of the information provided by the officer. In other locales such as Plains City itself, Border City, and to some extent in Forest City, the prosecutor systematically reviews all search warrant

applications before they are presented to the magistrate and occasionally goes so far as to accompany the applying officer to the judge's chambers to assist in the presentation of the application. Finally, in rural areas of the states in which Mountain and Forest City are located and in Border City, a significant number of warrants are obtained telephonically.

Step III: Pre-Judicial Screening

In all of the cities we visited, warrant applications were reviewed either by a supervising officer or by a prosecutor, or in some instances by both, before they were submitted to a magistrate. Generally, the review by a supervisor is a matter of informal practice. Prosecutorial screening on the other hand, is usually the result of official policy.[24/]

The level of involvement of prosecutor's offices varied both among and within the jurisdictions: from the police officer summarizing the facts over the telephone and obtaining a verbal authorization, to the prosecutor reading and initialing the papers prepared by the officer, to the practice, described above, in which assistant prosecutors actually write the affidavit and application. Because no records are kept of the number of applications rejected outright during the preliminary review or sent back for additional information, we were not able to obtain a clear picture of the effectiveness of this review. From our interviews, however, it appears that although few applications are screened out completely, in a significant number of cases (the estimates varied from 10 percent in Plains City to between 33 and 50 percent in Forest City) the screening prosecutor will ask the police officer to add information to the affidavit. Examples of suggested modifications included inserting

information concerning the reliability of the informant, the informant's past performance, and the time at which the criminal activity or evidence was observed.

We were told in two jurisdictions that if a prosecutor's initials do not appear on the application, the reviewing judge will ask whether it has undergone prosecutorial review. Several judges stated that the quality of affidavits had improved since the initiation of prosecutorial screening of warrant applications. A possible explanation was offered by one Forest City judge who observed that his/her standard for review was higher as a prosecutor than it is as a judge. As a judge, this magistrate will sign any warrant that meets the threshold standards, but as a prosecutor, he/she was concerned about presenting as strong a future case as possible.

Step IV: Presentation to the Magistrate

Once preliminary approval has been obtained, the applicant goes to the courthouse, or, if the court is not in session, to the home of a judge to present the application, warrant, and affidavit. The practice of determining which judge to go to during normal work hours varied among the jurisdictions. In most jurisdictions in the United States, almost every judicial officer (from a justice of the peace to the chief justice of the state's highest appellate court) is statutorily authorized to issue a search warrant. In practice, the authority is exercised almost entirely by felony and misdemeanor court judges, with the latter group actually issuing all but a handful of warrants in each of the cities studied.

In Border and Mountain Cities, the responsibility for signing warrants was rotated among the lower court judges. In Plains and Harbor Cities, the courtrooms for some (Plains) or all (Harbor) of the misdemeanor court judges are immediately adjacent to police stations, and police officers generally, though not always, go to the judge at the station to which the officers were assigned to present a search warrant. In River City, a single magistrate for the entire city is on duty at the courthouse during weekday working hours. In Forest City, officers are able to go to any judge on the county misdemeanor court or municipal court bench.

At night and on weekends, each of the cities uses a duty judge system whereby one judge remains available to sign search warrants and arrest warrants. This duty is rotated among the judges on the lower court bench. In all but River City, this is accomplished through a call-in or a beeper system. In River City, part-time magistrates are on duty at the courthouse all night and all weekend on a rotating basis to review warrants and conduct bail hearings. This greatly simplifies the officer's task of obtaining review of a warrant application.

The degree to which officers actually went to the duty magistrate varied considerably. Across all the study sites, 20 percent of the judges reviewed at least 45 percent of the search warrant applications. In some jurisdictions, the pattern of concentration matched the organizational structure of the court or the location of individual courtrooms.[25/] In others, the concentration is not as easily explained by work schedule or location.[26/]

When the warrant application is presented in the courtroom, the review consists either as a hushed conversation at the bench, or the judge will call a brief recess and will have the officer make a presentation in chambers. Seldom does the presentation take very long. The mean time for the review of a search warrant application in the proceedings we observed was two minutes, forty-eight seconds. The median time was two minutes, twelve seconds.

Step V: Approval of the Application

After examining the application and affidavit and perhaps querying the applicant,[27/] the magistrate must determine whether there is probable cause to believe that the listed items are connected with a criminal offense and that they are located at the place specified in the warrant. Based on our observations and interviews, the rate of outright rejection is extremely low. Most of our police interviewees could not remember having a search warrant application turned down. The estimates by our judicial interviewees varied on the number of rejections, from almost never to about half. Of the 84 warrant proceedings observed, seven resulted in denial of the application (8 percent). We were told that most judges permit the officer to add information during the review if the magistrate desires that additional information be included. Usually the judge or the officer, or both, will initial the changes.

Judges and prosecutors advised us that the most common deficiency in search warrant applications was the affiant's failure to establish a link between the object sought and either a crime or the place to be searched. A Forest City judge related that affidavits commonly state that a white powder was seen and make a presumption that the powder was

heroin or cocaine without any more substantiation such as the way it was packaged, representations of the people in the car or house, or observation of activity consistent with narcotics distribution.

Another frequently mentioned deficiency was the lack of a sufficiently detailed description of the items to be seized. Prosecutors noted that in many instances, the officer has additional information but failed or chose not to include it in the affidavit. Judges suggested that lack of a sufficient description is particularly a problem in stolen property cases and in rape or murder cases in which the evidence frequently consists of items such as unidentified weapons, clothing, or bedsheets.

Type of Crime: The applications in our sample were usually based on a single type of crime (81 percent). In the relatively rare instances when more than one type of crime was being investigated, we assessed which criminal event or allegation was most central to the request using the broader categories of "crimes of violence" (murder, sexual assault, kidnapping, aggravated assault, robbery), "property crimes" (burglary, fencing, larceny, theft, vandalism, motor vehicle theft, arson), "drug offenses," other "vice and morals charges" (e.g., illegal gambling, sale of pornography, obscene phone calls, prostitution), and "miscellaneous" (including cruelty to animals, food stamp and medicaid fraud, liquor law violations, and doing business without a license).

There are differences among the cities, but overall, most of the cities behaved in remarkably similar ways. In all except Forest City, the top ranking central offense involved drug or property crimes. (In Forest City, 51 percent of the search warrants concerned violent crimes.) The mean percentage of warrants in our sample for which drug crime was the central offense was 38 percent. For property crime the mean percentage was 29 percent and for violent crime, 21 percent. Vice and moral offenses figured prominently in only River, Harbor, and Border Cities.

Place to be Searched: In accord with the historical basis for the warrant requirement, warrants were most often sought for searches of private residences. Impounded vehicles constituted the next largest category, on average, with businesses third. A high number of business searches in River City corresponds to the more stringent enforcement of anti-pornography ordinances there.

Items Sought: The items sought under the authority of a search warrant closely paralleled the central offenses. For each warrant issued, field researchers identified the three principal categories of material specifically named in the warrant application. It was rare that more than three categories were named. Drugs and stolen goods accounted for the greatest number of items sought, but "Other Documents" was the most frequently sought item in four of the cities. In those jurisdictions, the search warrant included a standard provision authorizing searches for and seizures of "rent receipts, personal correspondence and effects, keys, and other items that demonstrate dominion or control" of the premises.

Sources of Information: The sources of information on which search warrant affidavits were based ranged from police officers to informants to eyewitnesses to suspects. The single most common source was the affiant's personal observation. Among the seven cities, an average of

almost half of the warrant applications (46 percent) cited the affiant as one source. Forest City was conspicuously unlike the other cities in this regard, with only nine percent of the warrants citing the affiant. The second most common source of information was a confidential informant, mentioned in an average of 40 percent of the applications. Harbor City was the chief exception in this instance: 80 percent of the applications there relied upon a confidential informant, more than double the figure in any of the other cities. This is probably related to the predominant use of search warrants in drug cases in Harbor City.

When the sources of information were coded in terms of which was the primary source on which an application was based, a different pattern emerged. Confidential informants constituted the primary source of information for search warrants in each of the cities studied. Further analysis revealed that in all the sites, confidential informants were used mainly--and in most cities overwhelmingly--in drug-related cases.[28/]

We also examined the type of information on which the credibility of the informant and the trustworthiness of the informant's tip was based. Forest City affiants almost never provided corroborating information when relying on a confidential informant. Elsewhere, corroboration of some sort usually was offered with the most common form being the affiant's own observation. Such observations, however, did not always constitute an independent check on the reliability of the informant's statement. In some instances, for example, the affiant's observation was limited to a confirmation that the utilities were, indeed, listed in the name of the person identified by the informant as engaging in illegal activities.

