The Complete Search Warrant, Annotated

Consolidated Edition

By

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NEW YORK STATE UNIFIED COURT SYSTEM

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ABOUT THE AUTHOR

A graduate of the University of Pennsylvania and Harvard Law School, Albert M. Rosenblatt is a Judge on the New York Court of Appeals and former Chief Administrative Judge of New York State. Before that, he had been Dutchess County's District Attorney and then served on the County Court, Supreme Court, and Appellate Division, Second Department. He has written on a variety of legal and popular topics.

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PREFACE

"Where is your warrant?"

This question has been asked countless times, but rarely with more drama than in "The Disappearance of Lady Frances Carfax," a Sherlock Holmes adventure. The villain, a bogus preacher named Holy Peters, was unlawfully secreting his victim and Holmes demanded entry. On his side, the great detective had only justice and a revolver. Where was the warrant? Holmes half drew the revolver from his pocket and replied, "This will have to serve till a better one comes," Holmes explained.

The approach worked well for Sherlock Holmes but will not do for American law enforcement officials. A revolver can be as effective as a warrant, and may even produce prompter compliance, but given the exclusionary rule, it would be uneconomical to trade in this modest volume for a Colt .45.

This is the most recent incarnation of a work that I wrote as a prosecutor in 1973. Much has happened over the ensuing 31 years. The cases (not to mention the writer) have grown older but the inventory has been replenished several times over, and so what began as a 44 page work has grown to 120 pages. In 1973 the piece was published by the New York State District Attorneys' Association, under the able aegis of Richard L. Friedman. I updated the work for a few years, with the help of the Bureau of Prosecution and Defense Services, expertly directed by Bill Dowling and Michael Gross. 1997 saw a revised edition, and so the work stood until this past year.

In preparing it, I relied not only on the abundant body of decisional law but on a number of publications, particularly the excellent treatises by Judge William C. Donnino (*New York Court of Appeals on Criminal Law*), Barry Kamin's book on New York Search and Seizure, and Wayne R. LaFave's Search and Seizure volumes. In addition, and with their eagle eyes, Judge Donnino and Judge Steven W. Fisher read the manuscript and made a number of valuable suggestions that I have included in the text.

At a judicial training event at our Pace Law School facility, Judge Juanita Bing Newton generously commented

that the work was still on its feet (although a bit wobbly with age, I submit), and that her office would publish a new version. She offered to have her staff collate the earlier editions and their supplements. This took not only astute computers but the energy and creativity of Justin Barry, who designed the program for the table of contents and more, Ellen Magid who diligently helped stitch together all the previous editions, and Janine Zanin, who aided immeasurably in updating the version immediately preceding this one. I thank them all for their valued contributions, along with Lisa DellAquila, and Justin Long for their helpful comments.

ALBERT M. ROSENBLATT

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AFFIDAVIT FOR SEARCH WARRANT

SUPREME COURT (COUNTY COURT)[1]

(CRIMINAL COURT OF THE CITY OF NEW YORK)

(DISTRICT COURT), (CITY COURT)

(TOWN COURT), (VILLAGE COURT)

(VILLAGE) (TOWN) (CITY) OF _____

COUNTY OF _____

STATE OF NEW YORK

Hon. _____, issuing Judge (Justice)

IN THE MATTER OF THE APPLICATION OF

(NAME)_____ of the _____(Agency)_____

_____

for a

search warrant to search the following premises.[2]

(Describe the structure and it components, e.g.: #2F; the ground floor of a two family dwelling; a barn, a garage, etc.)[3] _____

_____

_____

located at (give address, as specifically as possible): _____

_____

_____

in the (city) (town) (village) of _____

County of _____, State of New York.

IF APPLICABLE:

and the following vehicle (aircraft, boat, etc.)[4] _____

_____

IF APPLICABLE:

and the person(s) of [5] _____

wherever (he) (she) (they) be found.[6]

IF APPLICABLE:

and pursuant to CPL 690.15 (2), the search of any person found in the designated premises or vehicle[7] _____

_____

STATE OF NEW YORK

COUNTY OF _____

_____, being duly sworn, deposes and says that:

I am the applicant herein,[8] a public servant[9] of the kind specified in CPL Section §690.05(1), my title being _____

_____

There is reasonable cause[10] to believe that certain property, hereinafter described, (may be found at) (will within the next _____ [hours] [days] be arriving at)[11] the following premises[12] _____

_____

_____

_____and (if applicable) upon the person of _____

_____

_____

_____

_____

and (if applicable) in the vehicle of _____

_____

being (describe vehicle as explicitly as possible) _____

_____

_____

The property referred to sought to be seized is:[13]

(a) stolen[14] property, consisting of[15a] (identify as explicitly as possible):_____

_____

_____

_____

(b) property, unlawfully possessed,[15b] to wit (identify as explicitly as possible):

(c) property that has been used (and/or) is possessed for the purpose of being used to commit an offense (or to conceal the commission of an offense[15c]), to wit (identify property as explicitly as possible):

(d) property constituting evidence of crime,[16] tending to demonstrate that an offense was committed, to wit (describe the property constituting evidence and how it demonstrates the commission of an offense):

(e) property tending to demonstrate that (NAME)

participated in the commission of the offense of _____

_____

_____, to wit[17] (describe the property and how it connects the target with the offense): _____

_____

_____

_____

_____

_____

_____

_____

If applicable (FOR USE IN ARREST WARRANT CASES): There is reasonable cause to believe that _____ (name of person) for whom the attached arrest warrant has been issued (CPL 690.05 [2] [b]) may be found at _____ _____.

In support of your deponent's assertion as to the existence of reasonable cause, the following facts are offered,[18] based on your deponent's personal knowledge[19] as attested to by your deponent (and by the supporting affidavits of others who have personal knowledge).

> Set forth, as explicitly as possible, the supporting facts, using dates, places, names, and the source(s) of the deponent's personal knowledge. This paragraph is to be used in cases where the facts are being supplied by the applicant-deponent, supplemented, if necessary, by the affidavits of others who have personal knowledge. (CPL 690.35. [3] [c])

_____

IF RELYING ON A CONFIDENTIAL INFORMANT ALLEGE AS FOLLOWS

The source of my information is the following:

I have received information from a reliable confidential informant, that (specify the facts, using names, dates,[20] and places[21] to the extent feasible, spelling out the information being furnished by the confidential informant): _____

The informant is known to me to be reliable because:[22] _____

(Establish history)_____

The information conveyed to me by the informant is based on the informant's personal knowledge and direct observations, to wit[23] (relate what the informant claims to have actually seen or heard, and what the informant asserts based on first-hand knowledge and observations. If the informant is not speaking from first-hand knowledge, the applicant must set forth the basis for the informant's knowledge and assertions, along with reasons to satisfy the court that the informant's assertions are reliable – in addition to the informant himself/herself being reliable. See footnote 22): _____

IF APPROPRIATE

Moreover, members of this department, including your deponent, have independently confirmed the confidential informant's assertions in the following respect, and to the following degree:[24]

IF APPROPRIATE

Furthermore, the informant's assertions are reliable because they represent declarations against penal interest.[25]

IF THE INFORMANT IS WILLING, THE FOLLOWING

SHOULD BE DONE, AND ALLEGED:

The confidential informant, though undisclosed by name, is now being produced before this court,[26] in order that the informant may, under oath, furnish the court with evidence in support of this search warrant. The informant is amenable to any questioning the court deems necessary for purposes of issuing this warrant. I request that questioning be recorded under the court's authority, in the court's own notes, or by use of a stenographer[27] or tape recorder, with the record to be sealed by the court, until further order of a court having jurisdiction to order disclosure.

IF FACTS ARE FURNISHED BY A "CITIZEN" WHO WANTS

ANONYMITY (AS OPPOSED TO A RELIABLE CONFIDENTIAL

"POLICE" INFORMANT) ALLEGE AS FOLLOWS:

I have received information from an individual who is not a regular police informant but an ordinary citizen who, owing to fear of involvement or reprisal, wishes to remain anonymous (or, if not, name the person). The individual told me the following (relate what the citizen

claims to have actually seen or heard, and what the citizen asserts, based on first hand knowledge and observations[28]): _____

This individual is known to me to be reliable, because:[29] _____

IF APPROPRIATE

Moreover, members of this department, including your deponent, have independently confirmed the veracity of the individual's assertions in the following respects, and to the following degree: _____

_____

_____

_____

_____

_____

_____

_____

_____

IF APPROPRIATE

Additional grounds exist establishing reasonable cause, namely, the prior criminal record of the individual (who) (whose premises) (whose car) is (are) to be searched. The prior criminal record consists of the following:[30] _____

_____

_____

_____

_____

_____

_____

Based on CPL 690.35 (4) (a), I request a determination pursuant to CPL Section 690.40(2) that the search warrant contain an authorization for execution at any time of the day or night,[31] on the ground that there is reasonable cause to believe that:

(a) It cannot be executed between 6:00 A.M. and 9:00 P.M. because (set forth the

reasons, based on facts) _____

_____

_____

_____

_____

_____

AND/OR

(b) The property sought will be removed or destroyed if not seized forthwith, because (set forth reasons, based on facts) _____

_____

_____

_____

_____

_____

_____

(c) [For use in arrest warrant cases (CPL 690.05 [2] [b])]: The person is likely to flee or commit another crime or may endanger the safety of the executing police officer or another person if not seized forthwith or between the hours of 9:00 P.M. and 6:00A.M. _____

_____

_____

_____

_____

_____

Based on CPL 690.35 (4) (b), I request a determination pursuant to CPL Section 690.40(2) that the executing officer(s) be authorized to enter the premises to be searched without giving notice of authority or purpose,[32] on the ground that there is reasonable cause to

believe that

(a) the property sought may be easily and quickly destroyed or disposed of (set forth facts in support of this belief) _____

_____

_____

_____

_____ and/or

(b) such notice may endanger the life or safety of the executing police officer or another person (set forth facts in support of this belief): _____

_____

_____

_____

_____

_____

_____

Or

(c) [For use in arrest warrant cases (CPL 690.05 [2] [b])]: The person sought is likely to commit another felony or may endanger the life or safety of the executing officer or another person

Wherefore, your deponent requests that the court issue a search warrant directing a search for and seizure of[33] the following property or (if searching for a person pursuant to CPL 690.05 [2] [b]), the following person[34] _____

_____

Dated: _____

_____, New York

_____[35]

(Deponent)

Approved by:

_____

DISTRICT ATTORNEY'S OFFICE *(not necessary but advisable*)

Sworn to before me this _____

day of _____, 20_____

_____[36]

Judge (Justice) of the_____Court,

County of _____, State of New York.

SEARCH WARRANT

1. SUPREME COURT (COUNTY COURT)[37]

   (CRIMINAL COURT OF THE CITY OF NEW YORK)

   (DISTRICT COURT), (CITY COURT)

   (TOWN COURT), (VILLAGE COURT)

   (VILLAGE) (TOWN) (CITY) OF _____

   COUNTY OF _____

   STATE OF NEW YORK

   Hon. _____, issuing Judge (Justice)

2. To any police officer of the _____

   _____ Department[38]

3. You are hereby authorized and directed[39] to search for and to seize the following property[40] : _____

   _____

   _____

   _____

   _____

   _____

   _____

   or (if the search warrant is based on an arrest warrant pursuant to CPL 690.05 [2] [b]), the following person:_____

4 (a) If applicable: (if inapplicable, strike the following paragraph)

   You are authorized and directed to search the following premises[41] : _____

   _____

_____

_____

_____

_____

4 (b) If applicable: (if inapplicable, strike the following paragraph)

You are authorized and directed to search the following named or described person(s): _____

_____

_____

_____

4 (c) If applicable: (if inapplicable, strike the following paragraph)

You are authorized and directed to search the following vehicle: _____

_____

_____

_____

4 (d) If applicable: (if inapplicable, strike the following paragraph)

This court having authorized the search of the designated premises, further directs, pursuant to CPL §690.15 (2), the search of any person present thereat or therein.[42]

5. Pursuant to CPL 690.45 (6), this warrant must be executed between 6:00 A.M. and 9:00 P.M. or,

6. For anytime/nighttime warrant

If sought and supported factually, strike the above 6:00 A.M. to 9:00 P.M. clause, and replace it with the following: This court hereby specially determines that adequate grounds exist for authorizing the search to be made at any time of the day or night, and pursuant to CPL 690.45 (6) the court so directs.

7. **For no-knock warrant**

If sought and supported factually, include the following clause for no-knock warrant; if not, strike it. This court hereby specially determines that adequate grounds exist and pursuant to CPL 690.45 (7) authorizes any executing police officer to enter the premises to be searched without giving notice of the officer's authority and purpose.

8. This warrant must be executed not more than 10 days[43] after the date of its issuance and any property seized shall be returned and delivered to the court without unnecessary delay.[44]

9. (If appropriate): Having heard and recorded the testimony of the confidential informant, the court orders the record of that testimony sealed until further court order.

Dated: _____[45]

_____, N.Y.

_____[46]

Judge (Justice) of the _____ Court,

_____ County, New York

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FOOTNOTE 1

PROPER COURT TO ISSUE WARRANT

The application must contain the name of the court (CPL 690.35 [3] [a]). Search warrants are issuable by local criminal courts (CPL 690.35 [2] [a]). A superior court (a supreme court or a county court) may issue a search warrant, but when those courts do so they sit as "local criminal courts" (CPL 690.20 [1]; CPL 10.10 [1], [2]). Under CPL 690.20 (1), a search warrant of the Supreme Court, County Court, District Court, or the New York City Criminal Court may be executed anywhere in the State.

The language authorizing "a local criminal court" to issue a search warrant comports with CPL 10.10 (3) (f) and (g), which contemplates supreme court justices or county court judges sitting as local criminal courts. The New York City criminal court is a local criminal court (CPL 10.10 [3] [b]), as is any district court (CPL 10.10 [3] [a]). Thus, in *People v Carson* (216 AD2d 965 [4th Dept 1995]), the appellate division upheld a search warrant issued by the county court sitting as a local criminal court even though the warrant did not say so. In *People v Johnson* (165 Misc 2d 227 [Rochester City Ct 1995]), the court invalidated a search warrant (issued by a county judge) because it did not indicate that the court was sitting as a local criminal court. This decision was rejected, correctly, in *People v Rhoades* (166 Misc 2d 979 [Sup Ct, Monroe County 1995]).

City courts, town courts and village courts are local criminal courts (CPL 10.10 [3]) and hence are authorized to issue search warrants, but the warrants may be executed pursuant to their terms “only in the county of issuance or an adjoining county” (CPL 690.20 [2]). There is a bit of history here. In 1976, the Court of Appeals held that a town court or

justice court may not issue a search warrant unless it has geographic (though not necessarily trial) jurisdiction (*see e.g. People v Hickey*, 40 NY2d 761, 762-63 [1976] [the Town Justice of Orchard Park lacked jurisdiction to issue a search warrant for narcotics directed at an apartment in the city of Buffalo since the offense was not committed in Orchard Park, the geographic jurisdiction of the Town Justice]). By contrast, see *People v Johnson* (44 AD2d 451 [1st Dept 1974], *affd* 36 NY2d 864 [1975]) in which the Court held that a district court may issue a search warrant to be executed anywhere in the State (CPL 690.20[1]) and that a warrant issued by a Suffolk County district court judge authorizing a search in Bronx County for the proceeds of a Suffolk County jewelry store robbery was lawful, notwithstanding that it uncovered evidence of a crime in Bronx County (criminal possession of stolen property). See also *People v Herrara* (112 AD2d 315 [2d Dept 1985]) in which a search warrant, executed in Nassau County, was issued by a Suffolk County District Court. The affidavits did not contain a specific allegation that crimes had been committed in Suffolk County. The seizure was upheld on the ground that it could be inferred that crimes were allegedly committed in Suffolk County because the police applicant and assistant district attorney were both Suffolk officials.

In the aftermath of *Hickey*, the legislature amended CPL 690.35 in 1992 to broaden the choice of courts empowered to issue search warrants (L 1992, ch 815, 816). The application may now be made to any judge having geographic jurisdiction or "preliminary jurisdiction" over the underlying offense (CPL 690.35 [2] [a]; *see also* CPL 1.20 [25] [defining preliminary jurisdiction] and CPL 100.55).

Further, by way of alternative and given the road map of CPL 690.35 (2) (a) (i), if a town court *has* such preliminary or geographical jurisdiction, but is not available, the

warrant may be issued by the local criminal court judge in:

(1) any village within such town, or

(2) any adjoining town or village embraced in whole or in part by such adjoining town, or

(4) a city of the same county.

Thus, if a crime is committed, for example, in Westchester County and a search is justified for a location in the Town of Tonowanda in Erie County, a Tonowanda town court would be authorized to issue the search warrant (*see generally* Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 690.35, at 379). Accordingly, the City Court of Newburgh (Orange County) had jurisdiction to issue a warrant to search the defendant's premises in the Town of New Windsor (Orange County) where the underlying illegal drug activity described in the warrant application occurred in the Town of New Windsor (*People v Chrysler*, 287 AD2d 7 [2d Dept 2001], *citing People v Fishman*, 40 NY2d 858 [1976]; *see also* Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 690.35, at 379, 2004 Supp Pamph, at 131).

In *People v Cobb* (5 AD3d 790 [2d Dept 2004]), the court held that a Pleasant Valley (Dutchess County) Town Justice had authority to issue a search warrant for a search in the Town of LaGrange (Dutchess County) in a case in which the application alleged that the defendant committed class B felonies in the Town of LaGrange. The Court rejected the defendant’s contention that the issuing court lacked preliminary jurisdiction, holding that CPL 100.55 (6) gives every town court within a county preliminary jurisdiction over a felony committed in any town in the county. The Court went on to hold that the Town Justice had authority to issue the search warrant even though he was not within his geographic

jurisdiction at the time (*citing United States v Strother*, 578 F2d 397 [DC Cir 1978]).

CPL 690.10 (3) and (4) were amended in 1994 to make it clear that New York courts may issue search warrants for property relevant to out-of-state crimes.

A search warrant application must contain the name of the court (CPL 690.35 [3] [a]), but in *People v Pizzuto* (101 AD2d 1024 [4th Dept 1984]), the court stated that the failure of judge to fill in the space at the top of the search warrant, intended for the designation of the court, was a technical and non-fatal omission where it was elsewhere identified (*see also People v Smythe*, 172 AD2d 1028 [4th Dept 1991]).