Post-Application Filing Procedures: After a search warrant has been approved, the judge gives the original and at least one copy to the applicant and retains a copy of the warrant and its underlying documentation. Practices differ with regard to what the judge does with the copy of the unexecuted warrant. In some jurisdictions, e.g., River and Hill Cities, the warrant, application and affidavit are given to a clerk who establishes a file, registers it in a special log, and assigns it a log number. In others, e.g., Harbor and Plains Cities, the judges seal the warrant materials in an envelope which they carry with them or place in a locked file cabinet until a return is filed.

Steps VI-IX: Service of Warrant, Seizure of Items, Preparation of Inventory, Filing of Return

The next step after approval of the warrant is its execution--i.e., the authorized law enforcement officer or other official serves the warrant, conducts the search, and seizes the items specified in the warrant if they are found. Statutory law generally requires that the officer serve the warrant and file a "return" in the issuing or designated court, usually within 10 days of the issuance of the warrant. The return normally indicates whether the warrant was executed, the date and time of service, and what was seized. The return, the original warrant, and the supporting documentation usually are appended to the judge's copy of the warrant and filed with the clerk of the issuing court or the court with jurisdiction over the offense.

Although we were told almost universally by police officers that they file a return irrespective of whether the warrant was executed or a seizure made, the rate at which returns were actually filed varied

considerably. A return was filed for every or nearly every warrant issued in four cities. In Plains City, Hill City, and particularly River City, a more notable percentage of returns were not filed, probably signifying that executing officers sometimes neglect to file a return when nothing is found during the search.

With this possible distortion in mind, it appears that almost every warrant for which a return is filed, was served. This squares with the perception of the officers we interviewed. They told us that once they have gone through the effort to obtain a search warrant, they will execute it unless it is clear that the items sought have been moved or destroyed. Almost without exception, the same officer who applied for a warrant served it and, in most cases, did so promptly. However, in three cities, Harbor, Hill, and Border, a significant number of warrants were not served until five or more days after they were issued.[29/]

The executing officer(s) seldom came back empty-handed, judging from the cases for which returns were filed. All jurisdictions except River (88 percent) and Harbor City (84 percent) turned up something worth seizing in at least 90 percent of the reported searches. In Forest and Hill Cities, the percentage was nearly 100. Moreover, the seizures corresponded with the items specified in the warrant in at least 75 percent of the reported searches. In an average of more than a third of the cases, the police also came away with significant additional evidence that had not been specifically named in the warrant.

The specific materials most commonly seized were drugs and drug paraphernalia, stolen goods, and weapons in that order. The distributions were not markedly discrepant across sites. The differences

among the cities reflect the differences in the warrant applications discussed earlier--that is, the items seized generally correspond to the types of items specified in the warrant. It is apparent, however, that although police officers in four of the cities (River, Harbor, Plains, and Mountain) seek authorization to seize weapons less often than do their counterparts in Forest, Hill, and Border Cities, they nevertheless seize weapons just as frequently. Also, although documents demonstrating dominion or control were specified targets in only 17 percent of Harbor City warrants, such documents are seized in the course of nearly half (47 percent) of the searches.

Filing and Prosecuting a Criminal Case Following Execution of a Search Warrant

Retrieving information about whether a criminal case ever evolved from an issued warrant constituted, without a doubt, the most taxing and troublesome aspect of our data collection effort. As a result of the difficulty of "linking" warrants to eventual criminal cases, we cannot say with confidence that all the criminal court cases that evolved from our original sample of warrants were successfully identified.

The percentage of executed warrants resulting in the filing of at least one criminal case was between 25 percent and 48 percent in six of the seven jurisdictions studied.[30/] This relatively low percentage may be attributable to several factors beyond the recordkeeping problems noted. We were told by prosecutors in several jurisdictions that it is often difficult to link seized contraband or stolen goods to a particular individual with sufficient certainty to permit prosecution. In addition,

it was suggested in a number of cities that some searches are conducted solely to seize drugs or retrieve stolen property and not necessarily to support a prosecution. For example, one judge stated that he had once advised officers: "This is a bad warrant, so don't shoot nobody; don't kill nobody; just get the stuff [drugs] off the street." Finally, prosecutorial screening of cases prior to filing was intense in most of these jurisdictions, so that a high percentage of investigations without warrants also failed to lead to charges being filed.

Several interviewees expressed the belief that motions to suppress evidence alleged to have been seized illegally were routinely filed by the defense in every case involving a search warrant. Our findings suggest otherwise. In our seven-city sample, motions to suppress evidence were filed in 139 of the 347 cases filed after execution of a search warrant (40 percent). Only 17 of these motions were granted. This figure represents approximately 12 percent of all cases in which such motions were filed and just under five percent of the total number of search warrant related cases. Moreover, convictions were obtained in 12 of the 17 cases in which a motion to suppress regarding the warrant was granted.

Motions to disclose the identity of a confidential informant were also very rare--a total of eleven. Of those, only four were successful (one in River City and in Mountain City, two in Border City). What is especially interesting is that the granting of a motion to disclose the informant is tantamount to a dismissal, since law enforcement officers and prosecutors apparently prefer to forego the possibility of a conviction rather than to jeopardize the well-being of informants by divulging their identities.

Appeals related to the warrant were trivially few. We found only 19 appeals, and of these, only four (two in River City and one each in Mountain and Border Cities) were appeals that related to the search. In only one of those four instances was the appeal successful and the evidence suppressed.

Several possible explanations exist for the absence of defense challenges. The simplest was presented to us by the attorney who handles almost all the motion work for the Hill City public defender office: "Most search warrants are good." A second explanation could be that most of the cases involving a search warrant that is constitutionally suspect are dismissed by the prosecutor before filing. We were unable to collect quantitative data on this point, but were told by the prosecutors with whom we spoke that screening out a case because of a bad warrant was a very rare occurrence.[31/] A third possible explanation was provided by a Border City defense attorney who told us of a variety of defense strategies other than a motion to suppress to test the validity of a search or to suggest to a prosecutor that the case may be appropriate for settlement through plea negotiation. Finally, there is the comment of a Forest City prosecutor that defense attorneys "roll over" when they see a warrant. The presumption of validity accorded a warrant was seen as a significant hurdle to overcome. As a Hill City prosecutor put it:

> ...[T]he warrant insulates the police considerably more than a warrantless search, because there has been the interdiction of the independent magistrate, where he [and not the police] is the one determining probable cause. . . . [T]he warrant is presumed to be valid; the burden is on the defendant to show that is isn't.

There may be a negative side to the presumed legitimacy of a warrant and the resulting lack of challenges, however, if (due to the factors

noted previously) the initial scrutiny by the magistrate is not as probing as the creation of just such a presumption would seem to require. An underlying sentiment that we detected at several different stages of review was--if this instrument were faulty, they wouldn't have let it get past point 'x' (e.g., the trusted detective, the screening prosecutor, or the magistrate); or, if it's bad, they'll catch it at 'y' (felony court or on appeal). As one Border City police officer phrased it, "Some judges will let you walk in and out.... You have to feel that they are counting on the DA." As a result, the warrant may never receive the neutral and objective scrutiny presumed by the Fourth Amendment.

Section 3. Protection of 4th Amendment Rights

As indicated in the introduction to this summary, the overriding objective of the search warrant requirement is to safeguard "an individual's interest in the privacy of his home and possessions against unjustified intrusion of the police."[32/] The purpose of this section is to examine the extent to which the search warrant requirement successfully imposes the limits listed above and achieves its proffered purpose.

Interposition of a Neutral and Detached Magistrate

Under Supreme Court decisions, a neutral and detached magistrate is one who is "removed from [the] prosecutor or police . . ., works within the judicial branch"[33/] and acts as "a judicial officer . . . [rather than] as an adjunct law-enforcement officer."[34/] The magistrates with whom we spoke viewed their role in varying ways. Most of the judges clearly distinguished themselves from both police and prosecutors.

Although many of the magistrates rarely denied a warrant application, none expressed reluctance to do so should an inadequate application be presented. Yet, one judge in Mountain City expressed the belief that "a lot of judges," particularly those in rural areas or without legal training, see their role as assisting the police rather than being objective independent observers of the facts. Another suggested that some colleagues were little more than "ornaments for the prosecution," and a magistrate in Hill City recalled that upon being sworn in as a judge, he was told by a colleague, "Welcome to law enforcement."

That judges regard their role differently was borne out, as well, by the comments of law enforcement officers and prosecutors, and by our analysis of case records. A Hill City detective remarked that, "you can have a case that seems fairly solid to nine out of ten judges, but that number ten judge can throw the whole thing out." One Border City police officer observed that, "It is the old bell curve, you have a few on either end and everybody else falls in the middle."

As indicated in section 2, the majority of the search warrants in each city were reviewed by a few magistrates. This was due, in part, to the location of the magistrate's court in a high crime area or adjacent to the police headquarters, or to the duty hours of the judge or judges involved. But this concentration was augmented by the police practice of selecting the judge with whom an individual officer feels comfortable or who is perceived as less likely to raise questions. For example, a Forest City judge, who told us of having denied only one warrant during a lengthy tenure on the bench, signed 53 percent of the warrants in our sample. The explanation given was that the magistrate's home was near an

expressway exit making it convenient for officers needing a nighttime review. A prosecutor with whom we spoke acknowledged, however, that at least in some circumstances, applications are presented to those judges who do not usually press deeply into the facts.

In Mountain City, as well, we were told of systematic efforts to avoid at least one judge who had a reputation for being particularly demanding. The reason most often given for choosing or avoiding particular judges was to limit "the hassle." A Hill City prosecutor put it this way:

> I'm sure there are judges there who the officer knows are ... going to sign anything.... The skilled officer ... who does this day in and day out [knows] the easy way to do it and the hard way to do it, and once he learns which one is which, he's going to go the easy way when he can. Now I, to be a lawyer and to be overly protective, I'd probably prefer that they go to the nitpicking judge. But I understand why they don't.

In addition, it was evident that judicial personalities and predelictions sometimes played a significant part in how some magistrates carry out their role. For example, two judges who had expressed a strong commitment to performing neutral and detached reviews of warrant applications informed us that they might sign search warrants when the showing of probable cause was questionable, if doing so would help to get a large quantity of narcotics off the street or to assist in capturing a suspect in a major homicide case. One stated:

> If ... [a police officer] is rousting someone, he isn't going to prevail on me [to issue the warrant], unless he's tripped over somebody big, and I want that [person] in. If he trips over the trunk murderer, Charlie Manson, or this, that, or the other thing, I might torture the standard.[35]

On the other hand, a police officer in Harbor City suggested that some of the local judges refuse to approve any warrant in a gambling case

or do not wish to become involved in pornography investigations. A judge in Harbor City who characterized gambling cases as the most difficult to deal with, described gambling raids as a ritual of nominal enforcement: the same people are arrested over and over; the affidavits all read the same; and nothing happens.

Orderly Review Process

As indicated in the preceding section, the "orderly" warrant review process before a magistrate is brief. Magistrates with whom we spoke estimated that the average review lasts three to ten minutes. The average in our observed cases was between two and three minutes. When magistrates questioned affiants, they often sought information already contained in the affidavit rather than additional substantive information, a pattern that lends further credence to the suggestion that reviews tend to be cursory.

Although each of the cities we studied made some provision for having a magistrate assigned to review search warrant applications 24 hours per day, 7 days per week, police officers in all but River City expressed frustration at the difficulty of finding a magistrate ready and willing to review a warrant. We heard stories of officers spending hours in an anteroom or courtroom, waiting for a judge to take the time to review an application, or having difficulty locating the night-time duty judge. How often such problems occur is not clear, but such delays clearly upset law enforcement officers and discourage use of warrants.

The orderliness of middle-of-the-night reviews is also open to question. A Forest City judge remarked about sometimes being so sleepy during a middle-of-the-night review that he/she remembers little of the

application in the morning even though it has been signed. A judge in Mountain City conceded that in at least one instance, he/she had concluded, upon morning reflection, that a warrant signed "in the dead of the night" should not have been approved. A Forest City police sergeant admitted that, especially at night, judges who scrutinize warrants less closely are often selected not so much to slip improper warrants by, but simply "to reduce the hassle."

It is misleading, however, to look only at the official judicial review. Search warrant applications in many jurisdictions are examined once, sometimes twice, before being submitted to a judge. In Border, Forest Hill, Mountain, and Plains Cities, the prosecutor's office is routinely involved in warrant applications; in River and Harbor Cities, police supervisory personnel frequently review warrant applications before they are presented to a magistrate. The intensity of this preliminary involvement varies in much the same way as the magisterial review, itself, from a perfunctory review to actual drafting of the affidavit.

Furthermore, prosecutorial or supervisory review suffers from many of the same problems as reviews by magistrates. For example, there was grumbling among some of our police interviewees that prosecutors were as reluctant to review a warrant or as difficult to find as were judges. We also heard complaints that inexperienced assistant prosecutors who know comparatively little about the law concerning search warrants are assigned to conduct the reviews, resulting in "prosecutor shopping."

To determine whether early screening by prosecutors makes a difference, we checked the perceptions of the other major participants in

the system and examined the data collected from our sample of warrants. The views of the police officers we spoke with varied. Detectives in most of the cities studied welcomed the availability of prosecutors as consultants to help them determine whether there was sufficient information to establish probable cause. As a police lieutenant in Harbor City lamented, officers are supposed to understand all the nuances of legal language and have their actions reviewed by lawyers even though they, themselves, are not legally trained. Where strictly routine warrants are concerned, however, prosecutorial approval is viewed more as an administrative hurdle than as assistance.

The judges also differed in their assessment of the effect of prosecutorial screening. Several Forest City felony and misdemeanor court judges saw little effect, although as noted earlier, one judge commented that prosecutorial review standards were more stringent than those of the court. A Forest City municipal court judge who told us that few of the applications presented to that court were pre-screened, saw prosecutorial screening as an important safeguard.

In Plains, Mountain, and Border Cities, the judges attributed their high search warrant approval rate to the fact that the prosecutors in their jurisdiction pre-screen search warrant affidavits for probable cause. It was assumed that the prosecutors reject a substantially higher percentage of search warrant applications at this pre-screening stage. As a Border City magistrate put it, "the bad stuff never gets to me." This judge added, however, pre-judicial screening "doesn't make my job easier, because I still have to look for all the necessary factors." On the other hand, judges in River City and Harbor City, where prosecutorial

pre-screening is rare, generally agreed that it would be of little assistance, since they would still be responsible for making the probable cause determination.

Our analysis of sample warrants suggested that prosecutorial screening might be significant in three ways: the percentage of warrants resulting in seizures, in general, and of the items sought, in particular; the percentage of warrants which resulted in the filing of a case; and the percentage of cases in which items seized pursuant to warrant were suppressed. With regard to the rate of seizures, two jurisdictions without prosecutorial screening show a somewhat lower rate of success in terms of the percentage of seizures made. The mean percentage for the jurisdictions with prosecutorial screening is 94 percent; for those without, the mean percentage is 86 percent.

There is a more significant distinction in terms of the percentage of searches in which most or all of the listed items were seized. The mean percentage of successful seizures in River City and Harbor City is 64.5 percent versus a mean of 79 percent in the other jurisdictions. This difference is particularly significant in the case of River City, where returns apparently were not filed for almost half of the approved warrants.

The percentage of approved warrants resulting in cases filed in the felony court is inconclusive, with Harbor City showing the lowest and River City the highest. The low percentage in Harbor City may be attributable to the inaccessibility of misdemeanor court records.[36/] As for differences in the instances in which items seized pursuant to a warrant were suppressed, the low number of successful suppression motions make it difficult to draw any firm conclusion.

Probable Cause

The precise meaning of probable cause is elusive. The U.S. Supreme Court recently observed that:

> [P]robable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts--not easily or even usefully, reduced to a neat set of legal rules.[37/]

A traditional definition of probable cause is facts and circumstance sufficient to justify a "reasonable and prudent" person to believe that a crime has been committed and that evidence or contraband related to that crime are at a specified location.[38/] In the Gates decision cited above, the Supreme Court characterized the showing necessary to meet the probable cause standard as "a fair probability that contraband or evidence of crime will be found in a particular place."[39/] In determining whether probable cause exists, a magistrate "must judge for himself the facts relied upon by a complaining officer"[40/] drawing "such reasonable inferences as he will"[41/] "in a common sense and realistic fashion" rather than "hypertechnically."[42/]

The police response to the probable cause requirement in all of the cities studied was to develop standardized text and formats into which the specifics of the case could be inserted. This text includes the "magic words" needed for an application to pass muster in a particular jurisdiction. The police officers we spoke with acknowledged that they were often kidded about and sometimes challenged over the use of "boilerplate" affidavits, but as one Plains City detective remarked, "Why change a good thing?"

Although there is nothing inherently improper about the practice of routinely incorporating certain court-sanctioned language into a warrant

affidavit, it is a matter of concern that many factors that lie at the heart of the need for review by a neutral and detached magistrate are routinely reduced to boilerplate language. The kinds of factors which we saw treated in this fashion included:

- the inference that a crime had been commited;[43/]
- evidence that an officer had probable cause to believe that the evidence could be found in the place specified in the warrant,[44/] and
- evidence that an informant was reliable and that the information provided was trustworthy.