An issuing judge was not disqualified from acting as suppression motion judge (*People v McCann*, 85 NY2d 951 [1995]; *cf. Pierce v Delameter*, 1 NY 3 [1847]).

After a judge declined to sign a search warrant, the applicant was free to go to another judge. The first judge's refusal was not the law of the case (*People v Bilsky*, 95 NY2d 172 [2000]).

See generally Annotation, *Requirement, Under Federal Constitution, That Person Issuing Warrant for Arrest or Search Be Neutral and Detached Magistrate – Supreme Court Cases*, 32 L Ed 2d 970 (2004).

FOOTNOTE 2

AUTHORIZING SEARCH OF MORE THAN ONE PERSON,

PLACE, OR VEHICLE

A court may issue a search warrant for a designated premises, vehicle, or person (CPL 690.05 [2] [a]; 690.15 [1]). Accordingly, a search warrant may cover more than one

entity, provided there is reasonable cause for each (*People v Tambe*, 71 NY2d 492 [1988]; *People v Vanderpool*, 217 AD2d 716 [3d Dept 1995]; *see also* Annotation, *Propriety and Legality of Issuing Only One Search Warrant to Search More Than One Place or Premises Occupied by Same Person*, 31 ALR2d 864).

In *People v De Sivo* (194 AD2d 935 [3d Dept 1993]), the facts justified a search warrant for defendant's trailer, outbuildings, and vehicle. A search of two residences was upheld in *People v Alaxanian* (76 AD2d 187 [3d Dept 1980], *affd sub nom People v Lanier*, 54 NY2d 725 [1981]). A search warrant authorizing the search of defendant's *house* justified a search of his car (trunk) which was parked at the premises (*see People v Powers*, 173 AD2d 886 [3d Dept 1991]; *United States v Ross,* 456 US 798 [1982]).

In *People v Cahill* (2 NY3d 14 [2003]), a search of defendant's shed was justified because the warrant was explicitly identified as an addendum to a warrant issued three days earlier which permitted searches in the defendant's home or "within any unattached garage or storage shed."

A search warrant that did not specifically authorize the search of an automobile could not be used to search a car that was driven into the driveway of the house specified in the *warrant* (*see People v Dumper,* 28 NY2d 296, 299 [1971]; *but see United States v Combs*, 468 F2d 1390 [6th Cir 1972], *cert denied* 411 US 948 [1973] [valid seizure of a gun from defendant's car, under a warrant for his house, on the theory that the car was "on the premises" situated close enough to the house to be within its curtilage]).

Curtilage: This term is defined (according to *Webster*) in *People v Reynolds* (71 NY2d 552 [1988]) as "a yard, a garden, enclosure, or field near or belonging to a building." In areas outside the curtilage, an owner of open fields enjoys no fourth amendment

protection (*see Oliver v United States*, 466 US 170 [1984]), but state constitutional law will require a search warrant where the owner posts signs signifying an expectation of privacy (*see People v Scott*, 79 NY2d 474 [1992]).

Courts have allowed some flexibility in sustaining searches executed within the "curtilage" of the premises when the search warrant does not name the curtilage area as an area to be searched (*see generally* 2 LaFave, Search and Seizure, § 4.10 [a] [3d ed]; *United States v Dunn*, 480 US 294 [1987]). Curtilage searches were upheld as within the search warrant in *United States v Earls* (42 F3d 1321 [10th Cir 1994] [outbuildings]; *United States v Griffin*, 827 F2d 1108 [7th Cir 1987] [tool shed]; *People v Davis*, 146 AD2d 942 [3d Dept 1989] [tool shed]; *United States v Frazin*, 780 F2d 1461 [9th Cir 1986] [garage]). But there are limits. A search warrant for a first floor apartment in a 20-unit building did not authorize a search of the basement (*see United States v King*, 227 F3d 732 [6th Cir 2000]). These issues may sometimes be averted by specific language in the application and warrant particularizing the outbuildings (*see e.g. State v Pelletier*, 673 A2d 1327 [Me 1996]; *see generally* Annotation, *Search Warrant: Sufficiency of Description of Apartment or Room to be Searched in Multi-Occupancy Structure*, 11 ALR3d 1330).

Severability: When reasonable cause exists with respect to one premises or person, but not another, the warrants, as severable, have been sustained as to the reasonable cause segment (*People v Hansen*, 38 NY2d 17 [1975]; *see also People v Brown*, 96 NY2d 80 [2001]; *People v Robinson*, 68 NY2d 541 [1986]; *People v Scavone*, 59 AD2d 62 [3d Dept 1977]; *People v Hines*, 62 AD2d 1067 [3d Dept 1978]; *People v Nyemczycki*, 67 AD2d 442 [2d Dept 1979]. *See generally* Annotation, *Propriety in State Prosecution of Severance of Partially Valid Search Warrant*, 32 ALR 4th 378, § 6;

Annotation, *Propriety in Federal Prosecution of Severance of Partially Valid Search Warrant and Limitation of Suppression to Items Seized Under Invalid Portions of Warrant*, 69 A.LR Fed 522 (2003).

FOOTNOTE 3

PRECISENESS OF DESCRIPTION OF PREMISES -- MISDESCRIPTION

The premises named in the search warrant should be particularly identified. For example, a search warrant directing a search of a "building," was struck down as overbroad when the police knew or should have known that it contained more than one apartment (*see People v Rainey*, 14 NY2d 35 [1964]; *People v Henley*, 135 AD2d 1136 [4th Dept 1987]; *People v Sprague*, 47 AD2d 510 [3d Dept 1975] [wrong building]; *People v Sciacca*, 45 NY2d 122 [1978] [evidence of crime seized from van must be suppressed where the van was in garage when searched since search warrant authorized only search of van but not garage]).

By contrast, see *People v Teicher* (52 NY2d 638 [1981] [upholding execution of a search warrant authorizing videotaping of a dentist's sexual abuse of patients, although warrant stated that camera was to be placed in one examining room, and was actually placed in another]), *People v Horton (*32 AD2d 707 [3d Dept 1969] [search valid though it encompassed room not found in warrant; defendant rented the room, which was adjacent to his apartment, the subject of the search warrant]), and *People v Salgado (*57 NY2d 662 [1982] [erroneous designation of apartment to be searched as number 25J instead of number 25C held immaterial where informant accompanied police to apartment, was admitted by occupant, and confirmed that occupant was person referred to in warrant;

before search was conducted, warrant was amended to state correct designation of apartment]). S*ee also People v Hammock* (182 AD2d 1114 [4th Dept 1992] [no hearing necessary to deal with alteration of address in search warrant intended to encompass entire premises]).

In *People v Tramell* (152 AD2d 989 [4th Dept 1989]), the Court held that the description in the search warrant, when read with the affidavit, sufficiently delineated the area to be searched, as against defendant's claim of "overbreadth" *(see also People v De Lago*, 16 NY2d 289 [1965]; *Maryland v Garrison*, 480 US 79 [1987] [upholding the seizure of contraband where police believed there was only one apartment at the named location but where there were actually two]).

Warrants were upheld when the description (of the premises identified in the search warrant) enables the officers with reasonable effort to ascertain and identify the place to be searched – even if the warrant contains a partial misdescription (*see People v Graham*, 220 AD2d 769 [2d Dept 1995]; *People v Rodriguez*, 254 AD2d 95 [1st Dept 1998]; *People v Davis*, 146 AD2d 942 [3d Dept 1989]).

An inconsequential misdescription did not invalidate a search warrant when there was no possibility that the wrong premises would be searched (*People v Eldridge*, 173 AD2d 975 [3d Dept 1991]). Nor was slight misdescription of the name of the premises' occupant fatal in *People v Earl* (138 AD2d 839 [3d Dept 1988]; *see also People v Graham*, 220 AD2d 769 [2d Dept 1995]). In *People v Lavin* (220 AD2d 886 [3d Dept 1995]), a slight address imprecision was excused (*see also People v Chandler*, 212 AD2d 623 [2d Dept 1995]; *People v Mabrouk*, 290 AD2d 235 (1st Dept 2002); *People v Riddick*, 143 AD2d 1060 [2d Dept 1988]); and in *People v Webb* (97 AD2d 779 [2d Dept 1983]), the warrant

was upheld as against a claim of premises misdescription (*accord People v Taggart*, 51 AD2d 853 [4th Dept 1976]). The premises were substantially described and the warrants upheld in *People v Germaine* (87 AD2d 848 [2d Dept 1982]) and *People v Anderson* (291 AD2d 856 [4th Dept 2002]).

In *People v Wallace* (238 AD2d 807 [3d Dept 1997]), the court cured the warrant's insufficient description by referring to the application (*see also People v Murray*, 233 AD2d 956 [4th Dept 1996] [warrant upheld as against claim of insufficient particularity]; *People v Otero*, 177 AD2d 284 [1st Dept 1991]; *People v Bogdin*, 59 AD2d 1026 [4th Dept 1977] [accord]; *People v Harris*, 47 AD2d 385 [4th Dept 1975] [upheld as against overbreadth claim]). See Joseph G. Cook, *Requisite Particularity in Search Warrant Authorizations*, 28 Tenn L Rev 496 (1971); Annotation, *Search Warrant: Sufficiency of Description of Apartment or Room To Be Searched in Multiple-Occupancy Structure*, 11 ALR3d 1330; *see also* Annotation, *Sufficiency Under Federal Constitution's Fourth Amendment of Description in Search Warrant of Place To Be Searched or Of Person or Thing To Be Seized -- Supreme Court Cases*, 94 L Ed 2d 813; see also Annotation, *Sufficiency of description in warrant of person to be searched*, 49 ALR2d 1209.

If contraband is reportedly observed at location A, it does not follow that the warrant may validly authorize a search at location B, unless the facts support it. In *People v Pinchback* (82 NY2d 857 [1993]), they did (drug sales in street authorized search in house, owing to people traffic) (*see also People v Tambe*, 71 NY2d 492 [1988] [establishing the nexus between the location of the criminal activity and the place to be searched]).

In *People v Nibur* (113 AD2d 957 [2d Dept 1985]), the search warrant authorizing a search of an auto shop at one end of a building did not justify a search of an adjoining

shop. In *People v Santana* (154 Misc 2d 994 [Westchester County Ct 1992]), the search warrant for an entire multiple occupancy (which is to be distinguished from a multiple unit dwelling) was sustained, in that all the occupants had unlimited access to the entire premises.

A search warrant authorizing the search of defendant's *house* justified a search of his car (trunk) which was parked at the premises (*see People v Powers*, 173 AD2d 886 [3d Dept 1991]; *see also United States v Ross*, 456 US 798 [1982]). In *People v De Sivo* (194 AD2d 935 [3d Dept 1993]), the court held that in addition to authorizing a search of defendant's trailer, it was permissible to include the defendant's storage buildings and the surrounding area over which he had control. In *People v Padilla* (132 AD2d 578 [2d Dept 1987]), the court held that a search warrant for defendant's home was properly read to include a combination safe in the bedroom closet. In *People v Brito* (__ AD3d __ [4th Dept 2004]), the court sustained the search of defendant's attic which was accessible only through the upstairs apartment and therefore considered a part of it.

See generally Larry EchoHawk and Paul EchoHawk, *Curing a Search Warrant that Fails to Particularly Describe the Place To Be Searched*, 35 Idaho L Rev 1 (1998); Annotation, *What Is Within "Curtilage" of House or Other Building, So As To Be Within Protection From Unreasonable Searches and Seizures, Under Federal Constitution's Fourth Amendment — Supreme Court Cases*, 94 L Ed 2d 832; Annotation, *Error, in Either Search Warrant or Application for Warrant, As To Address of Place To Be Searched as Rendering Warrant Invalid*, 103 ALR5th 463; Annotation, *Search Warrant as Authorizing Search of Structures On Property Other Than Main House or Other Building, or Location Other Than Designated Portion of Building*, 104 ALR5th 165.

FOOTNOTE 4

VEHICLE DEFINED

A search warrant may direct the search of a described vehicle (CPL 690.15 [1] [b]). For search warrant authorization purposes, a vehicle is a motor vehicle, trailer, or semi-trailer (as defined in the Vehicle and Traffic Law), an aircraft, any vessel equipped for propulsion by mechanical means or by sail, and any snowmobile as defined in the parks and recreation law (*See* Penal Law § 10.00 [14]).

A search for "all vehicles" on the premises may be problematic *(but see United States v Gentry*, 839 F2d 1065 [5th Cir 1988]) as contrasted with specified vehicles (*see United States v Finnigin*, 113 F3d 1182 [10th Cir 1997] ["any and all vehicles driven by or registered to the owners or occupants of said trailer home"]; *see generally* 2 LaFave, Search and Seizure, §4.5[d], at 538 et seq [3d ed]; *see also* Annotation, *Sufficiency of Description in Search Warrant of Automobile or other Conveyance to be Searched*, 47 ALR2d 1444).

That the warrant application stated the vehicle was in a parking lot when in fact it had been towed to police garage was not fatal in *People v La Bombard* (99 AD2d 851 [3rd Dept 1984]).

FOOTNOTE 5

CERTAINTY OF IDENTIFICATION OF KNOWN TARGET

Where a target's name is unknown, a search may be performed if the target is identified with certainty. CPL 690.45 (5) contemplates this by allowing searches of people

or places designated by "name or any other means essential to identification with certainty." It generally falls under the heading of "John Doe" warrants. Where the targets were adequately described, the warrants have satisfied Fourth Amendment criteria (*see e.g. United States v Espinosa*, 827 F2d 604 [9th Cir 1987]; *United States v Ferrone*, 438 F2d 381 [3rd Cir 1971]); *see also* Annotation, *Sufficiency, under federal constitution's fourth amendment, of description in search warrant of place to be searched or of person or thing to be seized -- Supreme Court cases*, 94 L Ed 2d 813).

This test could be met by a photograph or adequate description, including characteristics such as height, weight, age, and the like (*People v Rawluck*, 14 NY2d 609 [1964]). That defendant's name was not known until after the execution of the search warrant did not invalidate it in *People v Germaine* (87 AD2d 848 [2d Dept 1982]; Annotation, *Sufficiency of Description in Warrant of Person to be Searched*, 43 ALR5th 1).

An error in the surname of the person named in the warrant did not invalidate the warrant where it correctly designated the defendant’s address (*People v Brooks*, 54 AD2d 333 [4th Dept 1976]).

For search warrants for corporeal evidence (blood, hair, etc.), see Discussion Item #18, *infra*. For search warrants for people sought because of arrest warrants (CPL 690.05 [2] [b]), see footnote 34.

FOOTNOTE 6

SEARCH OF PERSON WHEREVER FOUND

If the person is to be searched outside of the described premises, the warrant should say so by authorizing a search of the named target " wherever (s)he be found," and

the allegations of probable cause should include facts supporting the reasonable contention that the target, when found, will have the evidence (*see People v Darling*, 263 AD2d 61 [4th Dept 1999], *affd* 95 NY2d 530 [2000] [not necessary to specify location in county in which it is sought]).

In *People v Green* (33 NY2d 496 [1974]), the Court remanded because the warrant did not specifically authorize a search of the subject wherever found. After a further hearing, the trial court found probable cause because the informant whose information was the basis for the search warrant had observed narcotics at the premises (*see People v Green*, 80 Misc 2d 626 [Sup Ct, NY County 1975]). Although the Appellate Division reversed (51 AD2d 928 [1st Dept 1976]), the Court of Appeals found probable cause, reversed the Appellate Division decision, and remitted the case to the Appellate Division for a review of the facts (42 NY2d 1023 [1977]) (*See also People v Sanin*, 60 NY2d 575 [1983] [search of defendant in driveway upheld]).

See Discussion Item #31, *infra*, relating to search warrants for non-suspects, and Footnote 34, relating to searches for the suspect at a third person's premises, as well as Discussion Item 9, pertaining to the arrest of a suspect in a third-party's premises.

FOOTNOTE 7

SEARCH OF ANY PERSON "THEREAT OR THEREIN"

CPL 690.15 (2) provides that a search warrant directing “a search of a designated or described place, premises, or vehicle may also direct the search of any person present thereat or therein.” In some cases, provisions of this type have been held overbroad, but in others the doctrine of severability has been applied to validate the remainder. Although

a search warrant was overbroad where it gave authority to search "any other person" who might be found at defendant's apartment, this unlawful command did not vitiate the legitimate command to search the premises and person of defendant. Warrants have been held severable where the surviving portion:

1) particularly describes a discrete target of the search;

2) is justified by probable cause upon facts originally disclosed to the issuing judge; and

3) relates to a subject of investigation essential to the government's interest that justified the intrusion at its inception

(*see* severance discussion in footnote 2; *see generally People v Hansen*, 38 NY2d 17 [1975]; *People v Brown*, 96 NY2d 80 [2001]; *People v Robinson*, 68 NY2d 541 [1986]; *Andresen v Maryland*, 427 US 463 [1976]; *People v Hines*, 62 AD2d 1067 [3d Dept 1978]; *People v Scavone*, 59 AD2d 62 [3d Dept 1977]; *People v Niemczycki*, 67 AD2d 442 [2d Dept 1979] [admittedly overbroad language: "any other contraband which is unlawfully possessed" in a search warrant to search premises for marihuana, would be severed to uphold seizure of plant material pursuant to warrant that could have authorized search for drug paraphernalia, instrumentalities, and other evidence of sale and possession of drugs]). As to the searches of unnamed persons present at the scene, see *People v Nieves* (36 NY2d 396 [1975]).

In *People v Betts* (90 AD2d 641 [3d Dept 1982]), police kept an apartment under surveillance after receiving a tip that certain individuals conducted drug trafficking on the premises. Defendant argued that a failure to name her in the warrant was not cured by CPL 690.15 (2) (authorizing the "search of any person present" at the designated

premises) which she contended was contrary to the constitutional requirement of particularity. Upholding the search, the court observed that the issuing magistrate could reasonably infer that the apartment was the scene of ongoing illegal activity and that there was a substantial likelihood that anyone present was a participant. The difficulty of specifying each of the individuals who might be present at any one time rendered this type of search necessary.