Boilerplate recitations about the statements, activities, reliability, and trustworthiness of confidential informants are perhaps the most troubling of all. Judges are asked to believe in both the existence and the truthfulness of persons whose identities and movements are cloaked in standardized legalese. Concerning the issue of the need for informant confidentiality, every warrant application involving such an informant in Border City recited:

> I desire to keep said informant anonymous because said informant has requested me to do so, because it is my experience that informants suffer physical, social, and emotional retribution when their identities are revealed, and because it is my experience that revealing such informants' identities prevents other citizens from disclosing confidential information to law officers.

With regard to the reliability of informants, magistrates in Plains City routinely read that "to the knowledge of the affiant, this informant has never supplied your affiant with information that was proven to be false"; that reliable information was provided on "at least two prior occasions"; and that the items sought has been "seen on the premises within the past 72 hours."[45/]

It is easy to imagine how a magistrate, seeing the same recitation over and over, can be tempted to skim over these important pieces of

evidence, looking for key words and phrases.[46/] Asked what he/she looked for when reviewing boilerplate affidavits, a Border City magistrate responded:

> You gotta read it and make sure that it's there, because once in a while the typist will leave something out. It's boilerplate, but it's all got to be there.

The presence of such boilerplate statements is certainly important, but the question of their truthfulness is far more critical. This latter concern is more than argumentative, for it seems that one of the more insidious qualities of boilerplate presentations is that the affiant may take them only half-seriously, as part of the game that must be played, as form rather than substance.

In this vein, we were told in Harbor, Forest, and Plains Cities that affidavits are drafted to include the minimum amount of information necessary to establish probable cause in order to limit the avenues of attack by the defense and to protect the identity of informants. The amount of information considered the minimum necessary, however, varies considerably from city to city. In Harbor City, the affidavits routinely begin with a paragraph describing the affiant's training and police experience, presumably to provide the magistrate with information on the affiant's credibility. In Plains and Hill Cities, most affidavits examined contained a reference to the number of years that the affiant had served on the city police force and sometimes to the number of years in his or her current division. Biographical sketches are seldom included in affidavits in other cities.

In Harbor City warrants seeking illicit drugs, there is often extensive corroboration provided to validate a tip from a confidential

informant that narcotics were present at a particular address. In contrast, a typical Forest City drug case affidavit contains only two to three short paragraphs, including statements on how long the affiant or other officers have known the informant, and statements intended to support both the basis of the informant's knowledge and the informant's record of prior reliable statements. Affidavits typically provided little, if any, information regarding where in the building to be searched the alleged drugs had been seen or how they were packaged, and no independent corroboration. A Forest City detective commented that first-time drug informants are usually required to make a series of controlled buys before the police will rely on them, but if an informant is a demonstrated truth-teller, a simple telephone call is enough to have the police seek a warrant without corroboration.

Oath

The oath appears to be treated as a procedural formality rather than as a significant protection against false statements. It was rarely mentioned during our interviews. One judge in River City remarked that although police officers can be questioned, once they have taken an oath, their statements have to be accepted on faith. A Mountain City judge told us of discovering an inconsistency between an officer's oral statement and the affidavit, and asking for clarification. "I didn't write that," the officer explained, to which the judge responded, "But you signed it!"

It should be further noted that much of the information that forms the basis for warrants, particularly in drug-related cases, is not sworn testimony provided under oath, but rather, unsworn statements of

confidential informants. Indeed, in Plains City, it is a common practice to use double hearsay--the confidential informant makes a statement to Officer A who relates it to Officer B who applies for the warrant.[47]

The danger inherent in diminishing the solemnity of the oath is illustrated by the 1982 arrest of the head of the narcotics bureau of the St. Charles Parish, Louisiana, Sheriff's Office for perjury.

> Before the raid, [the agent] swore out an affidavit saying a confidential informant told him that [the suspect] had marijuana in his home.... According to the district attorney handling the case: "There was no factual basis for issuing that search warrant. In effect, there was no confidential informant. We feel certain that he did perjure himself."[48]

Although there is no basis in our data for believing that abuses such as that alleged to have occurred in St. Charles Parish, or documented in People v. Garcia and United States v. Cortina, are widespread,[49] the sterile formality of the oath and the limited information necessary in some jurisdictions to establish probable cause on the basis of the statement of a confidential informant provide, as a Hill City judge observed, a tempting opportunity for the ambitious officer "to fudge a little on probable cause ... if he knows he's got [a suspect] dirty."[50] The district attorney's eulogy for the convicted Louisiana officer was especially telling:

> Paul was a good policeman. He was just overzealous in overstepping the bounds and the rules he should have followed.[51]

Specificity

Both the place to be searched and the items to be seized are to be described in detail, in order to prevent random and wholesale searches. The description of the site must be sufficient so that "the officer with

a search warrant can, with reasonable effort, ascertain and identify the place intended."[52/] In general, address or vehicle identification information appeared to meet the constitutional requirement. Except when the premises to be searched was an outbuilding such as a garage or shed, however, there was little effort to specify the area within a residence or business that was to be searched. A Mountain City judge told us of one instance in which a search had been limited to a specific container in a house, but this was clearly the exception rather than the rule. Indeed, in describing the advantages of getting a search warrant, one police captain commented on the extensiveness of the search that is possible when a warrant has been obtained.

Regarding the specification of the items sought, a number of common practices stretch the intent, if not the letter, of the constitutional directive. One such practice is to describe the item(s) to be seized by quoting or paraphrasing statutory provisions regarding the illegal possession of a gamut of controlled substances and related paraphernalia, though the supporting affidavit provides information about only one particular drug. For example, one Plains City affidavit which articulated cause to believe only that cocaine would be found resulted in the issuance of a warrant which authorized seizure of:

> Narcotic drugs (coca leaves, coca leaf derivative, opium, opium derivatives) as defined . . . together with such vessels, implements, and furniture used in connection with the manufacture, production, storage, or dispensing of such drugs . . . .

In Mountain City, it was routine to include as an object of drug searches "any literature regarding the production, preparation, or use of narcotic substances." Besides inviting officers to seize materials they had no

particular grounds to suspect might be found, such phrasing also enables police to expand substantially the scope of the search. Warrants containing descriptions such as those quoted above, or such as "any and all substances controlled by section ___," seem dangerously close to permitting the open-ended general searches that the Fourth Amendment was intended to proscribe.[53/]

Another practice noted in a number of cities was the routine inclusion of the following items in the list of evidence to be seized:

> Property tending to establish the identity of persons in control, care, and maintenance of the premises to be searched, including but not limited to cancelled mail envelopes, utility bills, rent receipts, photographs, and keys.

Similar standardized language was used for searches of automobiles. Certainly, the listed evidence regarding dominion and control are of obvious value in prosecuting a case. Indeed, one prosecutor attributed the relatively low number of cases resulting from search warrants to the inability to relate the items seized to a particular person. But in the context of a search of a residence or business, inclusion of items like rent receipts or envelopes permit a far more extensive and detailed search than could be justified if the search were limited in scope to areas where one might reasonably expect to find the stolen merchandise (such as television and tires) or large quantities of marijuana that constitute the real focus of the search. Moreover, inclusion of such "indicia" allow intrusions into private papers and effects, areas that have been held to be particularly sensitive and deserving of protection.[54/]

Limits on Execution

Three types of limits are placed on the execution of search warrants. Overall Time Limit: The general time limit, most commonly 10 days, is to

encourage warrants to be served promptly, while probable cause is still fresh. In all but two of the sampled jurisdictions, 80 percent or more of the search warrants were served the same day or the day after they were signed. This practice is consistent with the major concern about search warrants expressed during our interviews; namely, the delay in seizing evidence and contraband incurred as a result of having to obtain a warrant.

Nighttime Searches: A special finding is required in five of the cities studied to conduct a nighttime search. These range from a level of proof greater than probable cause that the items sought are at the specified location (e.g., "positive proof"), to a recitation of good cause for the search to be conducted at night. We found that few warrants are served late at night or early in the morning. Most are executed between 7 a.m. and 11 p.m.; according to our interviewees, to coincide with peak hours of criminal activity and the executing officer's duty hours. It was explained to us that nighttime searches are not desirable because of the increased risk of injury to the executing officer and because, at night, it is easier for suspects to escape.

No-Knock Entry: In two jurisdictions, we encountered actual requests for so-called no-knock warrants--warrants authorizing officers to break into a room or building without announcing their presence and authority.[55/] Standardized text was usually offered to support the no-knock request. None of the officers we spoke with indicated that such warrant applications were scrutinized any more stringently than others.

Law enforcement officers with whom we spoke were divided about the usefulness of no-knock entries. One Mountain City narcotics officer remarked:

> We still get no-knocks on occasion but most of the time we don't use them. A lot of times there are disadvantages that way. If you take a guy's door off and run into the house, you're really looking for problems.

This view was echoed in River City. On the other hand, we heard in several cities of officers "kicking down doors" without waiting for a response--"all you've got to [do is] raise your palm up aside the door" to announce your presence before forcing your way into a house.

Section 4. Conclusions and Recommendations

In the introduction to this summary, several points raised in prior studies regarding search warrant practices were listed. Before proceeding further, a quick review of these points, and the support or lack thereof found for them in our research seems appropriate.

1. Search warrants are sought in relatively few cases. True. Although the numbers vary from city to city, search warrants figure in a very small percentage of police investigations.
2. Search warrants are sought in only a limited array of cases. False. Drug and property crimes predominated in most of the cities we studied (a mean of 38 percent and 29 percent respectively), but there were significant percentages of violent crimes (a mean of 21 percent) in the samples of the search warrants that were examined.
3. Search warrants are rejected infrequently. True. However, the prescreening procedures employed in many cities help to assure that the magistrate is presented with the information necessary in the jurisdiction for a finding of probable cause.
4. Magistrates are not "neutral and detached." Many are, some are not. Attitudes vary considerably among magistrates, and an

individual magistrate's neutrality and detachment may vary depending on the crime and circumstances.

5. Judge-shopping is practiced by search warrant applicants. True. Again the extent of the problem varies, but when the procedures used in a city permit selection of the magistrate who will review a warrant, judge-shopping occurs.

6. Magistrates are not adequately trained. A one-word answer cannot be given. However, the sharp variation in the intensity with which different judges examined affidavits and the striking differences in "the minimum information necessary" among cities, suggests that there is a need for further training in order to achieve a greater degree of consistency within and among jurisdictions.

7. Search warrant applications are often based on unsworn hearsay from anonymous informants. True. A confidential informant was the primary source in a mean of 37 percent of all the warrant applications examined, and a mean of 75 percent in applications in drug-related cases. In an average of three out of ten of the applications relying on confidential informant tips, no corroborative evidence was offered (ranging from 7 percent in one city to 88 percent in another).

8. Search warrants broaden the area that may be lawfully searched. True. Few of the search warrants we examined limited the search of a residence to specific rooms or areas. Moreover, the inclusion in most of the cities of boilerplate language permitting officers to search for documents, keys, photographs, letters, and other items indicating dominion and control gave

almost unlimited authority to search drawers, desks, and other private areas regardless of the type of evidence, contraband, or stolen property being sought.

9. The delay involved in obtaining a search warrant impedes law enforcement. False. The data we collected from records and from interviews indicated that few officers executing a search warrant come out empty-handed. Most or all of the items sought are seized in an average of nearly three out of four warrants served. It is true, however, that in order to avoid the delay and bother of obtaining a search warrant, police officers often rely on other means of conducting a search--some legal, some not.

10. Search warrants are routinely the target of motions to suppress. False. Motions to suppress were filed in an average of only 39 percent of the cases filed following execution of a search warrant. Few of these motions were actually heard, and in only five percent of the filed cases were motions to suppress granted. Of the 17 cases in which a motion to suppress was granted, only one was dismissed and more than 70 percent resulted in at least one conviction.

Having said all this, do search warrants accomplish their objective of protecting citizens from unreasonable searches and seizures? It is impossible to draw hard and fast conclusions about the warrant review process and the significance of the warrant requirement because our observations were consistent with some radically different, even contradictory, characterizations of the process. Clearly, many of the shortcomings of the search warrant process vary significantly depending

on the state, the setting (urban or rural), the judge, the prosecutor, and the law enforcement officer involved. On the one hand, we witnessed occasions when the requirement operated much as it was intended to. Insofar as it causes officers to at least contemplate the probable cause standard before they act, the process does appear to inhibit the "impulsive" search by police. We are persuaded that this reflection, coupled with the realization voiced by many officers we interviewed that evidence seized in disregard of the standard may be excluded from any subsequent criminal proceedings, induces a higher standard of care by many police officers than would otherwise be the case.

Further, to the extent that officers elect to seek a search warrant, the requirement does appear to produce a multi-layered review that decreases the likelihood that a search will occur in the absence of probable cause. This is true, in part, because each stage of review seems to add rather than delete the amount of information on which the eventual issuance of the warrant is based.

Finally, the warrant requirement provides, in most instances, a clear and tangible record of enforcement activities without major interference or cost. The affidavit and related documentation that must be offered in support of an application for a warrant clearly articulate before a search for incriminating evidence, precisely what is being sought and the basis for the belief that it will be found at the time and place of the search. Having this information on the record clearly enables a more objective post hoc evaluation of the original search.

It is a sizable overstatement, on the other hand, to say that the warrant review process routinely operates as it was intended. For

example, it was clear in many cases, principally on the basis of the individual involved, that the review process was largely perfunctory. We were told of judges--and spoke with some--who regarded themselves more as allies of law enforcement than as independent reviewers of evidence.

Equally important, we witnessed infrequent but significant evidence of efforts that undermined, and sometimes entirely defeated, the integrity of the review process. Understandably, but unfortunately, many police officers--resentful, frustrated, and confused by what they see as an unnecessary obstacle to the already difficult task of law enforcement--simply go through the motions of the "warrant game" when they see no other choice. It is generally clear to them what is the minimally necessary to sustain a search warrant request in their jurisdiction. It is equally clear to most officers that judges tend not to scrutinize closely certain kinds of information that is critical to the demonstration of probable cause, such as information provided by confidential informants. These realities make the process extremely susceptible to abuse by those who are willing to risk the consequences.

The most striking and significant--and perhaps the most troubling--discovery regarding the operation of the search warrant review process, however, is not so much how that process occurs as the fact that it is so rarely invoked. For a host of reasons, police officers--and even some judges--eschew the process. It is burdensome, time-consuming, intimidating, frustrating, and confusing, and there are many easier ways to get the evidence or otherwise make a case against the accused. It is not surprising, therefore, that many officers tend to regard the warrant option as a last resort.

Yet, significant improvement cannot and will not spring simply from making it easier for police to rely on search warrants. Therein lies a critical and troublesome irony that undergirds the recommendations we offer. Unless the nature and integrity of the review process, itself, is substantially improved, it would be disingenuous to suggest that increased reliance on search warrants, per se, is likely to produce the kind of protection against unreasonable search and seizure that is contemplated in the Fourth Amendment.

Our conclusions, therefore, as well as the recommendations that flow from them, address two independent concerns: the infrequency with which search warrants are sought; and the adequacy of the review process. Following a discussion of these concerns one additional problem area is addressed--the inadequacy of current systems for maintaining search warrant records, and the failure to use the information available.

Increasing the Frequency with which Search Warrants are Sought.

Because search warrants can set some valuable boundaries on police conduct, promote the use of a higher standard of care, and provide a clear record of enforcement activities without major interference or cost, every effort should be made to encourage their use. Two problems will have to be addressed to accomplish this goal: reducing "the hassle" of obtaining a search warrant, and increasing the incentives for obtaining a search warrant.

Reducing the Hassle: The effort and time required was cited by many law enforcement officers as the most troublesome disincentives to obtaining a search warrant. Clearly, police officers should not be discouraged from

seeking a warrant by unnecessary time delays, by judges or prosecutors unwilling to review an application, or by the lack of clerical assistance. A number of practices we observed appeared to help reduce the time and effort required to obtain a search warrant.

-- Telephonic Applications. The first of these is an effective telephonic application process. The telephonic application procedures in Border City cut the application time in half without impairing--in fact, they may enhance--the amount of information presented or the quality of the review.[56/] Several procedures used in Border City have overcome the practical problems and concerns that have inhibited the use of telephonic applications in the other cities in which they are legally possible. The foremost of these is the use of a central switchboard to make the connections and to record the application conversation. Use of a central switchboard can reduce the cost of implementing the system, allows telephonic applications to be made during the day as well as at night, facilitates use of an alternative reviewer when the judge or prosecutor on warrant duty is not available, and assures the technically competent recording of the application.

Another important practice in Border City is the affiant's use of a field sheet. This helps the applying officer and screening prosecutor organize the facts, list the items to be sought, and ensure that all the necessary information is presented.

The third practice is the use of a three-way conversation between the officer, prosecutor, and magistrate. One danger of the telephonic procedure is that a necessary element might be inadvertently omitted and that this omission would not be detected until after the seizure has been

made. Casting the application as a colloquy between the prosecutor and the officer limits the risk of inadvertent omissions and further helps to organize the material for the magistrate.

-- Judicial and Prosecutorial Availability. In jurisdictions in which telephonic applications are not legislatively authorized, procedures should be instituted to ensure the availability of a reviewing magistrate. Our data suggest that, although the 2 a.m. visit is a relatively rare occurence, many warrants are sought after-hours, particularly between 4 and 11 p.m. Extending court hours is one approach that is being used successfully in River and Forest Cities to meet a number of needs including the expeditious review of search warrant applications. Where there are evening and weekend court sessions already in place which are not being used for warrant reviews, police officers should be apprised of them and the judges should be advised to be receptive to review warrant requests. In cities which do not currently hold such court sessions, local court, prosecutorial, and police officials should review the pattern and volume of applications for search warrant, arrest warrants, and bail, and consider the possibility of conducting at least some traffic and civil cases during non-traditional work hours. Such a program may have substantial advantages for the public beyond facilitating search warrant applications.