A warrant to search a particular person in a tavern, a place open to the public, does not authorize a warrantless search, without probable cause, of a patron who just happened to be present and not named in the warrant (*see Ybarra v Illinois*, 444 US 85 [1979]). In *Ybarra*, an Illinois statute empowered law enforcement officers executing a search warrant to detain and search any person found on the premises in order to protect themselves from attack or to prevent the disposal or concealment of anything described in the warrant. The police had obtained a warrant to search the bartender, but in executing the warrant searched the defendant, a customer, and found six tinfoil packets of heroin in his possession. The Supreme Court reversed his conviction, stating that although the warrant gave the officers authority to search the premises and the named bartender, it gave them no authority to search a customer without a separate and distinct finding of probable cause. The Supreme Court also rejected the State's argument that the search was justified under *Terry v Ohio* (392 US 1 [1968]), reasoning that the initial frisk of the defendant was not supported by a reasonable belief that he was armed and presently dangerous– – a belief that must form the predicate to a patdown for weapons.

Ybarra sets the bar. In post-*Ybarra* cases, all manner of fact patterns have emerged, relating to the search of unnamed people at targeted premises. Some scenarios

involve "protective sweeps." In *United States v Daoust* (916 F2d 757 [1st Cir 1990]), the court held that police may conduct a protective sweep while executing a search warrant. The court applied the rationale of *Maryland v Buie* (494 US 325 [1990]) that police may do so– as in an arrest situation– when they have a reasonable belief based on articulable facts that the area to be swept harbors danger. As of 2004, the issue has not been addressed in any New York appellate decision. In general, see 2 LaFave, Search and Seizure, § 4.9 (c) and (d) (3d ed) (*see also People v Smith*, 78 NY2d 897 [1991]; *People v Wheeler*, 2 NY2d 370 [2004]).

The police were justified in questioning defendant (who entered the apartment which the police were searching for narcotics under a search warrant that did not name or describe him) but were not justified in searching him even though his raincoat fell to the floor with a thud. The Court suppressed the gun seized from the raincoat pocket (*People v Costales*, 39 NY2d 973 [1976]). Where agents were executing a search warrant, the search of a latecomer was not justified in *People v Fripp* (58 NY2d 907 [1983]).

A valid search warrant for a gambling premises justified the arrest of a person present, talking on a telephone hooked up to a tape recorder (*People v Paccione*, 80 NY2d 1019 [1992]; *cf*. *People v Rossi*, 80 NY2d 952 [1992] [in which the charges were dismissed against a defendant who was unlawfully arrested while the police were executing a valid search warrant]).

The court upheld the search of a person unnamed in the search warrant but in the apartment in *People v Abernathy* (175 AD2d 407 [3d Dept 1991]; *see also People v Vanderpool*, 217 AD2d 716 [3d Dept 1995]; *People v Ortiz*, 103 AD2d 303 [2d Dept 1984], *affd* 64 NY2d 997 [1985]). The arrest of an unnamed third party was proper when he held

contraband in plain view (*People v McLeod*, 281 AD2d 746 [3d Dept 2001]). In *People v Easterbrook* (35 NY2d 913 [1974]), the search warrant authorized the search of a named person at a premises and "any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered." The Court upheld the search of the defendant while he was leaving the premises (*see also Guy v Wisconsin*, 509 US 914 [1993]).

See generally Angela S Overgaard, Comment, *People, Places, and Fourth Amendment Protection: The Application of* Ybarra v Illinois *to Searches of People Present During the Execution of Search Warrants on Private Premises*, 25 Loy U Chi LJ 243 [1994].

FOOTNOTE 8

APPLICANT'S USE OF FICTITIOUS NAME

The application must contain the name of the applicant (CPL 690.35 [3] [a]). Federal courts have ruled that the applicant's willful or intentional use of a fictitious name voids the warrant (*see King v United States*, 282 F2d 398 [4th Cir 1960]; *United States ex rel Pugh v Pate*, 401 F2d 6 [7th Cir 1968]; *United States ex rel Maxey v Morris*, 591 F2d 386 [7th Cir 1979]; *United States v Thomas*, 489 F2d 664 [1973]; *but see United States v McCoy*, 478 F2d 176 [10th Cir 1973] [error in name not fatal]). This is to be distinguished from situations in which the court allowed a police witness to use a fictitious name at trial (*People v Frost*, 100 NY2d 129 [2003]) or to conduct a search warrant suppression hearing ex parte (*People v Castillo*, 80 NY2d 578 [1992]). In *United States v Soriano* (482 F2d 469 [5th Cir 1973]), the failure of the warrant to specify the name of the affiant did not require

suppression of the seized evidence. The names of the affiants appeared in the supporting papers.

FOOTNOTE 9

PUBLIC SERVANT DEFINED

It is necessary to list the name and title of the applicant (CPL 690.35 [3] [a]). According to CPL 690.35 (1), the applicant must be a public servant of the kind specified in CPL 690.05 (1), namely, "a police officer, a district attorney, or other public servant acting within the course of his official duties." A "police officer" includes all of the officials identified in CPL 1.20 (34). A district attorney includes assistants and, where appropriate, the Attorney General and assistants (CPL 1.20 [32]).

Pursuant to CPL 690.35 (1), a written search warrant application must be made, subscribed, and sworn to by a CPL 690.05 (1) type public servant. An unsworn application failed in *People v Dunn* (117 AD2d 863 [3d Dept 1986]; *see also People v Coburn*, 85 Misc 2d 673 [Rensselaer County Ct 1976]). In *People v Butchino* (152 AD2d 854 [3d Dept 1989]), *People v Rodriquez* (150 AD2d 622 [2d Dept 1989]), and *People v Zimmer* (112 AD2d 500 [3d Dept 1985]), on the basis of substantial compliance, search warrants were upheld as against assertions that the applications were unsworn (*see also* Footnotes 32 and 33-a).

The New York State Organized Crime Task Force ("OCTF") had lacked the statutory authority to apply for search warrants as part of its general investigatory authority, although it was permitted to do so in appropriate cases in which it had prosecutorial powers, if it had received prior authorization by the Governor and the approval of the local district attorney

(*see B.T. Productions v Barr*, 44 NY2d 226, 235-37 [1978] [under Executive Law § 70a]; *see also Agresta v Roberts*, 66 AD2d 929 [3d Dept 1978]). However, by Chapter 667 of the Laws of 1982, section 70a (4) of the Executive Law was amended to empower OCTF to apply for search warrants generally.

In *People v Brancato* (101 Misc 2d 264 [Sup Ct, Kings County 1979]), the Court held that a search warrant addressed "to any police officer of the City of New York" may be executed by a police officer whose geographic authority extends to the City of New York, including an officer employed by the Waterfront Commission.

Regional "Task Force" applications were upheld in *People v Martin* (163 AD2d 536 [2d Dept 1990]) and *People v Pearson* (179 AD2d 786 [2d Dept 1992]).

The New York State Commission of Investigation does not have the authority to obtain search warrants. Any evidence so obtained will be suppressed *(People v Cardillo*, 80 AD2d 952 [3d Dept 1981]).

FOOTNOTE 10

PROBABLE CAUSE (REASONABLE CAUSE)

The Fourth Amendment requires “probable cause” for the issuance of a search warrant. CPL 690.10 and 690.35 (3) (b) require a showing of “reasonable cause” (*see also* CPL 690.40). For our purposes, they mean the same thing. As the Court held in *People v Bigelow* (66 NY2d 417, 423 [1985]), “probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt, but merely information sufficient to support a reasonable belief that ... evidence of a crime may be found in a certain place” (*see also People v Pinchback*, 82 NY2d 857, 858 [1993]).

Reasonable cause lies at the heart of the search warrant application, but failure to recite those very words did not nullify the warrant if the proof is there and can be inferred (*see People v Robinson*, 68 NY2d 485 [1986]; *see also People v Bowers*, 92 AD2d 669 [3d Dept 1983]).

See also Annotation, *Odor Detectable by Unaided Person as Furnishing Probable Cause for Search Warrant*, 106 ALR5th 397; Annotation, *Propriety of Considering Hearsay or Other Incompetent Evidence in Establishing Probable Cause for Issuance of Search Warrant*, 10 ALR3d 359.

FOOTNOTE 11

ANTICIPATORY SEARCH WARRANT; CONTROLLED DELIVERY

This contemplates the issuance of a warrant where the designated property has not yet arrived at the premises (or is not yet on the person to be searched) but probable cause exists to believe that it will arrive before execution of the warrant. The Court of Appeals upheld such a search warrant in *People v Glen* (30 NY2d 252 [1972]; *see also People v Wyatt*, 46 NY2d 926 [1979]; *People v Giammarino*, 42 NY2d 1090 [1977]).

In *People v Singer* (44 AD2d 730 [3d Dept 1974], *affd without opinion* 36 NY2d 1006 [1975]), the Court upheld a search warrant authorizing the seizure of a package of marihuana enroute to defendant's residence. Similarly, a search warrant specifying that property to be seized consisted of untaxed cigarettes which "will be delivered" was valid since the affidavit established probable cause to believe that this contraband was being taken in and out of the subject premises (*People v Giammarino*, 53 AD2d 871 [2d Dept 1976], *affd on opinion below*, 42 NY2d 1090 [1977]).

For a variation on this theme, see *People v Mahoney* (58 NY2d 475 [1983]), where police seized contraband while awaiting the actual arrival of the search warrant which another officer was bringing to the scene. Since a "no-notice" warrant was issued, the officers' knowledge that it was en route justified police entry, even though they did not possess the warrant when entering.

In *People v Aaron* (172 AD2d 842 [2d Dept 1991]), the expected delivery of a package of drugs justified a search warrant for the entire apartment (i.e. in addition to the package) (*cf*. *People v Pokun*, 135 AD2d 1064 [3d Dept 1987]). For cases involving the police securing premises while applying for a search warrant, see Discussion Item #12, *infra*.

The concept involved here is often in the form of a "controlled delivery" by which the police learn of the expected arrival of contraband. In *People v Offen* (78 NY2d 1089 [1991]), authorities were told that the defendant was receiving UPS parcels containing drugs. They employed a dog to sniff the packages and thereby established probable cause for a search warrant. The warrant was valid, as based on probable cause (i.e., the dog sniff) which in turn was based on *reasonable suspicion*, satisfying the dog sniff criterion (*see People v Dunn*, 77 NY2d 19 [1990]; *see also People v Rodriguez* 181 AD2d 1049 [4th Dept 1992] [a controlled delivery, non-canine case]).

For federal dog-sniffing, "controlled delivery" cases, see *United States v Gonzalez,* 90 F3d 1363 (8th Cir 1996); *United States v Hayes,* 49 F3d 178 (6th Cir 1995); *United States v Smith,* 34 F3d 514 (7th Cir 1994); *United States v Hall,* 20 F3d 1084 (10th Cir 1994); see also Annotation, *Opening, Search, and Seizure of Mail*, 61 ALR2d 1282; Dogs, Discussion Item # 16).

For other controlled delivery cases, see *United States v Lora-Solano,* 330 F3d 1288 (10th Cir 2003) and *United States v Ware,* 338 F3d 476 (6th Cir 2003). In *United States v Martin* (157 F3d 46 [2d Cir 1998]), the Court held that the police were justified in directing UPS to delay delivery pending the acquisition of a search warrant.

See generally James A. Adams, *Anticipatory Search Warrants: Constitutionality, Requirements, and Scope*, 79 Ky LJ 681 (1991); John Magee, Case note, Kostelec v. State*: Present Tense Language of Search Warrant Statute Does Not Permit Issuance of Anticipatory Search Warrant Based on Future Evidence of a Criminal Act*, 28 U Balt LF 31 (1998); Joshua D. Poyer, Note & Comment, United States v. Miggins: *A Survey of Anticipatory Search Warrants and the Need for Uniformity Among the Circuits*, 58 U Miami L Rev 701 (2004); Jeanine Perella McConaghy, *Survey of First Circuit Law 1993-1994: Topical Survey: Constitutional Law– Anticipatory Search Warrants Survive Fourth Amendment Challenge*– United States v. Ricciardelli, 998 F.2d 8 (1st Cir. 1993), 28 Suffolk U L Rev 876 (1994); Michael J. Flannery, Note, *Abridged Too Far: Anticipatory Search Warrants and the Fourth Amendment*, 32 Wm and Mary L Rev 781 (1991); David P. Mitchell, *Recent Development: Anticipatory Search Warrants: The Supreme Court's Opportunity to Reexamine the Framework of the Fourth Amendment*, 44 Vand L Rev 1387 [1991].

FOOTNOTE 12

MATCHING DESCRIPTIONS

See Footnotes 2 and 3 with regard to a description of the premises. The description

in this portion of the affidavit should match the description in the caption and be equally explicit.

FOOTNOTE 13

DESCRIPTION OF PROPERTY TO BE SEIZED

Subparagraphs (a) through (e) in paragraph 2 of the model affidavit consist of a required statutory statement prescribed by CPL 690.35 (2) (b) identifying, in extensive detail, the type of property sought. The five subparagraphs are simply recitations of the "seizable" categories set forth under CPL 690.10. Needless to say, the property may be of a type described in more than one category. For example, an unlicensed firearm is unlawfully possessed (subpar. b), may be used to commit a crime (subpar. c), may constitute evidence demonstrating the commission of or participation in an offense (subpar. d) and may, indeed, be stolen (subpar. a). *See generally* Joseph G. Cook, *Requisite Particularity in Search Warrant Authorizations*, 38 Tenn L Rev 496 [1971].

Article I, §12 of the New York State Constitution imposes a higher standard for the issuance of a search warrant where books and other items that may be protected by the First Amendment are the objects to be seized (*see People v P.J. Video*, 65 NY2d 566, *rev sub nom New York v P.J. Video*, 475 US 868, *on remand* 68 NY2d 296 [1986]).

See *Marcus v Search Warrant*, 367 US 717, 722 [1961]), relating to obscenity. Child pornography is not protected and may be seized pursuant to a search warrant (*see People v Keyes*, 75 NY2d 343 [1990]; *People v Burke*, 287 AD2d 512 [2d Dept 2001] [requisite particularity established]; *People v Fraser*, 264 AD2d 105 [4th Dept 2000]; *People v Duboy*, 150 AD2d 882 [3d Dept 1989]).

FOOTNOTE 14

STOLEN PROPERTY -- BASIS FOR CONCLUSION

If the property is purportedly stolen, there must be authentication, by alleging the basis for the conclusion that it is stolen (*see Rugendorf v United States*, 376 US 528 [1964]) Also, it must be adequately particularized (*See* footnotes 15 a-c).

FOOTNOTES 15 a-c

PARTICULARITY OF DESCRIPTION; OVERBREADTH

There is an unfortunate tendency on the part of unskilled search warrant drafters to seek (and all too often receive) authorization to search for items of a far broader nature than probable cause establishes. Proof that suggests the possession of a certain type of drug should not be broadened to include every conceivable controlled substance the drafter can imagine (*see People v Brown*, 96 NY2d 80, 88 [2001]). Extravagance invites invalidity through overbreadth. Furthermore, overbroad descriptions are hardly necessary: for example, courts have held that if during the course of the search for the one named drug, other drugs are seen, they may be seized (*see* footnote 14).

Dozens of cases illustrate the point. Because the facts and descriptions vary widely, the cases are not always easy to reconcile (*see e.g.* descriptions were held too broad in: *People v Yusko*, 45 AD2d 1043 [2d Dept 1974] [“dangerous drugs”]; *People v Giordano*, 72 AD2d 550 [2d Dept 1979] [“any other contraband]; *People v Conte*, 159 AD2d 993 [4th Dept 1990] [other “contraband]; *People v Price*, 204 AD2d 753 [3d Dept

1994] [“grab what you think pertinent”– quaint and trusting, but overbroad]; *People v Couser*, 303 AD2d 981 [4th Dept 2003] [“papers of defendant relating to a specific homicide”]; *United States v Brown*, 984 F2d 1074, 1077 [10th Cir. 1993] [other items "the officers determine or have reasonable belief [are] stolen"]).

On the other hand, warrants that qualified include *People v Sinatra*, 102 AD2d 189 (2d Dept 1984) (“handguns, rifles, narcotics, and narcotics paraphenalia”); *People v De Meo*, 123 AD2d 879 (2d Dept 1986) (“drugs"); *People v Augustine*, 235 AD2d 915 (3d Dept 1997) (“gambling records”); *People v Graham*, 69 AD2d 544 (3d Dept 1979), *vacated on other grounds* 446 US 932 (1980), *mod on other grounds* 76 AD2d 228 (3d Dept 1980) (“other evidence” of a specific homicide); see also *People v Lanier,* 54 NY2d 725 (1981); *People v Ashley*, 2 AD3d 1321 (4th Dept 2003) (vehicle adequately described); *People v Welch*, 2 AD3d 1354 (4th Dept 2003) (controlled substance sufficiently described). For a catalog of decisions, see 2 LaFave Search and Seizure, § 4.6, at 549-583 (3d ed); see also Annotation, 94 L Ed 813; B. Kamins, New York Search & Seizure, at 288-291 (14th ed 2004).

If the warrant fails to specify adequately the material to be seized, thereby leaving the scope of the seizure to the discretion of the executing officer, it will be unconstitutionally overbroad (*see Marron v United States*, 275 US 192 [1927]; *see also Groh v Ramirez*, __ US __, 124 S Ct 1284 [2004]). Obscenity search warrants have frequently suffered from this infirmity (*see e.g. People v Rothenberg*, 20 NY2d 35 [1967]).

The Court of Appeals has held that a search warrant that is overbroad in describing the property to be seized may be severed, to allow seizure of items based on probable cause (*see People v Brown*, 96 NY2d 80, 85-88 [2001]; *People v Couser*, 303 AD2d 981

[4th Dept 2003]).

Applying the doctrine of severability, a search warrant was valid insofar as it authorized a search for marihuana, but the stolen property seized pursuant to the warrant was suppressed since the underlying affidavit did not establish probable cause to search for and seize stolen property (*see People v Haas*, 55 AD2d 683 [2d Dept 1976]; *see* Annotation, *Propriety in federal prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant*, 69 ALR Fed 522).