The need for accessibility applies during the day as well. Although the difficulty of finding an available judge or prosecutor is less, it nonetheless occurs. In every site except River City, we were told by police officers of the inevitable--and often unnecessarily

protracted--wait for the magistrate. A Mountain City detective observed:

> [I]f everything goes right . . ., you can find the judges when they are sitting at the bench--because a lot of judges won't see people in their offices. [If you miss them there,] they leave and go to lunch and you have to wait until they come back for the afternoon dockets, and if they are already into the afternoon dockets, they are not going to interrupt the procedures [for a warrant]. So you sit and wait through three or four docket sessions. . . . It can take all day.

No one is well-served when officers are forced to cool their heels all afternoon in an anteroom or to trudge from courtroom to courtroom.

At the same time, however, efforts to facilitate judicial accessibility must be undertaken in such a way as to minimize the possibility of judge-shopping, a practice that underlies many of the problems discussed in this report. We are persuaded that in at least some cases, judge-shopping undermines the standard of review contemplated by the Fourth Amendment. It would be a relatively simple matter for the administrative judge, court administrator or court clerk to monitor the review process to detect and explore possible reasons for any grossly disproportionate distribution of the warrant review workload, as well as to design acceptable methods for alleviating the problem.

The foregoing discussion concentrated on judges. But in those jurisdictions in which prosecutors are involved in the search warrants review process, the same need for ready access applies. The availability of a judge is of little help if the screening prosecutor or an alternate is unreachable.[57]/

Establishing Departmental Incentives to Obtain Warrants. Taking the actions recommended above will not in themselves be sufficient to increase significantly the use of search warrants. Studies of police officer behavior indicate that the norms and procedures within a police

department are often prime determinants of how law enforcement personnel carry out their duties.[58/] Accordingly, law enforcement executives must recognize and communicate to the rank and file the importance of submitting their judgment to independent review by judicial authority prior to the execution of a search. Unless the department leadership itself, provides the training that instills in officers the importance of obtaining a warrant before a search and creates the necessary procedures and incentives to ensure that these practices are followed, the Fourth Amendment will continue, for some officers, to be little more than something, as one officer put it, "to be winked at." That action from above is effective was demonstrated in Plains City by the increased use of search warrants in one division after its commander began counting the number of applications filed by each detective and including that number as one of the factors used in evaluating performance.

Improving the Review Process

As stated earlier, efforts to increase the number of search warrant applications cannot be undertaken without steps being taken at the same time, to ensure that the review of warrant applications meets the standard of care envisioned by the Constitution. These steps include the routine provision of several layers of review, the clarification of precisely what the Constitution requires for approval of a warrant application; improved training for police officers, prosecutors, and judges, and procedures to inhibit judge-shopping.

Pre-Review Screening. When an officer is required to have a search warrant application pass muster with a member of the prosecutor's office

or as is the case in some jurisdictions or departments, to win prior approval of a field supervisor before it can be presented to a magistrate for review, we are convinced that a higher standard of care prevails. For a host of reasons, the prosecutor brings a particularly high standard to the assessment of the sufficiency of a warrant. Not the least of these is the fact that the prosecutor may eventually have to defend the warrant in court; most are not about to jeopardize their chance of obtaining a conviction by passing a marginal warrant on to a magistrate. Indeed, as some who had held both positions informed us, the prosecutor's review is often more stringent than that of the magistrate.

Whether the screening is performed by law enforcement or prosecutorial personnel, however, the pre-screeners should be carefully selected and receive special training to ensure that they are conversant with state and federal caselaw and state statutes governing search warrants and understand the policies that underlie them. In particular, this is not a task that should automatically be assigned to the least experienced member of the prosecution staff.

Clarification of What is Required to Issue a Search Warrant. In our research, we were struck not so much by any insuperable difficulty in understanding Fourth Amendment caselaw itself, as we were by the varying interpretations that search and seizure caselaw seems to have generated among criminal magistrates. In every jurisdiction except Plains City, we were told of considerable variation among local judges in the amount of information each required and in the standards each imposed during warrant application reviews. Furthermore, in both Plains and Mountain Cities, we were told of discrepancies between urban and non-urban areas

of the state. Finally, we found substantial differences in the working standard of probable cause applied in the seven cities studied, two of which were in the same state.

Given the renewed emphasis by the Supreme Court in the Gates decision on the factual content of affidavits and the myriad fact situations presented to the courts in search warrant cases, it is unlikely that the current confusion will be resolved through appellate decisions. A possible alternative would be the development of a set of guidelines addressing in some detail the major issues presented to magistrates. These issues include the amount and type of information needed to support the statement of a confidential informant, the materiality of past criminal activity by a suspect or prior criminal activity at the suspected location, the permissible scope of a search for materials demonstrating dominion and control, and the circumstances in which items may be seized without securing a second warrant. In addition, the guidelines could address the procedures for obtaining a truly voluntary consent to search.

The guidelines could be developed by a task force of judges, prosecutors, defense attorneys, police officers, and legal scholars. They should be based on a close examination of existing law and practice, and would be designed for adoption by police departments and state supreme courts as administrative rules or rules of procedure. Adoption should be followed by practically oriented training of police officers, judges, and attorneys. Some differences would inevitably remain within and among states, and the guidelines would, without doubt, be strenuously tested constitutionally and practically. The end result, however, would

likely be a clearer understanding by the police, the courts, and the public of the rules of search and seizure, and less frustration caused by idiosyncratic applications of the law.

Eliminating Judge-Shopping: For the reasons discussed above, judge-shopping can seriously undermine the integrity of the warrant review process. One approach in use in several jurisdictions is to assign the responsibility for reviewing search warrants to a particular magistrate for an extended period. The duration of the assignment depends on the number of magistrates on the bench. As each magistrate rotates through the cycle, officers are supposed to take their warrant requests first to the duty judge. Only if the duty judge is unavailable is an officer to take the application to another magistrate.

Although fine in design, the systems we saw were not enforceable, or at least were not enforced. Officers readily conceded to us that if they did not like the duty judge, they would simply consult the individual they preferred. Non-duty judges, it seems, seldom inquired into whether a bona fide effort had been made to locate the assigned judge.

Several solutions commend themselves. First, the administrative judge or court administrator should monitor the workload of warrant reviews and address apparent workload disparities in regular judicial meetings. Second, in place of a rotating assignment system, a jurisdiction might opt to assign the responsibility of warrant review for a protracted period to a single individual--e.g., the administrative judge--with a backup system in the event that person is unavailable. Third, in jurisdictions where telephonic applications are authorized by law, the assignment of responsibility for reviews through a central

switchboard could be quite equitable (even random), since a disinterested intermediary is actually responsible for linking the police officer with the magistrate. Thus, rectification of the problem of judge-shopping is practically and logistically possible.

Improving the Records Systems and Making Better Use of Search Warrant Records.

The third set of problems is related to, but narrower than, those discussed in the prior section. They have to do with the maintenance and use of the records generated during the search warrant process.

Improving Records Systems: Cases should not have to be dismissed because of the inability to locate the original search warrant affidavit or at least a legible copy; yet this occurs occasionally. The basic problem is how to integrate a set of documents, usually created before a case has been filed and a case number assigned to it, into a subsequently prepared case jacket where all other case-related materials are placed.

We do not have a total solution to this annoying problem. As a start, however, a sequential identification number should be placed on each part of the warrant package so that at least the return can be easily matched with the affidavit and warrant. In addition, space should be provided on the return for the name of each person arrested at the time the warrant is served and for the number that the police use to identify those arrests in their own files. This will facilitate cross-checking between police and court records for those persons arrrested on the scene and for linking the warrant records to a case file. We have no suggestions for linking search warrants to the cases of

those persons arrested after the return of the warrant. It is a problem requiring further research or the offer of an innovative technique already in use in some other jurisdiction.

Using Search Warrant Records More Effectively

As a result of our review of warrant application archives, we are persuaded that much can be learned from the routine monitoring of these records. Important information regarding the frequency of warrant use by law enforcement (including details about specific divisions and/or officers) and the extent of judge-shopping, including the extent to which judges and prosecutors share the responsibility of reviewing applications equally, can be gleaned from even a perfunctory review of these records. A more systematic exploration of the records can reveal other valuable insights, including information on discrepancies in practice and interpretation both across and within jurisdictions.