See Annotation, *Search Warrant: Sufficiency of Description of Apartment or Room to be Searched in Multiple-occupancy Structure*, 11 ALR3d 1330; *see also* Annotation, *Sufficiency, Under Federal Constitution's Fourth Amendment, of Description in Search Warrant of Place to be Searched or of Person or Thing to be Seized -- Supreme Court Cases*, 94 L Ed 2d 813.

See Annotation, *Seizure of Books, Documents, or other, Papers Under Search Warrant Not Describing Such Items*, 54 ALR4th 391; Annotation, *Sufficiency of Description of Business records Under Fourth Amendment Requirement of Particularity in Federal Warrant Authorizing Search and Seizure*, 53 ALR Fed 679.

FOOTNOTE 16

MERE EVIDENCE -- CONTRABAND -- PLAIN VIEW

Authorities may search for stolen property (CPL 690.10[1]), for contraband (i.e. property unlawfully possessed) (CPL 690.10[2]), and for instrumentalities of a crime (CPL

690.10[3]). The Supreme Court has held that property consisting of evidence tending to show the commission of a crime ("mere evidence") may also be seized constitutionally (CPL 690.10[4]). See *Warden v Hayden* (387 US 294 [1967]), which eliminated the distinction between criminal "instrumentalities" and "mere evidence" (*e.g.* sneakers seizable as evidence in *People v Thomas*, 188 AD2d 569 [2d Dept 1992]) (*see also Andresen v Maryland*, 427 US 463 [1976]).

When executing a valid search warrant, officers properly seized contraband not mentioned in the warrant but in plain view (*see People v Brown*, 96 NY2d 80 [2001]; *People v Hardwick*, 137 AD2d 714 [2d Dept 1988]; *People v Matos*, 94 AD2d 950 [4th Dept 1983]; *People v Tangney*, 306 AD2d 360 [2d Dept 2003]).

Plain view contemplates an inadvertent observation of contraband by officers lawfully in a position to observe what they observe *(Coolidge v New Hampshire*, 403 US 443, 465-472 [1971]; *Horton v California*, 496 US 128, 136 [1990]; *People v Brown*, 96 NY2d 80, 89 [2001]; *People v Diaz*, 81 NY2d 106, 110 [1993]; *People v Farmer*, 198 AD2d 805 [4th Dept 1993]). The court upheld the seizure of inadvertently observed mere evidence during a lawful search for other objects in *People v Watson* (100 AD2d 452, 462-3 [2d Dept 1984]; *see also People v Christopher,* 101 AD2d 504, 528 [4th Dept 1984], *revd on other grounds* 65 NY2d 417 [1985]). See Annotation, *Seizure of Books, Documents and Other Papers Under Search Warrant Not Describing Such Items*, 54 ALR4th 391. If the item's character is not obviously criminal, the police should acquire a second search warrant, according to *People v McCullars* (174 AD2d 118 [3d Dept 1992]). See also Discussion Item # 11, securing the scene pending a search warrant.

See generally Annotation, *Search and Seizure: Observation of Objects in "Plain View"– Supreme Court Cases*, 29 L Ed 2d 1067; Annotation, *Applicability of "Plain View" Doctrine and Its Relation to Fourth Amendment Prohibition Against Unreasonable Searches and Seizures– Supreme Court Cases*, 110 L Ed 2d 704.

FOOTNOTE 17

REQUIREMENT FOR FACTUAL RECITATION OF

SPECIFIC ACTS OF CRIME

In describing the alleged crime, a factual recitation of specific acts is required. It will not do to simply allege that the target is violating section "XYZ" of the Penal Law or the like. Such conclusory assertions, standing alone, have not survived attack in *People v Politano*, 17 AD2d 503 [3d Dept 1962], *affd* 13 NY2d 852 [1963] and *People v Hendricks*, 45 Misc 2d 7 [Sup Ct, Queens County 1965], *affd* 30 AD2d 640 [2d Dept 1968], *rev'd on other grounds* 25 NY2d 129 [1969]. Where the allegations of specific criminality were adequately spelled out, a court has held it unnecessary to recite the section of the law violated (*United States v Averell*, 296 F Supp 1004, 1014 [ED NY 1969]).

FOOTNOTE 18

POLICE DEPONENT -- DIRECT, KNOWLEDGEABLE OBSERVATIONS -- RELIABILITY

Many, or even most, applications are based upon direct police observation or knowledge, together with evidence supplied by informants. Note that the special skills or background of a police officer deponent have contributed to findings of probable cause.

In *People v Germaine* (87 AD2d 848 [2d Dept 1982]), the expertise of a narcotics squad detective was made a part of the search warrant application in an affidavit which "translated" code words used by suspected narcotics traffickers during telephone conversations lawfully intercepted pursuant to an eavesdropping warrant. The court held that the magistrate properly considered and evaluated this evidence to find reasonable cause to support the issuance of the warrant. Observations by police of football betting sheets and systematic transportation of bundles of paper, established probable cause in *People v Contento* (105 AD2d 918 [3d Dept 1984]).

Establishing reliability of the police deponent was held unnecessary, for the veracity of government agents–unlike confidential informants–could be relied upon with relative assurance when based on personal observations or communications from fellow officers (*see United States v Ventresca*, 380 US 102 [1965]; *People v Montague*, 19 NY2d 121, 122-23 [1967]; *People v Brown*, 40 NY2d 183, 186 [1976]; *People v Robinson*, __ AD3d __, 2004 NY App Div Lexis 8538 [1st Dept, June 14, 2004]; *People v Slater*, 173 AD2d 1024 [3d Dept 1991]; *People v Cuyler*, 44 AD2d 881 [3d Dept 1974]; *People v Contompasis*, 108 AD2d 1077 [3d Dept 1985]) (*Aguilar-Spinelli* does not apply when a warrant is based on a police officer's direct observations). (*Accord People v Rivenburgh*, 1 AD3d 696 [3d Dept 2003]; *People v Telesco*, 207 AD2d 920 [2d Dept 1994]; *People v Gaviria*, 183 AD2d 913 [2d Dept 1992]; *People v Londono*, 148 AD2d 753 [2d Dept 1989]).

Search warrants have been upheld based on facts "incorporated by reference" that are contained in an earlier application. Search warrant #1 was issued for location X. Before executing the warrant, police were able, by lawful observation, to tie the defendant to location #2. The evidence submitted for warrant #1 could properly be "incorporated by

reference" to support warrant #2, which authorized the search of location #2. To do this properly, the earlier application should be presented to the issuing judge (*see People v Tambe*, 71 NY2d 492 [1988]).

Incorporation by reference was upheld in *People v Cahill,* 2 NY3d 14 (2003), and *People v Augustine*, 235 AD2d 915 (3d Dept 1997). The affidavit incorporated by reference in *United States v Vesikuru,* 314 F3d 1116 (9th Cir 2002), cured the warrant's lack of particularity (*see also United States v $92,422.57*, 307 F3d 137 [3d Cir 2002]; *United States v Thomas*, 263 F3d 805 [8th Cir 2001]).

A showing of reasonable cause to believe that particular property may be found at a particular place is the central requirement of a search warrant application (CPL 690.35 [2]). Where the facts described in the affidavit were as susceptible of innocence as they are of guilt, the warrant failed (*see People v Dantzig*, 40 AD2d 576 [4th Dept 1972]), as where the allegations consist merely of the single assertion that "LSD users and sellers are frequenting [a designated house]" (*People v Dumper*, 28 NY2d 296 [1971]) or that known gamblers were entering premises that contained unlisted telephones (*see People v Fino*, 14 NY2d 160 [1964]), or that two men who had been arrested for gambling offenses 16 years before were meeting in daylight hours on a residential street and exchanging a brown paper bag (*see People v Germano*, 91 AD2d 1137 [3d Dept 1983]).

The warrant is to be judged in terms of the proof proffered and, absent deception, courts have held that there is no requirement to include exculpatory evidence in a search warrant application (*see Seigel v. City of Germantown*, 25 Fed Appx 249 [6th Cir 2001]; *Mays v City of Dayton*, 134 F3d 809 [6th Cir 1998]; *United States v Krech*, 1990 US App Lexis 18895 [9th Cir 1990]; *United States v Wolfe*, 375 F Supp 949 [ED Pa 1974]).

FOOTNOTE 19

MANNER OF ACQUISITION OF PROOF

The affiant's allegations of facts in support of probable cause may of course be made on personal knowledge (CPL 690.35 [c]; *see e.g. People v Badia*, 232 AD2d 241 [1st Dept 1996]), but they must be under oath to establish probable cause (*see People v Lalli*, 43 NY2d 729 [1977]). How the police acquire personal knowledge is sometimes open to question. Courts have upheld convictions where an officer gained the facts by "window peeking" in support of a search warrant (*see People v Lucente*, 39 AD2d 1003 [3d Dept 1972]). But the officer must have a right to be at the location at the time of the observation (*see People v Costanzo*, 14 NY2d 596 [1964] [search warrant for betting paraphernalia issued on information about conversation overheard by police]; *see also People v Spinelli*, 35 NY2d 77 [1974]). A search warrant based on an aerial viewing was valid (*People v Reynolds*, 71 NY2d 552 [1988]) but not where the land was fenced or had signs posted to impart privacy (*People v Scott*, 79 NY2d 474 [1992]).

Use or exploitation of illegal evidence to acquire search warrant

In *Scott*, a search warrant based directly on illegally acquired evidence failed (79 NY2d 474 [1992] [acquisition of marijuana sample based on illegal entry on to "open fields" poisoned the search warrant which was based on the sample]; *see also People v Guins*, 165 AD2d 549, 553 [4th Dept 1991], *citing Wong Sun v United States*, 371 US 471 [1963]; *see also People v Soto*, 96 AD2d 741 [4th Dept 1983]; *People v Jackson*, 235 AD2d 923 [3d Dept 1997]). This is to be contrasted with the federal rule (*Oliver v United States*, 466 US 170 [1984]) in which neither the construction of fences nor signs will create an

expectation of privacy in open fields beyond curtilage (*see United States v Scott*, 975 F2d 927 [1st Cir 1992]). *See also* Annotation, *Supreme Court's Development of "Open Fields Doctrine" With Respect To Fourth Amendment Search and Seizure Protections*, 80 L Ed 2d 860; Annotation, *Aerial Observation or Surveillance as Violative of Fourth Amendment Guaranty Against Unreasonable Search and Seizure*, 56 ALR Fed 772.

Evidence produced by a search warrant based on an illegal wiretap will be suppressed (*see People v Brenes*, 42 NY2d 41 [1977]; *People v Fino*, 29 AD2d 227 [4th Dept 1968], *affd* 24 NY2d 1020 [1969]).

A hearing is necessary to determine whether reasonable cause for the search warrant was derived solely from the fruits of an invalid wiretap or if there was independent evidence supporting the search warrant (*see People v Capolongo*, 85 NY2d 151, 166 [1995]; see also People v Harris, 62 NY2d 706 [1984]). While a search warrant based on an illegal wiretap will be nullified, a violation of the wiretap sealing requirements (CPL 700.50 [2]) which occurred after the search warrant issuance did not invalidate the warrant (*see People v McGuire*, 109 AD2d 921 [3d Dept 1985]; *see also People v Weiss*, 48 NY2d 988 [1980]).

The issue will generally turn on whether officials got the information by an invasion of privacy within the meaning of *Katz v United States* (389 US 347 [1967]). See, for example, *People v Price* (78 AD2d 24 [4th Dept 1981]), holding that there is no reasonable expectation of privacy in baggage transported by plane; therefore a search warrant for luggage was valid though obtained after a police dog sniffed luggage and detected drugs.

The "<u>independent source</u>" rule. Evidence from a search warrant obtained when police illegally entered defendant's premises was not suppressed where lawful evidence

was gathered independent of the illegal entry (*see People v Robertson*, 48 NY2d 993 [1980]; *People v Arnau*, 58 NY2d 27 [1982]; *People v Lee*, 58 NY2d 771 [1982]; *People v Plevy*, 52 NY2d 58 [1980]; *People v Harris*, 62 NY2d 706 [1984]; *People v Seidita*, 49 NY2d 75 [1980]; *People v Burr*, 70 NY2d 354 [1981]). *See generally Murray v. United States*, 487 US 533 (1988).

Search warrants have been upheld when the lawful information was gained independent of the unlawfully acquired information (*see People v Vonderhyde*, 114 AD2d 479 [2d Dept 1985]; *People v Pizzichillo*, 144 AD2d 589 [2d Dept 1988]; *People v Woodward*, 127 AD2d 929 [3d Dept 1987]; *People v Thorne*, 275 AD2d 681 [1st Dept 2000]). If the illegally obtained evidence forms the sole basis for the search warrant, the fruits of the search will be suppressed (*see People v Cirrincione*, 207 AD2d 1031 [4th Dept 1994]; *People v Polanco*, 203 AD2d 942 [4th Dept 1994]).

Where evidence was seized before the search warrant was obtained and was "come at by exploitation of the illegal police activity," the independent source rule was inapplicable and the evidence suppressed (*People v Soto*, 96 AD2d 741 [4th Dept 1983]). In *People v Van Luven* (96 AD2d 805 [1st Dept 1983]), the search was upheld where (according to the concurring opinion) the warrant was based not on an illegal intrusion but on information defendant voluntarily furnished before he knew that police opened the locker and were aware that guns were inside.

In *People v Rossi* (80 NY2d 952 [1992]), the court allowed the evidence acquired by the search warrant, but barred evidence linking the defendant to it as illegally obtained.

See generally Comment Note, *"Fruit of the Poisonous Tree" Doctrine Excluding Evidence Derived From Information Gained in Illegal Search*, 43 ALR3d 385.

FOOTNOTE 20

STALENESS

If the facts are not reasonably recent, the warrant may suffer from staleness (*see Sgro v United States*, 287 US 206 [1932]). Two types of issues arise: (1) the deponent's or informant's clarity as to when he saw what he says he saw and (2) the affiant's recital of the dates, whether or not an informant used. When the crime is an isolated one- - as opposed to a continuing enterprise- - there is a more pressing duty to act (*see People v Glen*, 30 NY2d 252 [1972]).

It is critical for the officer to learn from the informant (and to recite) the date the informant claims to have seen what he saw. That the informant communicated the information recently is not the test. Sometimes the date of the informant's observation may be gleaned from a fair reading (*see People v Brandon*, 38 NY2d 814 [1975]; *People v Hanlon*, 36 NY2d 549 [1975]; *see also People v Engle*, 68 AD2d 915 [2d Dept 1979] [affidavit for search warrant based on information supplied by an informant failed to specify the date the informer saw the drugs in defendant's possession, raising the possibility that the information was stale. A hearing was ordered to determine whether a "confidential affidavit" of the informant specified a date and if in fact the issuing court read the "confidential affidavit" before issuing the warrant]).

A search warrant was not stale when issued several hours after the officer had for the first time seen stolen property in the defendant's apartment; it is immaterial that the officer began his investigation of the burglary involving this particular property almost two months earlier (*see People v Burke*, 53 AD2d 802 [3d Dept 1976]). A search warrant issued on May 2 was not stale where it was based on a police officer's affidavit alleging

that informants had told him in the latter part of April that the defendant was continuously selling narcotics (*see People v De Luca*, 54 AD2d 1061 [3d Dept 1976]).

In *People v McCants* (59 AD2d 999 [3d Dept 1977]), police did not execute a search warrant because defendant had left town. They made a new application on the same affidavit eleven days later. The second search warrant was not stale since "[t]he information which was the basis of the warrants was quite detailed and indicated frequent illicit drug activity by defendant. In view of the fact that the delay was only 11 days and was caused by the defendant's absence, his present claim [of staleness] is without merit" (*id.* at 1000). See Annotation, *Search Warrant: Sufficiency of Showing as to Time of Occurrence of Facts Relied On*, 100 ALR2d 525.

Defendant told an informant, incarcerated with him, that he possessed stolen stereo equipment. Although five months elapsed from the informant's receipt of the information and the application for the warrant, the warrant was not stale because defendant said he possessed the equipment and the police applied for the warrant on the day they received the information (*see People v Wing*, 92 Misc 2d 846 [Allegany County Ct 1977]). Staleness was not established for search warrant issued on June 5th based on affidavit that a part of a truck purchased from defendant on May 15th was from a truck stolen that past December (*see People v Teribury*, 91 AD2d 815 [3d Dept 1982]).

A six week period between the last time the informants saw defendant sell cocaine and the search warrant application was not stale (*see People v Tune*, 103 AD2d 990 [3d Dept 1984]). Courts rejected staleness arguments in *People v Markiewicz,* 246 AD2d 914 (3d Dept 1998), *People v Telesco*, 207 AD2d 920 (2d Dept 1994), and *People v Anderson*, 291 AD2d 856 (4th Dept 2002). The undercover transactions of October 2 and October

9 were not so far removed from the October 20 search warrant date as to be considered stale in *People v Padilla* (132 AD2d 578 [2d Dept 1987]). The court found no staleness, despite lengthy periods, owing to on-going events in *Town of East Hampton v Omabuild USA* (215 AD2d 746 [2d Dept 1995]). Staleness arguments were rejected in *People v Mallory* (234 AD2d 913 [4th Dept 1996] [crime of a continuing nature]; *People v Gilfus*, 4 AD2d 788 [4th Dept 2004] [same]). Similar arguments were rejected despite three-year delay, holding that staleness depends on the nature of the crime (*United States v Wright*, 343 F3d 849 [6th Cir 2003]). The courts found no staleness in *United States v Pinson* (321 F3d 558 [6th Cir 2003]) and *United States v Leisure* (319 F3d 1092 [9th Cir 2003]).

Evidence was, however, stale in *People v Acevedo* (175 AD2d 323 [3d Dept 1991]) (two months) and in *People v Rodriguez* (303 AD2d 783 [3d Dept 2003] (*see also People v Beaufort-Cutner*, 190 AD2d 992 [4th Dept 1993] [stale as to some, but not others]).

An affidavit of April 22nd based on April 10th and April 13th admissions freshened stale information that a friend of defendant saw defendant's rifle a year earlier (*see People v Christopher*, 101 AD2d 504, 528 [4th Dept 1984], *rev'd on other grounds* 65 NY2d 417 [1985]).

The failure to include the dates of the officers' observation does not invalidate the warrant if a common-sense reading of the papers implies close proximity in time (*People v Sinatra*, 102 AD2d 189, 191 [2d Dept 1984], *citing United States v La Monte*, 455 F Supp 952 [ED Penn 1978]; *United States v Ciaccio*, 356 F Supp 1373 [D Md 1972]; *People v Walker*, 285 AD2d 660 [3d Dept 2001]) Practicalities dictate whether property will still be there based on the nature of the evidence.

See also Annotation, *When Are Facts Relating to Marijuana, Provided By Police or*

Other Law Enforcement Officer, So Untimely as to be Stale When Offered In Support of Search Warrant for Evidence of Sale or Possession of Controlled Substance– State Cases, 114 ALR5th 235; Annotation, *When Are Facts Relating to Marijuana, Provided By One Other Than Police or Other Law Enforcement Officer, So Untimely as to be Stale When Offered In Support of Search Warrant for Evidence of Sale or Possession of a Controlled Substance– State Cases*, 112 ALR5th 429; Annotation, *When Are Facts Relating to Drug Other Than Cocaine or Marijuana So Untimely as to be Stale When Offered in Support of Search Warrant for Evidence of Sale or Possession of Controlled Substance– State Cases*, 113 ALR5th 517; Annotation, *When Are Facts Offered In Support of Search Warrant for Evidence of Sale or Possession of Cocaine So Untimely as to be Stale– State Cases*, 109 ALR5th 99; Annotation, *When Are Facts Offered in Support of Search Warrant for Evidence of Federal Nondrug Offense So Untimely as to be Stale*, 187 ALR Fed. 415; Annotation, *When Are Facts Offered In Support of Search Warrant for Evidence of Sexual Offense so Untimely as to be Stale– State Cases*, 111 ALR5th 239; Annotation, *Search Warrant: Sufficiency of Showing as to Time of Occurrence of Facts Relied On*, 100 ALR2d 525.

FOOTNOTE 21

SPECIFICITY OF LOCATION

It is important to specify that there is (i.e. why there is) reasonable ground to believe that the objects to be seized relate to the particular crime and will be found at a specified location or locations (*see People v Robinson*, 68 NY2d 541 [1986]).

FOOTNOTE 22

RELIABILITY OF CONFIDENTIAL INFORMANT

CPL 690.35 (3) (c) provides that allegations of fact in support of a search warrant may be based on information and belief if the sources of such information and the grounds of such belief are stated. Often this type of proof involves informants.

It is elementary that an affidavit for a search warrant may be based upon hearsay founded on informant's account (*see Aguilar v Texas*, 378 US 108 [1964]; *Spinelli v United States*, 393 US 410 [1969]; *Draper v United States*, 358 US 307 [1959]). That the information is even hearsay on hearsay did not necessarily preclude its use in determining probable cause (*see People v Watson*, 100 AD2d 452, 462n [2d Dept 1984]; *People v Bush*, 266 AD2d 642 [3d Dept 1999]; *People v Simon*, 107 AD2d 196 [4th Dept 1985]; *United States v Fiorella*, 468 F 2d 688 [2d Cir 1972]; *United States v McCoy*, 478 F2d 176 [10th Cir 1973]). It all (as they say) depends. *See* Annotation, *Propriety of Considering Hearsay or Other Incompetent Evidence in Establishing Probable Cause for Issuance of Search Warrant*, 10 ALR3d 359

Search warrant law involves a debate over what constitutes sufficiently reliable hearsay. In *Illinois v Gates* (462 US 213 [1983]), the Supreme Court held that in assessing its value, the informant's veracity, reliability and basis of knowledge are all highly relevant, but need not be rigidly applied in every case. *Gates* expressly overruled both *Aguilar v Texas* (378 US 108 [1964]), and *Spinelli v United States* (393 US 410 [1969]), to the extent they required that these tests must always be satisfied.

In *People v Griminger* (71 NY2d 635 [1988]) however, the Court of Appeals, applying state constitutional law, determined to continue the *Aguilar-Spinelli* two-prong test,

as to (1) informant's reliability and (2) basis of informant's knowledge. The Court chose to do so even though *Gates* allows a "totality of circumstances" test which is an easier standard to satisfy. The Court of Appeals had previously rejected the *Gates* approach and maintained *Aguilar-Spinelli* in evaluating warrantless searches (*see People v Johnson*, 66 NY2d 398 [1985]).

The Court in *People v Bigelow* (66 NY2d 417 [1985]) also declined to follow the federal "good faith exception" to the search warrant analysis of *United States v Leon* (468 US 897 [1984]).

The *Aguilar-Spinelli* test did not apply to cases in which the information constituting probable cause for the warrant was derived from firsthand knowledge of the police officer applicant (*see People v Contompasis*, 108 AD2d 1077 [3d Dept 1985]), or fellow officer (*see People v Rivenburgh*, 1 AD3d 696 [3d Dept 2003]).

An informant's reliability was satisfied by the deponent's assertion that the informant has, in the past, supplied facts leading to specific arrests and convictions (*see People v Cerrato*, 24 NY2d 1 [1969]; *People v Montague*, 19 NY2d 121 [1967]; *People v Rogers*, 15 NY2d 422 [1965]). Under *United States v Harris* (403 US 573 [1971]), reliability may be established by a number of other means, including the magistrate's reliance on information given under oath, that the statements were against the informant's penal interest, and that two or more informants tended to confirm the information which each gave (*see People v Wheatman*, 29 NY2d 337, 345 [1971]).

An informant's reliability based upon information previously provided need not have resulted in a conviction; it was enough that the past information led to arrests (*see People v West*, 92 AD2d 620 [3d Dept 1983] *reversed on other grounds*, 62 NY2d 708 [1984]).

Although informant reliability can be established by means other than arrests or convictions, it must be supported in some other way, most effectively through objective verification by police (*see People v Alaimo*, 34 NY2d 187 [1974]; *People v Pena*, 18 NY2d 837 [1966]; *People v Smith*, 31 AD2d 863 [3d Dept 1969]); *United States v Ventresca*, 380 US 102,111 [1965]). Cases abound on the methods of verification (*see People v De Luca*, 54 AD2d 1061 [3d Dept 1976] [affiant officer personally smelled marihuana smoke emanating from premises described by informant]; *People v Rivera*, 59 AD2d 689 [1st Dept 1977] [informant's reliability established by his having recently provided information leading to two arrests and having been personally examined by magistrate issuing search warrant, even though minutes of examination were lost]; *People v Collier*, 89 AD2d 1041 [3d Dept 1982] [informant's reliability established by having provided information leading to two earlier drug arrests and by personal observation of affiant police officer corroborating informant's information]). By contrast see *People v West* (44 NY2d 656 [1978] [police observations of a conversation between defendant and an unknown party in front of defendant's residence held insufficient to corroborate informant's tip where informant failed to disclose basis of his information]). Merely providing the identity of the confidential informant was not, in and of itself, sufficient to establish reliability in *People v Fox* (56 NY2d 615 [1982]).

By way of illustration, the *Aguilar-Spinelli* test was met in the following cases (*see People v Cerrato*, 24 NY2d 1 [1970]; *People v Lee*, 303 AD2d 839 [3d Dept 2003]["controlled buy" case]; *People v Tarver*, 292 AD2d 110 [3d Dept 2002]["controlled buy" case]; *People v Scott*, 256 AD2d 657 [3d Dept 1998]["controlled buy" case]; *People v Ackerman*, 237 AD2d 849 [3d Dept 1997]; *see also People v Hetrick*, 80 NY2d 344

[1992]; *People v Edwards*, 95 NY2d 486 [2000]; *People v Binns*, 299 AD2d 651 [3d Dept 2002]; *People v Bell*, 299 AD2d 582 [3d Dept 2002]; *People v Allen*, 298 AD2d 856 [4th Dept 2002]; *People v Laughing*, 288 AD2d 885 [4th Dept 2001]; *People v Morton*, 288 AD2d 557 [3d Dept 2001] [reliability prong satisfied]; *People v Williams*, 284 AD2d 564 [3d Dept 2001]; *People v Brown*, 267 AD2d 874 [3d Dept 1999]; *People v Park*, 266 AD2d 913 [4th Dept 1999]; *People v Bush*, 266 AD2d 642 [3d Dept 1999]; *People v Pratt*, 266 AD2d 318 [2d Dept 1999] [informant produced]; *People v Hines*, 262 AD2d 423 [2d Dept 1999]; *People v Christopher*, 258 AD2d 662 [2d Dept 1999] [informant produced, therefore, *Aguilar-Spinelli* inapplicable]; *People v Walker*, 257 AD2d 769 [3d Dept 1999]; *People v Shetler*, 256 AD2d 1234 [4th Dept 1998] [informant produced]; *People v Calise*, 256 AD2d 64 [1st Dept 1998]; *People v Tyrell*, 248 AD2d 747 [3d Dept 1998]; *People v Walker*, 244 AD2d 796 [3d Dept 1997] [informant produced]; *People v Hazel*, 92 AD2d 691 [3d Dept 1983] [information from two undisclosed informants and some personal corroboration by detectives]; *People v Davis*, 93 AD2d 970 [3d Dept 1983] [informant, personal observations]; *People v Brown*, 95 AD2d 569 [3d Dept 1983] [“citizen” informant case]; *People v Demers*, 96 AD2d 714 [4th Dept 1983] [the source of knowledge of the Ontario police officer who transmitted information to New York police, was undisclosed, but sufficiently confirmed by police observation]; *People v Levy*, 97 AD2d 800 [2d Dept 1983] [*Aguilar-Spinelli*, satisfied, based on informant’s past performance and his personal knowledge]; *People v Marinelli,* 100 AD2d 597 [2d Dept 1984] [based on a sworn statement from an identified person, on personal knowledge with some police confirmation]; *People v Santana*, 106 AD2d 523 [2d Dept 1984]; *People v Murray*, 233 AD2d 95 [4th Dept 1996]; *People v Davis*, 146 AD2d 942 [3d Dept 1989]).

The difficulty with unnamed informants is the fear frequently expressed by courts that the "informant" is nonexistent (*see People v Verrecchio*, 23 NY2d 489 [1969]). This fear may be dispelled by production of the (anonymous) informant before the magistrate (*see* Footnote 25), but even production of the informant before a prosecutor would go a long way toward establishing the informant's existence and reliability (*see e.g. People v Malinsky*, 15 NY2d 86 [1965]; *People v Coffey*, 12 NY2d 443, 452 [1963]; *cf. People v Salgado*, 57 NY2d 662 [1982] [no need to produce informant at hearing on warrant where he testified under oath before the issuing magistrate and transcript was presented at hearing]).

The *Aguilar-Spinelli* reliability prong was not established in *People v Rivera* (283 AD2d 202 [1st Dept 2001]) when court did not meet informant. In *People v Martinez* (80 NY2d 549 [1992]), the search warrant was struck down and evidence suppressed where the viewing judge did not examine the confidential informant, the affidavit of the confidential informant was merely signed "confidential informant," and the police did not adequately specify the reasons for the confidential informant's reliability (*i.e*. past results, independent verification) (*see People v Dukes* (245 AD2d 1052 [4th Dept 1997]) (*Aguilar-Spinelli* not satisfied); *accord People v McGriff*, 130 AD2d 141 [1st Dept 1987]).

Aguilar-Spinelli decisional law will not always invalidate search warrants in which the confidential informant's recitations are based on less than personal knowledge. The problem with relying on informant's second-hand information is that it is hearsay-on-hearsay and is obviously far weaker than when the confidential informant relays first-hand knowledge. Nonetheless, if the confidential informant relays convincingly reliable information – although not based on personal knowledge – the search warrant may meet

the *Aguilar-Spinelli* test. The caveat is that the informant's second-hand information must bear compelling indicia of reliability (*see e.g. Spinelli v US*, 393 US 410, 416; *People v Parris*, 83 NY2d 342 [1994]; *United States v Spach*, 518 F2d 866, 869 [7th Cir 1975]; *United States v McCoy*, 478 F2d 176, 178-179 [10th Cir 1973]; *United States v Smith*, 462 F2d 456, 459 {8th Cir 1972]).

See generally Note, *Proof of Informer's Reliability in Probable Cause Affidavits*, 85 Harv L Rev 53 (1971); Note, *The Undisclosed Informant and the Fourth Amendment:A Search for Meaningful Standards*, 81 Yale LJ 703 (1972); Annotation, *Sufficiency of Affidavit for Search Warrant Based on Affiant's Belief, Based in Turn on Information, Investigation, Etc., By One Whose Name Is Not Disclosed*, 14 ALR2d 605.

FOOTNOTE 23

BASIS OF CONFIDENTIAL INFORMANT'S KNOWLEDGE

A frequent ground on which search warrants are vacated is the applicant's failure to describe how the informant acquired the information ("basis of informant's knowledge"). This infirmity was fatal in *People v Wright* (37 NY2d 88 [1975]); *People v Hendricks* (25 NY2d 129 [1969]); *People v Mitchell*, (24 NY2d 952 [1969]); and *People v Powers* (37 AD2d 678 [4th Dept 1971]).

Although Federal courts use the "totality" test in *Illinois v Gates* (462 US 213 [1983]) and the "good faith" test in *United States v Leon* (468 US 897 [1984]), New York (under its State constitution) continues to follow the stricter *Aguilar-Spinelli* test (*see People v Johnson*, 66 NY2d 398 [1985] [declining *Gates*]; *see also People v Griminger*, 71 NY2d

635 [1988]; *People v Bigelow*, 66 NY2d 417 [1985] [declining *Leon*]; *People v Edwards*, 95 NY2d 486 [2000], *People v DiFalco*, 80 NY2d 693 [1993]).

The basis of the informant's information must set it apart from the category of rumor (*see People v Hendricks*, 25 NY2d 129 [1969], *citing Draper*, 358 US 307 [1959]) making it clear that the informant is speaking from first-hand knowledge (*see People v Hanlon*, 36 NY2d 549 [1975]; *People v Munger*, 24 NY2d 445 [1969]; *People v Scavone*, 59 AD2d 62 [3d Dept 1977]).

Where the police observation did not establish probable cause, a mere tip from an informer that did not state the underlying circumstances forming the basis for the informant's conclusion (that the defendant is engaged in criminal activity) was not a sufficient basis for a search warrant (*People v Wirchansky*, 41 NY2d 130 [1976]; *see also People v Germano*, 91 AD2d 1137 [3d Dept 1983] [defendant's 16 year-old conviction could not bolster officer's observations to the point where probable cause is established; *but see People v Weygant*, 79 AD2d 667 [2d Dept 1980] [warrant to search premises for evidence of illegal gambling was supported by probable cause where it was based on (1) informant's tip; (2) defendant's criminal reputation; and (3) police officers' observations of known gamblers engaging in behavior consistent with a policy scheme]).

In *People v Sall* (295 AD2d 812 [3d Dept 2002]), the search warrant was upheld based on an affidavit by defendant's roommate as to the existence and location of contraband. The search warrant was also upheld in *People v Walker* (257 AD2d 769 [3d Dept 1999]) on the basis of informant's knowledge (*see also People v McQueen*, __ AD3d __ [4th Dept 2004]).

First-hand observations by an informant that youths were going into defendant's

apartment and buying drugs established the reliability of the information in *People v Ambrozak* (54 AD2d 735 [2d Dept 1976]; *see also People v Hitt*, 61 AD2d 857 [3d Dept 1978]). An affidavit which set forth an informant's firsthand observations of defendant's criminal activity (but did not specify the dates on which the informant made these observations) established probable cause where the affiant police officer personally made observations corroborating those of the informant's (*see People v Brandon*, 38 NY2d 814 [1975]).

The informant's information was amply corroborated by the police supervision of his drug purchases and the independent investigation by police into defendant's criminal activity in *People v Thomas*, 78 AD2d 940 (3d Dept 1980). Probable cause was established by the informant's statements that he personally saw "a lot of marihuana in cardboard boxes" in the closet in the living room, that he saw it the night before the application for a warrant was made, that he bought some marihuana from one of the defendants at that time, and that he knew that he would go to jail if his statement was false (*People v Sullivan*, 101 Misc 2d 526 [Albany County Ct 1979], *affd* 82 AD2d 997 [3d Dept 1981], *affd* 56 NY2d 378 [1982]). Where an informant is less than convincing, a confession of the codefendant attached to the warrant application provided sufficient added information to establish probable cause (*see People v Everett*, 60 AD2d 693 [3d Dept 1977]).

The "basis of knowledge" test (*Aguilar-Spinelli's* second prong) was not met in *People v Parris* (83 NY2d 342 [1994]), where the officer's characterization of "eyewitness" was conclusory. *Parris* was not a search warrant case, but the *Aguilar-Spinelli* standard applies. The “basis of knowledge" test was also not met in *People v Edwards* (69 NY2d

814 [1987]), or in *People v Wright* (37 NY2d 88 [1975]) where the affidavit in support of the search warrant did not indicate how the informant knew that defendant had been given a pistol nor did it state when or where it had happened.

The ordinary citizen who provides the authorities with information is not as inherently suspicious as police informants (*see People v Hicks*, 38 NY2d 90, 93-4 [1975]; *People v Robertson*, 61 AD2d 600 [1st Dept 1978], *affd*, 48 NY2d 993 [1980]). Hence, the stringent reliability tests devised for unidentified-informants are not necessary in cases of named, eyewitness-informants. Their information, however, must be based on personal knowledge or on proof that otherwise satisfies *Aguilar-Spinelli*. For a discussion of citizen-informants, *see* Footnotes 28 and 29, *infra*.

FOOTNOTE 24

VERIFICATION OF CONFIDENTIAL INFORMANT'S ASSERTIONS

Assertions by informants are most effectively enhanced by police corroboration. An informant's "tip" that the defendant was engaged in gambling activities was, however, not sufficiently corroborated by police officers's observations of the defendant's repeated entrance into and exit from an apartment building every day of one week since (1) the police officer affiant did not allege the underlying circumstances upon which the informant based his conclusion that the defendant was engaged in gambling activities and (2) the only fact alleged by the police officer affiant to support his observations was that the defendant was reputed to be a gambler (*People v Wirchansky*, 41 NY2d 130 [1976]; *see also People v Yedvobnik,* 48 NY2d 910 [1979]), where the Court held that the affidavit in support of the search warrant was not sufficient when it stated only that the informant had

previously supplied accurate information and had told the police that defendant was conducting a bookmaking operation. The affidavit failed to demonstrate probable cause to believe that contraband could be found in the apartment to be searched. Neither observation by police of defendant exiting the apartment at a time informant told police operations closed for the day nor defendant's reputation as a known bookmaker served to raise informant's information to a sufficient showing of reasonable cause (*cf*. *People v Germano*, 91 AD2d 1137 [3d Dept 1983]). Informant's observations were confirmed by independent proof in *People v Jenkins* (184 AD2d 585 [2d Dept 1992]).