Ideally, such a review of search warrant practices could be conducted on a routine basis by a panel of current and retired judges, members of the bar, law enforcement officials, and scholars. By apprising the criminal justice professionals of differences in practice and problems, and incorporating the results of the review in training and evaluation programs, much could be done to improve current practices and eliminate unjustified disparities. However, since our legal system relies on the adversary process as a control rather than on self-regulation, prosecutors and the organized defense bar should become more familiar with the information available in their jurisdictions and how it can be used to further the interests which they represent. As for the courts themselves, they should, at a minimum, include data on the number of

search warrant applications reviewed and granted in their statistical summaries and internal caseload performance reports in order to assess the burden imposed by search warrant application reviews and the extent to which this burden is equitably shared among the members of the bench.[59]

Conclusion

Our research suggests that a properly administered and supervised search warrant review process can protect privacy and property rights without significantly impeding effective law enforcement, and that the exclusionary rule, though seldom invoked, does serve as a disincentive to police officers to misuse or abuse their authority. Thus, the fears that have arisen concerning the deleterious effects of the warrant requirement and the remedy provided by the exclusionary rule are overstated. New broad exceptions to the warrant requirement and exclusionary rule do not appear necessary, particularly if some of the basic improvements to search warrant practice and procedure that are recommended above are implemented.[60] Adoption of these recommendations would, we believe, do much to remove unnecessary impediments to the procurement of a search warrant and to ensure that the magistrate's review achieves the level of diligence and independence envisioned by the Fourth Amendment.

Even if these recommendations are implemented, problems will remain: some middle ground will have to be found between the use of boilerplate paragraphs and an insistence on original composition; fact situations will lie at the interstices of even the most carefully drafted guidelines; judges and prosecutors will remain overworked and resentful of interruptions; and police officers faced with on-going criminal

activity will continue to resent the additional time and effort required to obtain a warrant. But as observed by the Supreme Court in the midst of our field research:

> Whatever practical problems remain ... cannot outweigh the constitutional interest at stake. Any warrant requirement impedes to some extent the vigor with which the government can seek to enforce its laws, yet the Fourth Amendment recognized this restraint is necessary in some cases to protect against unreasonable searches and seizures .... The additional burden imposed on the police by a warrant requirement is minimal. In contrast, the right protected--that of presumptively innocent people to be secure in their houses from unjustified forcible instrusions by the government--is weighty.[61]

FOOTNOTES

1. U.S. CONSTITUTION, Amd't. IV.

2. Grano, Rethinking the Fourth Amendment Warrant Requirement, 19 American Criminal Law Review 601, 618 (1982); W. La Fave, 1 Search and Seizure: A Treatise on the Fourth Amendment, 4-5 (1978); D. Risig, Searches and Seizures Handbook, 57-58 (1968).

3. Grano, supra note 2, citing 1 Schwartz, The Roots of the Bill of Rights, 190-91 (1971).

4. United States v. Jeffers, 342 U.S. 48 (1951); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Shadwick v. City of Tampa, 407 U.S. 345 (1972).

5. Steagald v. United States, 451 U.S. 204, 213 (1981); accord Texas v. Brown, ___ U.S. ___, 103 S. Ct. 1535, 1546 (1983) (Stevens, J. concurring). Stanford v. Texas, 379 U.S. 476 (1965).

6. LaFave, supra note 2, at 52. Moylan, Hearsay and Probable Cause: An Aguilar and Spinelli Primer, 25 Mercer Law Review 741, 743 (1974); see Franks v. Delaware, 438 U.S. 154, 169 (1978); United States v. Cortina, 630 F.2d 1207 (7th Cir. 1980); People v. Garcia, 409 Ill. App.3d 142, 440 N.E. 2d 269 (1982) cert. den. ___ U.S. ___, 103 S. Ct. 1433 (1982).

7. 333 U.S. 10, 13-14 (1948).

8. L. Tiffany, D. McIntyre & D. Rotenberg, Detection of Crime, 99-120 (1967); S. Krantz, B. Gilman, C. Benda, C. Hallstrom, & E. Nadworny, Police Policymaking: The Boston Experience, 99-147 (1979); Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives, 2 The Journal of Legal Studies 243 (1973). See also J. Rubenstein, City Police (1973); J. Skolnick, Justice Without Trial: Law Enforcement in a Democratic Society, 112-163 (1967).

9. See, e.g., LaFave, Warrantless Searches and the Supreme Court: Further Ventures into the Quagmire, 8 Criminal Law Bulletin 9, 27-28 (1972).

10. Krantz, et al., supra note 8, at 110; Tiffany, McIntyre & Rotenberg, supra note 8, at 100.

11. House Committee on Government Operations, Search Warrants and the Effects of the Stanford Daily Decision, H. Rep. No. 95-1521 at 4, (95th Cong. 2d Sess., 1978); Tiffany, McIntyre & Rotenberg, supra note 8, at 119-120; National Center for State Courts, Virginia Court Organization Study, Chap. II, at 16 (1979), quoting from the Magistrate Utilization Study, an internal report of the Office of the Executive Secretary of the Supreme Court of Virginia, at B-3.

12. Tiffany, McIntyre & Rotenberg, supra note 8, at 120.

13. See W. LaFave, supra note 2, at 35-37 (1978); see also, Shadwick v. City of Tampa, 407 U.S. 345 (1972).

14. Krantz, et al., supra note 8, at 109.

15. Id., at 110.

16. See e.g., Steagald v. United States, 451 U.S. 204, 225 (Rehnquist, J. dissenting); Robbins v. California, 453 U.S. 420 (1981) (Rehnquist, J. dissenting).

17. The full report also includes sections that explore the possible adverse consequences of the search warrant requirement, decribe the search warrant process from the perspective of police officers, prosecutors and judges, and outline the statutory provisions governing search warrants in each of the fifty states and the District of Columbia.

18. Border City is the hub of a rapidly growing metropolitan area in the southwestern United States. Forest City is a western industrial and commercial center. Harbor City is a major eastern industrial city. Hill City is part of a major West Coast metropolitan area. Mountain City is the commercial, cultural and political hub of a western state. Both Plains City and River Cities are major regional commercial and transportation centers. Plains City lies in the central part of the country, and River City in the southern U.S.

19. It is important to recall the caveat issued earlier. The archival data were used principally to facilitate the exploration of significant patterns or the conspicuous absence of certain events (e.g., successful suppression motions), and to be modestly demonstrative of overarching patterns. Owing to the fact that the cities used in this study are not necessarily representative of all cities and that the cases included in each city sample were not selected in strictly random fashion, statistical reliability of the archival data is not claimed. They remain highly valuable, however, in conjunction with the other sources of data reported here.

20. Krantz, et al., supra note 8, at 99-113.

21. Tiffany, et al., supra note 8, at 100.

22. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The Schneckloth decision applies the "totality of the circumstances" test to assessing the voluntariness of a consent. Id., at 248-249. Some jurisdictions impose a higher standard of proof when a search is conducted by consent, than when a search is conducted pursuant to a warrant. See e.g., Military Rules of Evidence 314(e)(5).

23. See Ker v. California, 374 U.S. 23 (1963).

24. At least one state expressly makes prosecutorial screening an option in its rules of criminal procedure. Pennsylvania Rule of Criminal Procedure 2002A.

25. E.g., In River City, the one magistrate who is on duty during weekday working hours reviewed 45 percent of the applications, and in Plains City, 50 percent of the search warrant applications were reviewed by the two magistrates whose courtrooms were next to police headquarters.

26. E.g., The magistrate who received the most applications in Forest City commented that his/her home was close to a convenient freeway exit, but also acknowledged that he/she had rejected only one search warrant application in more than a decade and a half as a judge.

27. In River City, the reviewing magistrate asked at least one question in 48 of the 84 observed cases (57 percent). Of the eleven transcripts of telephonic applications examined in Border City, ten contained questions asked by the judge (91 percent).

28. Confidential informants were used in over 70% of the drug-related warrants in six of the seven cities studied.

29. Specifically, 21% of the Harbor City warrants, 17% of those in Hill City, and 12% of the search warrants were not executed for five or more days after issuance. In contrast, 96% of the search warrants in Plains City and 94% of those in Forest City were served within 48 hours.

30. The exception was River City in which 83 percent of the search warrants led to the filing of criminal charges. We have no ready explanation of the high percentage of charges filed in River City. It may be the result of having had a field researcher on-site with sufficient time to dig out the filed cases or, as is more likely, of the apparent failure of police officers to file a return when execution of the warrant did not result in a seizure.

31. This is in accord with a recent NIJ study of California data which found that fewer than eight-tenths of one percent of all felony arrests were rejected by the district attorney because of a search and seizure problem. The study did not reveal how many of these cases involved search warrants. Melnicoe, S., Schmidt, A., McKay, L., and Martorana, C., The Effects of the Exclusionary Rule: A Study in California (1982).) See also, Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 American Bar Foundation Research Journal 611 (1984).