The reliability prong of *Aguilar-Spinelli* was satisfied in *People v Lavere* (236 AD2d 809 [4th Dept 1997]). The affidavit of the military police investigator was presumed reliable; the informant's reliability was established through evidence that he participated in a "controlled buy" from the defendant.

An informant's "tip" was corroborated where the police officer affiant personally observed the defendant enter the premises where the informant had said that the heroin was stored and exit with a glassine envelope containing a white powder (*see People v Scavone*, 59 AD2d 62 [3d Dept 1977]). Similarly, the warrant was valid where police searched the informant to insure that he did not possess drugs and then observed him purchase drugs from the defendant (*People v Hitt*, 61 AD2d 857 [3d Dept 1978]).

The informant was sufficiently corroborated where (1) he was present when the defendant went to certain premises, returned with heroin and gave the informant a phone number to call if he wished to purchase more heroin and (2) the police checked that phone number and determined it was listed to the premises where the informant had observed the defendant go to "make the buy" (*People v Carmichael*, 61 AD2d 411 [4th Dept 1978]).

The *Aguilar-Spinelli* test was satisfied for a warrant issued to search a car lot although the informant did not give basis for his belief that cars were stolen, the affiant officer stated that he had undertaken surveillance of the car lot and had independently observed the presence of late-model automobiles with missing license plates and punched out trunk locks, and had seen cut-up late model cars being loaded on a flat-bed truck *(People v Maldonado*, 80 AD2d 563 [2d Dept 1981]).

The informant's information was satisfactorily corroborated where he was searched, sent into the target premises, and returned with the contraband (*see People v Backenstross*, 73 AD2d 796 [4th Dept 1979]; *see also People v Davis*, 146 AD2d 942 [3d Dept 1989]).

A statement concerning the experience of the observing officers in narcotics investigations strengthened a claim of probable cause (*see People v McRay*, 51 NY2d 594 [1980]), but was mandatory in *United States v Doty*, 714 F2d 761 [8th Cir 1983]; *see also People v Sinatra*, 102 AD2d 189 [2d Dept 1984]).

FOOTNOTE 25

INFORMANT'S DECLARATIONS AGAINST PENAL INTEREST

United States v Harris (403 US 573 [1971]) upholds the validity of declarations against penal interest as a legitimate basis for assessing the reliability of the informant's assertions. Declarations against penal interest established reliability in *People v Tune* (103 AD2d 990 [3d Dept 1984]) and *People v Harwood* (90 AD2d 923 [3d Dept 1982]). See also *People v Comforto* (62 NY2d 725 [1984]) (informant under arrest, would not lie and further exacerbate his predicament *citing People v Rodriguez* (52 NY2d 483, 490

[1981]; see also *People v Bowers*, 92 AD2d 669 [3d Dept 1983]; *People v Wolzer*, 41 AD2d 679 [3d Dept 1973]).

In *People v Barcia* (37 AD2d 612 [2d Dept 1971]), a possessor of drugs, upon arrest, identified his supplier. The Court upheld a search warrant directed at the supplier because the possessor's admissions, and the identification of the supplier were declarations against penal interest. In *People v Wheatman* (29 NY2d 337, 345 [1971]), the Court noted that the issuing judge may rely on the informant's declarations against penal interest as an element in assessing reliability (*see also People v Everett*, 60 AD2d 693 [3d Dept 1977] [accomplice's detailed statement about defendant's use of the gun sufficiently corroborated his reliability since the statement was against his penal interests].

Declaration against penal interest also supported search warrants in *People v Walker* (257 AD2d 769 [3d Dept 1999]; *People v Shetler*, 256 AD2d 1234 [4th Dept 1998]; *People v Morelock*, 187 AD2d 756 [3d Dept 1992]). An accomplice's statements to the police established probable cause in *People v McCann* (85 NY2d 951 [1995]) (*see also People v Sturgis*, 177 AD2d 991 [4th Dept 1991]). In *People v Lisk* (216 AD2d 851 [3d Dept 1995]), the accomplice's statement, as an admission against interest, contributed to probable cause.

Note: Where an informant made two different statements, both against penal interest, neither was credited over the other (*People v Cadby*, 62 AD2d 52 [4th Dept 1978]).

FOOTNOTE 26

SWORN TESTIMONY OR PRODUCTION OF CONFIDENTIAL INFORMANT

In *People v Wheatman* (29 NY2d 337 [1971]), the Court of Appeals, in a different context, stressed the value of sworn testimony as a means of establishing reliability. *Wheatman* may thus be relied upon to establish reliability of an informant who, though unidentified, is produced before the court, and sworn. See *People v Hicks*, (38 NY2d 90 [1975]) upholding a warrant on the sole ground that a named informant submitted a detailed statement under oath. Reliability was ensured because the informant could be prosecuted if his information was proven wilfully false Ibid. See also *People v Salgado* (57 NY2d 662 [1982]); *People v Sullivan* (56 NY2d 378 [1982]); *People v Bradley*, (181 AD2d 316 [1st Dept 1992]; *People v Bartolomeo*, 53 NY2d 225 [1981]). Thus, production of the informant before the issuing magistrate serves to establish existence and reliability (*People v Serrano*, 93 NY2d 73, 77 [1999]; *People v Rodriguez*, 182 AD2d 439 [1st Dept 1992]; *See also People v Gilmore*, 6 AD3d 748 [3d Dept 2004]; *People v Walker*, 244 AD2d 796 [3d Dept 1997] [Issuing magistrate heard testimony from both investigator and informant, thus obviating need to establish informant's reliability and basis of knowledge]; *see also People v Doyle*, 222 AD2d 875 [3d Dept 1995] [*Aguilar-Spinelli* inapplicable when warrant based on informant's sworn statement, citing *Bartolomeo*]; *see also People v Mendoza*, 5 AD3d 810 [3d Dept 2004]).

The failure to record the informant's testimony, however, was fatal in *People v Taylor*, 73 NY2d 683 [1989]; *cf. People v Brown*, 40 NY2d 183 [1976] [holding that an unnamed informant's reliability was established because he was examined by the court under oath prior to the issuance of the search warrant even though the examination of the

informant was off the record]).

An affirmation containing a statement that giving false information would constitute a misdemeanor, was the equivalent of a deposition (CPL 690.35 [2]; *People v Sullivan*, 56 NY2d 378 [1982]; *People v Simon*, 107 AD2d 196 [4th Dept 1985]).

FOOTNOTE 27

FACTS NOT INCLUDED IN AFFIDAVITS BUT PRESENTED WHEN WARRANT IS ISSUED -- METHOD OF RECORDING

CPL 690.40 (1) provides that in determining an application for a search warrant, the court may examine, under oath, any person whom it believes has pertinent information. The examination must be recorded or summarized on the record. Failure to comply substantially with this provision resulted in suppression (*see People v Taylor*, 73 NY2d 683 [1989]). A tape recorder or court reporter is best. Although in several cases "literal compliance" was not required (*see People v Brown*, 40 NY2d 183, 186-188 [1976]; *People v Cunningham*, 221 AD2d 358 [2d Dept 1995]; *People v Valdez-Rodrigues*, 235 AD2d 627 [3d Dept 1997]; *People v Miller*, 187 AD2d 930 [4th Dept 1992]; *People v Stewart*, 159 AD2d 971 [4th Dept 1990]; *People v Sullivan*, 56 NY2d 378 [1982]; *People v Dominique*, 229 AD2d 719 [3d Dept 1996] *affd* 90 NY2d 880 [1997]; *People v McGourty*, 188 AD2d 679 [3d Dept 1992]; *People v Lopez*, 134 AD2d 456 [2d Dept 1987]), the use of informal, sketchy notes is a risky, and possibly fatal practice, under *Taylor* (*see People v Isenberg*, 188 AD2d 1042 [4th Dept 1992]; *People v Blair*, 155 AD2d 676 [2d Dept 1989]). Court applied "presumption of regularity" to issuing magistrate's failure to record oral testimony

under CPL 690.40 (1) (*see People v Serrano*, 93 NY2d 73 [1999], citing *People v Dominique*, 90 NY2d 880 [1997]).

For federal counterpart, *see* Annotation, *Federal Court Determination of Probable Cause for Search Warrant: Consideration of Oral Testimony Which Was, in Addition to Affidavit, Before Officer Who Issued Warrant*, 24 ALR Fed 107.

It is also permissible to expand the proof at the time of the issuance of the warrant, by presenting to the issuing judge any facts not included in the affidavit (*see e.g. People v Marshall*, 13 NY2d 28 [1963]).

Moreover, at a suppression hearing to controvert the warrant, the prosecution was barred from supplying other facts claimed to have been furnished to the issuing judge, but not presented in the affidavit or recorded under oath (*see People v Asaro*, 34 AD2d 968 [2d Dept 1970]; *but see People v Cerrato*, 24 NY2d 1 [1969] [detective at suppression hearing permitted to elaborate on his affidavit about illegal drug sellers frequenting the apartment of the target of the stakeout]). In *People v Fici*, 114 AD2d 468 [2d Dept 1985], the informant was produced, but not sworn where police had established probable cause.

CPL 690.35 permits a sworn oral application for a search warrant by telephone, radio or other electronic communication. The applicant and any informants must be examined by the judge under oath and the examination and all communications with the judge must be recorded electronically or manually. (*See* Discussion Item13, *infra*; *Cf.* Note, *The Constitutionality of the Use of Unrecorded Oral Testimony to Establish Probable Cause for Search Warrants*, 70 Va L Rev 1603 [1984]).

Note: If the informant refuses to appear before the judge even anonymously, his appearance before the prosecutor could help establish the informant's existence and

reliability (*see People v Malinsky*, 15 NY2d 86, 93 [1965]; *People v Coffey*, 12 NY2d 443, 452 [1963]).

FOOTNOTE 28

CITIZEN-INFORMANT -- CRIME VICTIM

A number of cases stand for the proposition that citizen informants who act openly and out of a desire to aid in enforcement of the law should be encouraged, and that less rigid standards of testing reliability apply to them.

The reliability of the citizen-informant was established in that that she was not a regular police informant but an identified member of the community who had personally observed narcotics in the defendant's apartment, personally testified before the justice who issued the warrant, and had signed a sworn affidavit (*see People v Parliman*, 56 AD2d 966 [3d Dept 1977]). Similarly, information given by three citizen informants who were victims of defendant's sexual abuse justified the issuance of a search warrant to videotape a possible attempt by defendant to sexually abuse an undercover policewoman (*see People v Teicher*, 52 NY2d 638 [1981]). Information given by a citizen-informant, a relative of the suspect, was reliable particularly when considered in conjunction with the accomplice's confession (*see People v Everett*, 60 AD2d 693 [3d Dept 1977]). In *People v McCulloch*, 226 AD2d 848 [3d Dept 1996], the named informant's signed statement supported probable cause, taking the case out of the Aguilar-Spinelli requirements.

For other citizen-informant cases, see *People v Hicks,* 38 NY2d 90 (1975); *People v Brown*, 40 NY2d 183, 186 (1976); *People v Robertson*, 61 AD2d 600 (1st Dept 1978), *affd* 48 NY2d 993 (1980). A citizen informant was presumptively reliable in *People v*

Chipp, 75 NY2d 327, 339-340 [1990]; *People v Bourdon*, 258 AD2d 810 (3d Dept 1999); *People v Wilson*, 284 AD2d 958 (4th Dept 2001); *People v Brown*, 95 AD2d 569 (3d Dept 1983); *People v Simon*, 107 AD2d 196 (4th Dept 1985); *People v Allen*, 209 AD2d 425 (2d Dept 1994); see also *People v Crowder*, 198 AD2d 369 [2d Dept 1993]; *People v Reid*, 184 AD2d 668 [2d Dept 1992]; *People v David*, 234 AD2d 787 [3d Dept 1996]; *People v Slater*, 173 AD2d 1024 [3d Dept 1991]). In *People v Cantre* (65 NY2d 790 [1985]), the *Aguilar-Spinelli* test was satisfied even though the citizen may have been motivated by non-altruistic considerations.

FOOTNOTE 29

ESTABLISHING RELIABILITY

The word of a decent citizen with no motive to lie may form the basis for a finding of probable cause. This legitimacy, however, should be spelled out by allegations establishing the citizen's responsibility and cooperation (*see People v Ernest E.*, 38 AD2d 394 [2d Dept 1972]; *People v Talutis*, 39 AD2d 815 [3d Dept 1972]; *People v Parliman*, 56 AD2d 966 [3d Dept 1977].

FOOTNOTE 30

PRIOR RECORD OF SUSPECT

Although in *United States v. Harris* (403 US 573 [1971]), the Court ruled that the suspect's reputation could be considered in assessing the reliability of an informant's tip, a defendant's criminal reputation alone was held insufficient to corroborate the informant's

information (*see People v Wirchansky*, 41 NY2d 130 [1976]).

FOOTNOTE 31

NIGHTTIME (ANYTIME) SEARCH WARRANTS

A search warrant may be executed any day of the week, and only between the hours of 6:00 A.M. and 9:00 P.M. (CPL 690.30 [2]). In order to authorize a nighttime search (CPL 690.45 [6]), the warrant must contain certain allegations supporting the exercise of the judge's discretion in making that provision (CPL 690.35 [4] [a]; 690.40 [2]). But even if the nighttime authorization is inserted erroneously or without foundation, it will not invalidate a warrant executed during the day (*see People v Ferguson*, 25 NY2d 728 [1969], *cert. denied* 399 US 935 [1970]; *People v Costanzo*, 14 NY2d 596 [1964]; *People v Varney*, 32 AD2d 181 [2d Dept 1969]; *People v Midgett*, 86 Misc 2d 1003 [App Term 9th & 10th Jud Dists 1976]).

The court suppressed the evidence in *People v Acevedo* (179 AD2d 813 [2d Dept 1992] [no basis for nighttime search]). In contrast, courts upheld “anytime” warrants in *People v Alston*, 1 AD3d 627 (3d Dept 2003); *People v Lee*, 303 AD2d 839 (3d Dept 2003); *People v Bell*, 299 AD2d 582 (3d Dept 2002); *People v Ackerman*, 237 AD2d 849 (3d Dept 1997); *People v Roxby*, 224 AD2d 864 (3d Dept 1996); *People v Kane*, 175 AD2d 881 (2d Dept 1991); *People v Israel*, 161 AD2d 730 (2d Dept 1990). In *People v Henderson* (307 AD2d 746 [4th Dept 2003]), nighttime entry was upheld as authorized by court even though nighttime entry was not requested (*see also People v Rodriguez* (270 AD2d 956 [4th Dept 2000]; *People v Silverstein*, 74 NY2d 768 [1989]).

Under decisional law a small degree of flexibility or informality is possible, in

connection with the "anytime" directive (*see People v Crispell*, 110 AD2d 926 [3d Dept 1985]), so that it will not be interpreted hypertechnically, but there is risk in not following the format precisely. Moreover, if an ordinary search warrant is executed within the 6:00 A.M.-9:00 P.M. time frame, the search may lawfully extend beyond 9:00 P.M. (see *People v Vara*, 117 AD2d 1013 [4th Dept 1986]). A nighttime execution was upheld owing to readily destructible items (*People v Conklin*, 139 AD2d 156 [3d Dept 1988]; *People v Wollenberg*, 123 AD2d 413 [2d Dept 1986]; *People v Alston*, 1 AD3d 627 [3d Dept 2003]).

Failure to meet statutory requirements will invariably lead to suppression of evidence (*see People v Izzo*, 50 AD2d 905 [2d Dept 1975]; *People v Tarallo*, 48 AD2d 611 [1st Dept 1975]). On the other hand, courts will search supporting affidavits and testimony to uphold such warrants in spite of technical or procedural defects if there is substantial adherence to the statute.

In *People v Arnow* (108 Misc 2d 128 [Sup Ct, New York County 1981]), a failure to include the phrase "nighttime execution" was not fatal to a search warrant, where the affidavit of police officers requested permission to enter at night. Citing *United States v Searp* (586 F2d 1117, 1125 [6th Cir 1978]), the court found that the "technical defect" of the warrant -- the inadvertent exclusion of the phrase "nighttime execution" -- would "not preclude a consideration and examination of the substance of the application for the warrant" (108 Misc 2d at 132). The totality of circumstances demonstrated persuasively that nighttime execution was "correct, proper and authorized" (*Id*. at 132). A similar result was reached in *People v Harris* (47 AD2d 385 [4th Dept 1975]), where an express nighttime entry was granted although not requested by affidavit, with the court finding the explicit request for a no-knock entry to prevent destruction of contraband necessarily

incorporated a nighttime entry. On similar reasoning evidence was suppressed for failure to establish in fact the necessity for a nighttime search (*see People v Miller*, 109 Misc 2d 276 [Crim Ct, New York County 1981]).

Where the search warrant was ambiguous as to its character as an "all hours" warrant (CPL 690.35 [3] [a]), the court upheld a night-time execution where the justice testified as to his intention to make it an all-hours warrant, and the exigencies call for it (*see People v Crispell*, 110 AD2d 926 [3d Dept 1985]; *see generally* Annotation, *Propriety of Execution of Search Warrant at Nighttime*, 41 ALR5th 171, for a 600-page treatment).

FOOTNOTE 32

NO-KNOCK WARRANTS

CPL 690.35 (4) (b) and 690.40 (2) allow entry without announcing authority or purpose, if the court finds that the property is readily removable or destructible.

A no knock warrant was upheld, owing to possible physical injury or danger to police in *People v Israel*, 161 AD2d 730 (2d Dept 1990). No-knock search warrants were also upheld in *People v Kusse,* 288 AD2d 860 (4th Dept 2001); *People v Roxby*, 224 AD2d 864 (3d Dept 1996); *People v Henderson*, 307 AD2d 746 (4th Dept 2003); *People v Lee*, 303 AD2d 839 (3d Dept 2003); *People v Bell*, 299 AD2d 582 (3d Dept 2002); *People v Anderson*, 291 AD2d 856 (4th Dept 2002); *People v Skeete*, 257 AD2d 426 (1st Dept 1999); *People v Ackerman*, 237 AD2d 849 (3d Dept 1997). *See also* Randall S. Bethune, Note and Comment, *The Exclusionary Rule and the Knock-and-Announce Violation: Unreasonable Remedy for Otherwise Reasonable Search Warrant Execution*, 22 Whittier L Rev 879 [2001].

A warrant with a no-knock provision, obtained without complying with the procedures mandated by CPL 690.35 and 690.40, is nevertheless valid if the invalid no-knock provision was not utilized in the execution of the warrant (*see People v Parliman*, 56 AD2d 966 [3d Dept 1977]).

Under former Code of Criminal Procedure § 801, a substantially similar section, courts have not strictly required proof by affidavit to support no-knock authorization, holding that the nature of the contraband itself may enable the judge to notice judicially that the items are readily capable of destruction or removal (*see People v DeLago*, 16 NY2d 289, 292 [1965] [gambling materials]; *People v Horton*, 32 AD2d 707 [3d Dept 1969] [whiskey, beer, etc.]; *People v Rose*, 31 NY2d 1036 [1973] [narcotics]).

For Supreme Court jurisprudence, see *United States v Banks*, 540 US 31 (2003); *United States v Ramirez*, 523 US 65 (1998); *Richards v Wisconsin*, 520 US 385 (1997); *Wilson v Arkansas*, 514 US 927 (1995).

For treatises on no-knock search warrants, see Goddard, *The Destruction of Evidence Exception to the Knock and Announce Rule: A Call for Protection of Fourth Amendment Rights*, 75 Boston University L Rev 449; Garcia, *The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 Colum L Rev 685; Josephson, *Supreme Court Review: Fourth Amendment -- Must Police Knock and Announce Themselves Before Kicking in the Door of a House?*, 86 J Crim L 1229; Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant is an Idea Whose Time Has Come*, 64 Notre Dame L Rev 552).

See Annotation, *Sufficiency of Showing of Reasonable Belief of Danger to Officers or Others Excusing Compliance With "Knock and Announce" Requirement–State Criminal*

Cases, 17 ALR4th 301; *Propriety of Execution of Search Warrant at Nighttime*, 41 ALR5th 171, for a 600 page treatment.

NOTICE OF AUTHORITY AND PURPOSE

In the absence of authorization to the contrary, the police officer must, when executing the search warrant, give notice of authority and purpose (CPL 690.50). After doing so, a wait of about ten to fifteen seconds, followed by forced entry, was apparently approved in *People v Prisco* (30 NY2d 808 [1972]; *see also United States v Banks*, 540 US 31 [2003] [15-20 seconds valid]). A thirty-second wait was valid in *People v Drapala* (93 AD2d 956 [3d Dept 1983]; *but see People v Mecca*, 41 AD2d 897 [4th Dept 1973]), where under an ordinary search warrant, a wait of two to four seconds was not long enough. In *People v Clinton* (67 AD2d 626 [1st Dept 1979]), the forcible entry constituted a failure to comply with CPL 690.50.

In *People v Mahoney* (58 NY2d 475 [1983]), the court held that the failure of the police to bring the warrant with them did not invalidate it. There is no obligation to show the warrant in the absence of a request (*People v Rhoades*, 126 AD2d 774 [3d Dept 1987]; *People v Cotroneo*, 199 AD2d 670 [3d Dept 1993]; *see also People v Mikolasko*, 144 AD2d 760 [3d Dept 1988] [warrant in car, no violation]). The officer's failure to show the search warrant to the defendant was not fatal in *People v Williams* (275 AD2d 753 [2d Dept 2000]). Police may enter, without knocking, even though they have no warrant with them, but learned that one had just been issued (*see People v Mahoney*, 58 NY2d 475).

See Annotation, *What Constitutes Compliance With Knock-and-Announce Rule in Search of Private Premises-State Cases*, 70 ALR3d 217; *What Constitutes Violation of 18 USCS § 3109 Requiring Federal Officer to Give Notice of His Authority and Purpose Prior*

to Breaking Open Door or Window or Other Part of House to Execute Search Warrant, 21 ALR Fed 820; *What Constitutes Compliance with Knock and Announce Rule in Search of Private Premises—State Cases*, 85 ALR5th 1; Annotation, *Applicability and Application, to Questions Concerning What Violates Federal Constitution's Fourth Amendment Guarantee Against Unreasonable Searches and Seizures, of "Knock and Announce" Doctrine that Law Enforcement Officers, Before Entering Premises, Must Knock and Announce Some Matters– Supreme Court Cases*, 140 L Ed 2d 1111; Annotation, *Sufficiency of Showing to Support No-Knock Search Warrant– Cases Decided After* Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L Ed 2d 615 (1997),* 2003 ALR5th 6.

FOOTNOTE 33

DIRECTIVE FOR SEARCH AND SEIZURE

Pursuant to CPL 690.35 (3) (d), the application must contain a request for the court to issue a warrant directing a search for, and seizure of, property or the person in question. If the search warrant is for someone sought on the basis of an arrest warrant (CPL 690.05 [2] [b]), it is necessary to attach a copy of the arrest warrant and the underlying accusatory instrument (CPL 690.35 [3] [e]).

FOOTNOTE 34

SEARCHING FOR SUSPECT IN THIRD PERSON'S PREMISES

In 1991, the legislature amended the statute to allow authorities to search for a

person in someone else's premises (L 1991, at 504). This applies to a search for someone wanted under an arrest warrant. (CPL 690.05 [2] [a]). See *Steagald v United States*, 451 US 204 (1981); see also Discussion Item 9, *infra*.

FOOTNOTE 35

SUBSCRIBING AND SWEARING TO THE APPLICATION

CPL 690.35 (1) permits both written and oral search warrant applications. (For oral applications, see Discussion Item #13, *infra*). If in writing, the application must be sworn and subscribed to by a public servant of the type described in CPL 690.05 (*see People v Dunn*, 117 AD2d 863 [3d Dept 1986]; n 9 on Public Servants).

Defects in a warrant "may not be overcome by the unsworn, unwritten, and unrecorded details of the investigation related by a police detective to the Town Justice who issued the warrant [citation omitted]" (*People v Lalli*, 43 NY2d 729, 730-1 [1977]).

An affidavit from the issuing judge, stating that he recalls orally swearing in the police officer, satisfied CPL 690.35, in *People v Butchino* (152 AD2d 854 [3d Dept 1989]; *see also People v Rodriguez*, 150 AD2d 622 [2d Dept 1989]; *People v Oxx*, 155 AD2d 851 [3d Dept 1989]). Although unsworn, the informant's statement included a perjury warning and was held valid in *People v Sullivan* (56 NY2d 378 [1982]). *See also People v Johns*, 41 AD2d 342 (3d Dept 1973); Annotation, *Requirement, Under Federal Constitution's Fourth Amendment Guarantee Against Unreasonable Searches and Seizures, That Warrants, When Issued Upon Probable Cause, Must Be Supported "by Oath or Affirmation"– Supreme Court Cases*, 139 L Ed 2d 971.

For "Requirement of Swearing" cases, see 2 LaFave, *Search and Seizure*, §4.3(e),

pp. 473-476 (3rd ed).

Swearing to the application is plain enough, but it also must be "subscribed." The term is not defined in the search warrant article, but it should be taken to mean signing one's name at the end of the document, thereby attesting to it (*see e.g. Hughes v Merchants Nat'l Bank of Mobile*, 256 Ala 88, 53 SO2d 386 [1951]; *People v Pierce*, 66 Cal2d 53, 56 Cal Rptr 817, 243 P2d 969 [1967]).

FOOTNOTE 36

JURAT

The jurat is evidence that the "oath was properly taken before a duly authorized officer. In law, jurat means a statement by the magistrate that the application was sworn to before the magistrate (*see Vittorio v St Regis Paper Co*, 239 NY 148 [1924]). It is no part of the oath. Its absence is a defect curable by subsequent affidavits or testimony.

The absence of a jurat was not necessarily fatal (*see People v Zimmer*, 112 AD2d 500 [3d Dept 1985]; *People v Morelock*, 187 AD2d 756 [3d Dept 1992]; *People v Butchino*, 152 AD2d 854, 855 [3d Dept 1989]; *People v Rodriguez*, 150 AD2d 622 [2d Dept 1989]; s*ee also People v Sullivan*, 56 NY2d 378 [1982]; *People v Marshall*, 13 NY2d 28 [1963]).

FOOTNOTE 37

NAME OF COURT

CPL 690.45 (1) provides that a search warrant must contain the name of the issuing court. The name of the court was omitted, but it was not fatal, where it was elsewhere identified (*People v Pizzuto*, 101 AD2d 1024 [4th Dept 1984]). In *People v Smythe* (172

AD2d 1028 [4th Dept 1991]), the court held that this requirement was substantially fulfilled when stating that the "venue" was in Erie County and it was signed by a County Court Judge of Erie County, designated as a "JCC." As for the courts that are authorized to issue search warrants, see Footnote 1, P.__, *supra*. Even so, omitting the name of the court is not a good idea.

FOOTNOTE 38

PERSON OR AGENCY TO WHOM SEARCH WARRANT IS ISSUED; FAILURE TO ADDRESS WARRANT TO PARTICULAR POLICE AGENCY

CPL 690.45 (3) states that the search warrant must contain the name, department, or classification of the police officer to whom it is addressed. The failure to specifically address the warrant to a particular police agency was however, non-fatal, clerical omission in *People v. Davis* (93 AD2d 970 [3d Dept 1983]). Also, search upheld where warrant, addressed to New York City police officer is executed by a deputy warden, while observed by a police officer (*People v Gamble*, 122 Misc 2d 960 [Sup Ct, Bronx County 1984]).

Civilian assistance in executing the search warrant for confirmatory viewing of seized property violates no rights of defendant (*People v Boyd*, 123 Misc 2d 634 [Sup Ct, New York County 1984]).

CPL 690.25 provides that a search warrant must be addressed to a police officer whose geographical area of employment embraces (or is embraced wholly or partially by) the county of issuance. The warrant need not be addressed to any specific police officer; it may be addressed to any police officer of the designated classification or to any police officer of any classification employed or having general jurisdiction to act in the county (*See*

also Discussion Item 21, *infra*).

In cases of blood withdrawal or the like, the court would direct its authorization to a medical person (*Matter of Abe A*., 56 NY2d 288 [1982]).

FOOTNOTE 39

AUTHORIZATION AND DIRECTIVE

You are hereby “authorized and directed” is a reminder that a search warrant is a “court order and process” (CPL 690.05 [2]). Issuance of a search warrant is a "judicial act." (*Burns v Reed*, 500 US 478 [1991]).

FOOTNOTE 40

DESCRIPTION OF PROPERTY

CPL 690.45 (4) requires that the search warrant contain a description of the property that is the subject of the search [See footnotes 13,15a-c]. A search warrant that does not contain this provision is invalid (*see Groh v Ramirez*, ____US____, 124 S.Ct 1284 [2004])– – even though the application contains a description. The application’s content alone is insufficient unless the search warrant uses appropriate words of incorporation and the supporting document accompanies the warrant (*id.* at 1290).

FOOTNOTE 41

IDENTIFICATION OF PLACE, PREMISES, OR PERSON

Pursuant to CPL 690.45 (5), the search warrant must designate address, ownership,

name, or any other means essential for identification with certainty, the place, premises, or person to be searched (or searched for). See footnotes 2, 3, 4, 5.

FOOTNOTE 42

AUTHORIZATION TO SEARCH ANY PERSON "THEREAT OR THEREIN."

See footnote 7.

FOOTNOTE 43

EXECUTION OF WARRANT: WHERE AND WHEN

Pursuant to CPL 690.25 (2), a police officer to whom a search warrant is addressed (as provided in CPL 690.25 [1]) may execute it in the county of issuance or the adjoining county and may execute it in any other county in which it is executable if (a) the officer's geographical area of employment embraces the entire county of issuance or (b) the officer is a member of the police department of a city in the county of issuance. *See also* footnote 1.

Under CPL 690.30(1) a search warrant must be executed within ten days after issuance. The warrant may be executed any day of the week, including Sunday (CPL 690.30 [2]; *People v Childers*, 54 Misc 2d 752 [Sup Ct, Queens County 1967]) and must be executed between 6:00 A.M. and 9:00 P.M., unless it is a nighttime ("any hour") warrant, as specifically authorized under CPL 690.45 (6), as provided for in CPL 690.40 (2). The court excused an apparent typographical error directing the search between 6:00 P.M. and 9:00 P.M. in *People v Shetler* (256 AD2d 1234 [4th Dept 1998]). See nn 29, 30.

Cases arising under a similar ten-day rule in the federal courts (FED R CRIM P 41c)

have held a delay of six days valid even though the federal warrants contained a provision that the warrants be executed "forthwith" (*United States v Nepstead*, 424 F2d 269 [9th Cir 1970]; *United States v McClard*, 333 F Supp 158 [E D Ark 1971]; *United States v Dunnings*, 425 F2d 836, 841 [2d Cir 1970], *cert.denied* 397 US 1002 [1970] [nine days late, valid]; *United States v Harper*, 450 F2d 1032, 1043 [5th Cir 1971] [nine days late, valid]; *United States v Rael*, 467 F2d 333 [10th Cir 1972] [five days late, valid]). A delay in the execution of the search warrant was not fatal in *United States v Gerber* (994 F2d 1556 [11thCir 1993]; *See also United States v Gibson*, 123 F3d 1121 [8th Cir 1997]).

Even if the several day delay is strategic (i.e. timed for execution at the most propitious moment) it will not be invalidated before the ten day period *(United States v Wilson*, 491 F2d 724 [6th Cir 1974]).

The warrant was not executed until 17 days after issuance, in violation of CPL 690.30 and the evidence suppressed in *People v Jacobowitz* (89 AD2d 625 [2d Dept 1982]; *see also People v Patterson*, 78 NY2d 711 [1991]; *but see People v Bryan*, 191 AD2d 1029 [4th Dept 1993]).

A search conducted three days after the initial search pursuant to a search warrant was not illegal in *People v Graham* (90 AD2d 198, 204-5 [3d Dept 1982]).

If the warrant fails for lack of timely execution, the applicant may start over again, by resubmitting the proof for a new finding of probable cause (*see People v Tambe*, 71 NY2d 492, 502 [1988]; *People v Glen*, 30 NY2d 252 [1972]; *People v McCants*, 59 AD2d 999 [3d Dept 1977]).

For a discussion of the manner and extent of execution, see Discussion Item #26 (searching containers and the like). *See also* Brad M. Johnston, Note, *The Media's*

Presence During the Execution of a Search Warrant: A Per Se Violation of the Fourth Amendment, 58 Ohio St LJ 1499 [1997]. For a discussion relating to the search of unnamed others, see footnote 5. Plain view seizures of unnamed items are covered in footnote 16, *supra*.

See generally Annotation, *Timeliness of Execution of Search Warrant*, 2002 ALR5th 20; *see also* Annotation, *Civilian Participation in Execution of Search Warrant as Affecting Legality of Search*, 68 ALR5th 549. Note also that the Supreme Court has held that a prosecutor does not violate an attorney's Fourteenth Amendment right to practice his profession by executing a search warrant while the attorney's client is testifying before a grand jury (*see Conn v Gabbert*, 526 US 286 [1999]).

FOOTNOTE 44

RETURN OF WARRANT

CPL 690.45 (8) requires that the warrant contain a directive that any property seized be returned and delivered to the court without unnecessary delay (*see also* CPL 690.30 [1]). CPL 690.50 (5) involving the return and filing of an inventory of items seized is ministerial, and noncompliance will not vitiate search warrant *(see People v Dominique*, 229 AD2d 719 [3d Dept 1996], *affd* 90 NY2d 880 [1997]; *see also People v Davis*, 93 AD2d 970 [3d Dept 1983] [failure to file not fatal]; *People v LaBombard*, 99 AD2d 851 [3d Dept 1984] [deficient return not fatal]; *People v Nelson*, 144 AD2d 714 [3d Dept 1988]).

In *People v Rubicco* (30 NY2d 897 [1972]), a search warrant issued by one city judge and returned to another, was impliedly upheld. A search warrant cannot be invalidated on the ground that it does not contain a direction for its return; this is a

ministerial omission (*People v Pietramala*, 84 Misc 2d 496 [Crim Ct, Queens County 1975]).

A 13-day delay between search warrant issuance and return was a ministerial irregularity that did not invalidate the warrant (*see People v Frange*, 109 AD2d 802 [2d Dept 1985]; *see also People v Earl*, 138 AD2d 839 [3d Dept 1988]; *People v Frange*, 109 AD2d 802 [2d Dept 1985]; *People v. Hernandez*, 131 AD2d 509 [2d Dept 1987]; *People v Morgan*, 162 AD2d 723 [2d Dept 1990]).

The failure to provide defendant with a receipt for the contraband seized (CPL 690.50 [4]) was ministerial and not fatal (*see People v Morgan*, 162 AD2d723 [2d Dept 1990]). CPL 690.50 (6) requires that when a person is apprehended pursuant to a CPL 690.05 (2) (b) search warrant, the officer must follow procedures involving the search warrants return and inventory, and that the person apprehended has been brought before the appropriate court.

FOOTNOTE 45

DATING THE WARRANT

Police officers with knowledge that a search warrant has been issued and is en route may enter the premises before the search warrant arrives (*see People v Mahoney*, 58 NY2d 475 [1983]; *People v Williams*, 275 AD2d 753 [2d Dept 2000]). It is, therefore, useful to note the hour and minute at which the warrant was signed.

A warrant inadvertently dated two days after the judge signed it was not invalidated (*see People v Horton*, 32 AD2d 707 [3d Dept 1969]). In *People v Pietramala*, (84 Misc 2d 496 [Crim Ct, Queens County 1975]), the court held that the lack of a specific date on a

search warrant will not void the warrant provided it is executed within ten days after issuance, as required by CPL 690.30 (1).