32. Steagald v. United States 451 U.S. 204, 213 (1981); accord Texas v. Brown, ___ U.S. ___, 103 S. Ct. 1535, 1546 (1983)(Stevens, J. concurring).

33. Shadwick v. City of Tampa, 407 U.S. 345 (1972).

34. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

35. See Davies, Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal, 1982 American Bar Foundation Research Journal 543, 628 (1982) for a comparable view by an appellate judge. See also Brinegar v. United States 338 U.S. 160, 183 (1949) (Jackson, J. dissenting).

36. The records of misdemeanor filings were not kept at a central facility in Harbor City. Instead, they were housed in courthouses scattered throughout the city. Because of our limited time on site, we were not able to examine these records.

37. Illinois v. Gates, ___ U.S. ___, 103 S. Ct. 2317, 2328 (1983).

38. BLACK'S LAW DICTIONARY, 1365 (4th ed. 1968); see also Brinegar v. United States, 388 U.S. 160, 175 (1949).

39. Illinois v. Gates, ___ U.S. ___, 103 S. Ct. 2317, 2332 (1983).

40. Giordenello v. United States, 357 U.S. 480, 486 (1958).

41. Illinois v. Gates, ___ U.S. ___, 103 S. Ct. 2317, 2333 (1983).

42. United States v. Ventresca, 380 U.S. 102 (1965).

43. E.g., In Border City, it was common for warrants to search a drug dealer's residence to include a recitation that "dealers are known to accept stolen property in exchange for the drugs they sell."

44. E.g., "I also know [being an officer with __ years of experience in narcotics investigations and responsible for no less than __ arrests for drug-related offenses] that those who sell narcotics are frequently users of narcotics and other drugs and will commonly have narcotics and other controlled substances on hand to maintain the confidence of their customers and to satisfy their own habits."

"My experience indicates that persons who deal in stolen property often keep it around for weeks or months, frequently keeping it for their own use, or waiting for a safe time to move it."

45. In another city, nearly every search warrant affidavit involving statements of a confidential informant recited:

The informant has given me information in the past that drugs were to be found at specified locations and on specified persons. I subsequently investigated those locations and persons and determined the information was correct in all respects. Information provided by this informant has resulted in at least __ [usually in increments of 5] arrests and the recovery of contraband. Informant has never given false or misleading information, nor have I been given reason to doubt informant's ability to identify controlled substances, including [fill in drugs]. Informant has previously identified [fill in drugs] in my presence. I know informant to be familiar with methods of packaging, consumption, and transfer of [fill in drugs].

46. Many, though not all of the judges with whom we spoke, denied that they ever gave affidavits a cursory reading. Many of the police officers we interviewed, however, believed that judges often skim affidavits in routine cases such as researches for drugs and seizure of pornographic films.

47. In Border City, this practice is strictly forbidden.

48. The New Orleans Times-Picayune, June 12, 1982; Section 1, p. 15. The officer subsequently pleaded guilty to perjury. See also People vs. Garcia, 109 Ill. App. 3d 142, 440 N.E.2d 269 (1982), cert. denied, ___ U.S. ___, 103 S. Ct. 1433 (1982), and United States v. Cortina, 630 F.2d 1207 (7th Cir. 1980).

49. Id.

50. Cf. Fyfe, Don't Loosen Curbs on Cop Searches, The Washington Post, Feb. 27, 1983, at B1.

51. Times-Picayune, supra note 48.

52. Steele v. United States, 267 U.S. 498, 503 (1925).

53. See e.g. State v. Clark, 281 N.W.2d 412, 417 (S.D. 1979) (Henderson, J. concurring). But see e.g., Gonzales v. State 577 S.W.2d 226 (Tex. Crim. 1979), cert. den. 444 U.S. 853 (1979); People v. Schmidt, 172 Colo. 285, 473 P.2d 698 (1970).

54. See e.g., Andresen v. Maryland, 427 U.S. 463 (1976); State v. Kealoha, 62 Haw. 166, 613 P.2d 645 (1980); but see e.g., State v. Legas, 20 Wash. App. 535, 581 P.2d 172 (1978).

55. In most states, prior approval for such entries is not required. Executing officers are authorized to make an unannounced entry if notice would endanger the officers or lead to destruction of the items sought.

56. The transcripts of telephonic applications often contained more information than written affidavits in similar cases. Furthermore, the quality (i.e., relevance and completeness) of the information was also quite good, compared to written applications. We are pursuaded that this is due largely to two factors. First, it is easier and faster to verbalize than to write all the information a judge might deem necessary for a finding of probable cause. Second--in Border City, at least--the information provided is very carefully and efficiently solicited by prosecutors, who know both what the judge needs to hear and how to interrogate a witness to elicit that information.

57. In addition, clerical help for the officer should be available. One way in which such help can be offered during evening hours--especially in those police departments in which the bulk of the search warrant applications are prepared at headquarters rather than at outlying stations--is to change the duty hours of one or more clerk-typists from 9:00 a.m. - 5:00 p.m., to 3:00 p.m. - 11:00 p.m. or to hire a number of part-time clerk typists to cover the evening shift and peak weekend hours. Obviously, such clerk typists will not be working on search and arrest warrant applications on a full-time basis each night, but there is usually more than enough other paperwork to keep them occupied.

58. See e.g., Skolnick, supra note 8.

59. Resolving other questions involving the integrity of the search warrant review process will require additional information to be collected. For example, the recording of information on rejected applications could be used to explore the consequences of rejection--e.g., is the rejected application simply taken, as is, to another judge, is information added before it is resubmitted, is the investigation abandoned, or is the search conducted without a warrant? Such questions are central to our concerns about the operation and consequences of the search warrant process. Their answers could work directly to improve

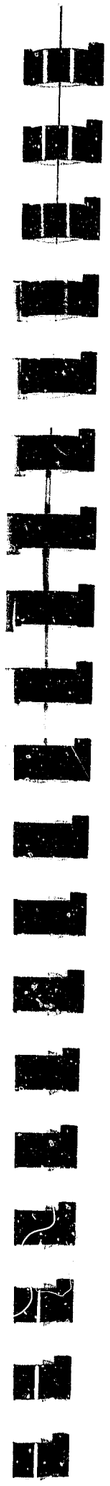
officer training in the preparation and use of search warrants and eventually, perhaps, to enhance the quality of the review, itself.

60. Although the exclusionary rule and the increasingly discussed "good faith" or "reasonable mistake" exception to it were not the primary focus of our research, the significant attention these issues have received requires us to address them briefly insofar as our research allows. The good faith exception to the exclusionary rule would permit the introduction of evidence illegally seized by police officers if a court finds that they had a reasonable good faith belief that they were acting in conformity with the law. (See e.g., United States v. Williams, 622 F.2d 830, 840-846 (5th Cir. 1980); United States Department of Justice, Report of the Task Force on Violent Crime, Recommendation 40 (1981), Colorado Revised Statute §16-3-3-8 (Supp. 1983).

Most of the police officers with whom we spoke felt that a good faith exception would make little different or would be helpful primarily in preventing innocuous typographical errors from invalidating a warrant. Judges, prosecutors, and defense attorneys had mixed views of the impact of a good faith exception. One cautious prosecutor, for example, reminded us that some officers are "prone to violate rights," a tendency that is not only not deferred by the exclusionary rule, but one that might very well be fostered by the proposed good faith exception to it. Others suggested that such an exception might diminish the quality of police work, suggesting that the current low levels of application rejections and successful suppression motions are, in part, due to police having learned to carry out their duties within the bounds of the Fourth Amendment.

Several judges and prosecutors further suggested that it would be very difficult to define precisely when good faith would be appropriate to consider, especially when confidential informants were involved. Others, including some defense attorneys, suggested the exception would require even more intense cross-examination of police officers during suppression hearings, by subjecting their good faith to direct attack by the defense. On the other hand, several defense attorneys did not revel in the prospect of challenging officers' good faith, suggesting it would be an impossible issue to litigate successfully.

Our data showed that, as the law is now, relatively few search warrants are ever challenged, only a tiny percentage of challenges are successful, and only a fraction of the successful challenges result in the loss of a case. In fact, many of the interviewed police officers who were most involved in the warrant process could not remember the last time



they--or a close associate--were involved in a case in which a motion to suppress was granted or a prosecution dismissed because of a faulty warrant.

Given the infrequency and inconsequence of challenges to searches conducted pursuant to a warrant, the mixed reviews, the apparent cursory nature of the review of many warrant applications, and the existence of caselaw that permits courts to overlook the most likely types of errors to be covered by a broad good faith exception (see La Fave, W.) supra note 2, at §4.5; Franks v. Delaware, 438 U.S. 154 (1978)), there appears to be little need for and wisdom in a new good faith exception to the exclusionary rule.

61. Steagald v. United States, 451 U.S. 204, 222 (1981).

END