FOOTNOTE 46

SIGNING THE WARRANT

The judge should sign the search warrant here. Although the failure to sign has been held ministerial (*see, e.g.*, *State v Huguenin*, 662 A2d 708 [RI 1995]; *Commonwealth v Pellegrini*, 405 Mass 86, 539 NE2d 514 [1989]), it is a risk best avoided.

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DISCUSSION ITEMS

1. THE VALUE OF A SEARCH WARRANT

Although the test for probable cause is generally the same for a search warrant or a warrantless search (*see Whiteley v Warden, Wyoming State Penitentiary*, 401 US 560, 566 [1971]; *United States v Smith*, 797 F2d 836, 840 [10th Cir 1986]) a warrant is preferred and will be given the benefit of the doubt (*see United States v Ventresca*, 380 US 102 [1965]). Put differently, courts will exercise a high level of scrutiny when reviewing warrantless searches (*see People v Bigelow*, 66 NY2d 417 [1985]; *People v Harper*, 236 AD2d 822 [4th Dept 1997]). For a comprehensive discussion as to the identity of standards for search warrant vs warrantless searches, see *Malcolm v State* (70 Md App 426, 521 A2d 796, *affd in relevant part*, 314 Md 221, 550 A2d 670).

In *People v Roberts* (79 NY2d 964 [1992]), the Court noted that in buy and bust operations, a "drive-by" is not the only way to assure reliability of an identification and the fact that the search warrant for the defendant's premises was executed only minutes after the undercover left the apartment substantially reduced the risk of arresting the wrong person (*see also People v Castillo*, 80 NY2d 578, 585 [1992] in which the court stressed that the issuing judge had examined the confidential informant, a factor in extending *People v Darden,* 34 NY2d 177 [1974], so as to authorize a post-issuance hearing in which the defendant was not a participant.)

A search warrant serves a "high function" (*Groh v Ramirez*, __US__, 124 S Ct 1284 [2004]) and while there is a benefit in using one, "the presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity

in the warrant" (*id.* at 1291).

There are, of course, a great many exceptions to the warrant requirement. One commentator has cataloged over twenty exceptions to the probable cause or the warrant requirement or both. *See* Craig M. Bradley, *Two Models of the Fourth Amendments*, 83 Mich L Rev 1468 [1985]; Robert M. Bloom, *The Supreme Court and Its Purported Preference for Search Warrants*, 50 Tenn L Rev 231 [1983].

2. BURDEN OF PROOF

A defendant has the burden of proof in attacking the sufficiency of a search warrant (*People v Glen*, 30 NY2d 252 [1972]; *see generally* B. Kamins, New York Search & Seizure, at 597 [14th ed 2004]). A defendant who makes a substantial preliminary showing that false statements were knowingly submitted in obtaining a warrant is entitled to a hearing on the issue (*see People v Ingram*, 79 AD2d 1088 [4th Dept 1981]; *cf. Franks v Delaware*, 438 US 154 [1978] [which held that a defendant challenging the issuance of a warrant must establish reckless and deliberate disregard of the truth]).

In *People v Price* (54 NY2d 557 [1981]), the Court refused to order the production for examination, of a dog whose superior senses detected the aroma of a controlled substance in defendant's luggage since defendant had failed to come forward with any evidence challenging the dog's accuracy (s*ee also United States v Johnson* (660 F2d 21 [2d Cir 1981]). Defendant has the burden of proof to show the officer's reckless disregard for truth. See Discussion Item #9 with regard to *Franks v Delaware*, 438 US 154 (1978).

3. ADMINISTRATIVE SEARCHES

Search warrants for administrative purposes -- such as health, fire, safety inspection -- were thought to be unnecessary until the United States Supreme Court decided *Camara v Municipal Court* (387 US 523 [1967]) and *See v City of Seattle* (387 US 541 [1967]). Eleven years later, the Court held that an administrative search warrant is required to search business premises for violations of the Occupational Safety and Health Act (OSHA) (*Marshall v Barlow's Inc.*, 436 US 307 [1978]). An administrative search is one based on the duty to enforce a non-penal statute or regulation. An administrative search warrant may be based upon specific evidence of violations or "reasonable legislative or administrative standards" for conducting an inspection rather than the stringent criminal search warrant standard of probable cause (*Id*. at 320). However, if during the course of an administrative search, the investigation changes from administrative to criminal, probable cause is required (*see Michigan v Tyler*, 436 US 499 [1978]).

In *Michigan v Tyler*, the Court reversed defendant's conviction for arson on the ground that a warrantless search of the burned premises conducted three weeks after the fire violated the Fourth Amendment. The Court also formulated standards for administrative warrants required before officials may inspect to determine the cause of the fire once the emergency has been controlled. The Court stated:

> In the context of investigatory fire searches, which are not programmatic but are responsive to individual events, a more particularized inquiry may be necessary. The number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders might all be relevant factors. Even though a fire victim's privacy must normally yield to the vital social objective of ascertaining

> the cause of the fire, the magistrate can perform the important function of preventing harassment by keeping that invasion to a minimum.

(*Michigan v Tyler*, 436 US at 507 [citations omitted]). The Court added that evidence of arson seized in a search under an administrative warrant is admissible in an arson prosecution but that where the officials' purpose is to search for evidence of arson they must obtain an ordinary search warrant based on probable cause.

In re Worksite Inspection of Quality Products, Inc. (592 F2d 611 [1st Cir 1979]), involved a motion to suppress an OSHA warrant. The subject of the search, Quality Products, Inc. (having contested administratively the three citations it received after the execution of the warrant and before the commission decided its case) brought a motion before the issuing magistrate to stay and recall the warrant. He granted it on the ground that (1) the Act's inspection procedures violated the Fourth Amendment; (2) the warrant was issued without probable cause; and (3) the complaint violated OSHA's regulations as it was not in writing and was not made by a current employee. The district court reversed, ruling that the magistrate had no jurisdiction to stay and recall the warrant. Treating Quality Products' motion as a suppression motion, the court denied it on the merits. The Court of Appeals for the First Circuit affirmed, holding (1) that the magistrate had no jurisdiction to stay and recall the warrant; and (2) the district court had jurisdiction to decide the motion and properly denied it on equitable grounds. The First Circuit found that:

> In the present case, as we suspect will be true in the vast majority of OSHA enforcement cases, the challenges to the warrant can be adequately considered in the statutory enforcement proceedings if not by the Commission then by the Court of Appeals. Quality's specific challenges to the warrant

> are: (1) that the anonymous telephone complaint was insufficient under the Act to justify an inspection; and (2) that the warrant application failed to show probable cause. The first of these challenges, presenting a question of statutory construction, is one that the Commission would reach (*see In re Restland Memorial Park*, 540 F2d 626, 628 [3d Cir 1976]). The probable cause challenge, on the other hand, would not be considered by the Commission, but it can be decided by the Court of Appeals should the employer lose before the Commission and seek review. No factual findings would be required; the contention gives rise to a question of law that can be decided on the basis of the papers that were presented to the magistrate, as happened when Quality's motion was heard by the magistrate and the district court below. The mechanics of seeing that the application and warrant become part of the record that ultimately goes to the Court of Appeals is a simple matter. We expect and would require the agency's cooperation to see that this is done, if the employer wishes to preserve the question. Because Quality has an adequate opportunity to litigate its challenges to the warrant in the procedure established by Congress, we hold that even if the district court had subject matter jurisdiction to decide Quality's motion, it should, in equity, have refrained from doing so in these circumstances.

Quality Products, 592 F2d at 615-616 (footnotes omitted). The court concluded that equitable grounds for deciding the motion are present only when veracity is at issue.

New York's legislature has authorized various forms of civil search warrants (see *e.g.* Agriculture & Markets Law § 20-a; Environmental Conservation Law § 71-0525; Family Court Act § 1034; General Business Law § 279-g). In *Matter of Shankman v Axelrod*, (73 NY2d 203 [1989]), the Court held that the Office of Professional Medical Conduct (OPMC) lacks authority to obtain an "inspection warrant" to seize a physician's record pursuant to

Public Health Law § 230 (10), although it may issue subpoenas pursuant to section 230 (10) (K).

In *People v Keta* (79 NY2d 474 [1992]), the Court struck down as unconstitutional Vehicle & Traffic Law § 415-a (5) (a) insofar as it purported to authorize warrantless administrative searches of vehicle dismantling businesses.

In *People v Calhoun* (49 NY2d 398 [1980]), the Court in affirming an arson conviction stated that it did not reach any question involving the use of an administrative warrant (49 NY2d at 408; n 3; *see also People v Quackenbush*, 88 NY2d 534, 542 [1980]; *People v Scott*, 79 NY2d 474, 501 [1992]).

An ordinance of the Town of Babylon permitted warrantless searches of residential rental property authorities sought to defend the ordinance on the ground that there was no violation of *Camara* because the inspectors were instructed to request permission before entering. The court held the procedure invalid because under the ordinance, landlords could be subject to criminal prosecution if they failed to permit an inspection (*see Pashcow v Town of Babylon*, 96 Misc 2d 1036 [Sup Ct, Suffolk County 1976]). See also *Sokolov v Village of Freeport*, 52 NY2d 341 [1981]), where the Court struck down as unconstitutional a village's rental permit requirement which essentially compelled a landlord's "consent" to the warrantless inspection of his residential property.

An administrative search (under the tax law) will not be justified in the absence of probable cause (*see People v Rizzo*, 40 NY2d 425, 429 [1976]).

4. DISCLOSURE OF INFORMANT

The Supreme Court has held that disclosure of the informant's identity is required

when necessary to a fair hearing on the issue of probable cause (*see Roviaro v United States*, 353 US 53 [1957]; *People v Malinsky*, 15 NY2d 86 [1965]). The requirements for disclosure will correspond proportionately to the lack of certainty as to the informant's existence or reliability of the informant. Thus, where the search rested solely upon the unconfirmed assertions of an informant whose source of information is not specified, disclosure was warranted (*see People v Verrechio*, 23 NY2d 489 [1969] [warrantless search]; *see also People v Jonas*, 33 AD2d 831 [3d Dept 1969] [search warrant based on informant, no corroboration of his existence or his tale, held, disclosure ordered]; *accord People v Tatum*, 36 AD2d 635 [2d Dept 1971] and *People v Elwell*, 66 AD2d 172 [3d Dept 1979], *affd* 50 NY2d 231 [1980]). But where there was adequate evidence of informant's reliability and information, based upon police confirmation, disclosure was not required (*see People v Castro*, 29 NY2d 324 [1971] [warrantless arrest], *citing McCray v Illinois*, 386 US 300, 302 [1967]; *accord People v Cerrato*, 24 NY2d 1 [1969] [proven reliable informant plus independent police observations, held, no disclosure required in search warrant case]; *People v Smith*, 21 NY2d 698 [1967] [search warrant based on proven reliable informant plus independent police observations, held, no- disclosure required]; *see also People v S & L Processing Lab, Inc.*, 33 NY2d 851 [1973]; *People v White*, 16 NY2d 270 [1965] [warrantless search based on proven reliable informant, plus independent police observations, held, no disclosure required]; *People v Maddox*, 24 NY2d 924 [1969] [search warrant based on informant who previously supplied information leading to "arrests," coupled with police observations of addicts entering premises, held, no disclosure required]; *People v Coffey*, 12 NY2d 443 [1964] [held, disclosure not required where informant, in warrantless arrest case, was produced before district attorney]).

The Court of Appeals has held that a defendant may not, by subpoena, acquire records of payments made to informants, if disclosure is not otherwise indicated (*see People v Rubicco*, 30 NY2d 897 [1972]).

Upon a motion to suppress the court may examine the informant in camera even where he was the sole support for the proof (*see People v Darden*, 34 NY2d 177 [1974]; *see also People v Brown*, 294 AD2d 513 [2d Dept 2003] [motion for discovery of redacted portions of search warrant]; *People v Little*, 48 AD2d 720 [3d Dept 1975]; *People v Davis*, 93 AD2d 970 [3d Dept 1983]).

Courts have held that a *Darden* hearing is not necessary if the police officer's testimony at the suppression hearing satisfies *Aguilar-Spinelli* (*see People v Edwards*, 95 NY2d 486 [2000]; *see also People v Mendoza*, 5 AD3d 810 [3d Dept 2004]). Nor was a *Darden* hearing necessary when the informant had previously appeared before the issuing magistrate during the application (*see People v Serrano*, 93 NY2d 73 [1999]). Under *Serrano*, the informant was kept confidential and a record of his testimony kept from defendant. *Edwards* held that at a *Darden* hearing the defense can be excluded but may submit questions for the court to ask the informant (*see also* People v Castillo, 80 NY2d 578 [1992]).

In *People v Castillo*, 80 NY2d 578 [1992], the Court denied the defendant access to the search warrant and supporting affidavits and to protect the confidentiality of the informant conducted a hearing without the defendant's participation. The issuing judge had taken sworn testimony from the confidential informant and sealed the papers and record. The Court held that defendant had no "right" to take part in the hearing. The defense did not participate in the hearing and the court in effect took the defendant's role in questioning

the search (*see also People v Rodriguez*, 182 AD2d 439 [1st Dept 1992]; *People v. Peterson*, 159 AD2d 983 [4th Dept 1990]; *People v Delgado*, 134 AD2d 951 [4th Dept 1987]). Note that *Darden* involved a warrantless search, whereas in *Castillo* the issuing judge had interviewed the confidential informant. The *Castillo* court stressed that this procedure is not to be routinized or trivialized, but is allowable only when special circumstances justify the procedure and the compelling need for confidentiality.

When, at a suppression motion, the prosecution could not produce the confidential informant owing to his fear, the People were allowed to establish the confidential informant's existence by alternative means, using extrinsic evidence (*see People v Carpenito*, 80 NY2d 65 [1992]).

Where an informer plays a part in the transaction forming the basis for the prosecution (as opposed to a role in the acquisition of a search warrant), the informant was indispensable, and an ex parte proceeding did not meet constitutional standards (*People v Goggins*, 34 NY2d 163 [1974]; *Roviaro v United States*, 353 US 53 [1957]; *see also People v Castro*, 63 AD2d 891 [1st Dept 1978]; *People v Alamo*, 63 AD2d 6 [1st Dept 1978]; *People v Tranchina*, 64 AD2d 616 [2d Dept 1978]). Where, however, the informant's part in the transaction (and hence his value) was limited, disclosure was improperly ordered (*see People v Casiel*, 42 AD2d 762 [2d Dept 1973]). Under those circumstances, the Appellate Division ruled that it would not be improper for the court to conduct an in camera inquiry -- without the defense present -- to determine the issue by interviewing the informant (*see People v Delgado*, 40 AD2d 554 [2d Dept 1972]). *See also United States v White*, 324 F2d 814 [2d Cir 1963]; *United States v Cimino*, 321 F2d 509, 512 [2d Cir 1963]) (If the informant's presence at the trial is deemed necessary, the

prosecution must go to reasonable lengths to locate and produce him; but if good faith efforts fail, non-production will not be held against the prosecution).

5. A SEARCH IS MEASURED BY THE PROOF IN EXISTENCE AT ITS INCEPTION

A search is good or bad at the start and is not justified by what it turns up (*see Johnson v United States*, 333 US 10 [1948]; *Bumper v North Carolina*, 391 US 543, 548 [1968]; *United States v DiRe*, 332 US 581, 595 [1948]; *People v O'Neill*, 11 NY2d 1 [1962]). Underlying the issuance of a search warrant is a prior determination by a neutral magistrate certifying the existence of probable cause (*see People v Vaccaro*, 39 NY2d 468, 470 [1976]). It is settled law regarding search warrants that a court's post-search validation of probable cause will not render the evidence admissible (*see Vale v Louisiana*, 399 US 30, 35 [1970]; *Powell v Nevada*, 511 US 79, 85 [1994]).

6. SEARCHING IN DEFENDANT'S ABSENCE

The defendant's house may be searched even though the defendant is not there (CPL 690.50 [2] [a]). In *State v Iverson* (187 NW 2d 1, 32-33 [N Dak 1971]), the defendant had already been incarcerated and the court upheld the nighttime execution of a warrant that lacked a nighttime clause (*see also Payne v United States*, 508 F2d 1391 [5th Cir 1975], citing 18 USC 3019).

Other cases authorizing searches where the defendant occupant is not at home are *People v Martinez* (207 AD2d 695 [1st Dept 1994]); *People v Taylor* (2002 Misc.Lexis 171 [2002]); and *Hart v Superior Court* (98 Cal. Rptr. 565, 21 Cal App 3d 496 [1971]

[requirement to "knock and announce" was held inapplicable]). There may, of course, be questions of defendant's knowledge and possession, as when the defendant is not the sole occupant (*see e.g*. *People v Law*, 31 AD2d 554 [3d Dept 1968]).

7. SEARCHING PAROLEES

Courts have held that parolees do not have the same Fourth Amendment rights as others and may be searched under conditions that do not meet probable cause standards applicable to ordinary citizens. What is reasonable for search of parolee differs from what is reasonable for an ordinary citizen (*see United States v Lewis*, 400 F Supp 1046 [SDNY 1975]; *see also Pennsylvania Bd of Probation and Parole v Scott*, 524 US 357 [1988]); or probationers (*see People v Hale*, 93 NY2d 454 [1999]; *see also People v Santos*, 31 AD2d 508 [1st Dept 1969], *affd*, 25 NY 976 [1969], and *United States ex rel. Santos v New York State Bd of Parole*, 441 F2d 1216 [2 Cir 1971], *cert. denied* 404 US 1025 [1972]). The search of a parolee or probationer as a condition of release was held constitutionally valid (*see People v Hale*, 93 NY2d 454 [1999]; *People v Fortunato*, 50 AD2d 38 [4th Dept 1975]). Parolees' due process rights are subject to limitations by the State (see *Morrissey v Brewer*, 408 US 471, 482 [1972]). However, the search of a parolee must be conducted as part of the supervising authority's routine supervision or with probable cause; thus police officers who lack a probable cause basis for searching a parolee were unable to circumvent Fourth Amendment standards by merely calling in a parole officer to conduct a search as their agent (see*People v Candelaria*, 63 AD2d 85 [4th Dept 1978]; *cf*. *Diaz v Ward*, 437 F Supp 678 [SDNY 1977] for a detailed discussion of the limitations governing search of parolees; *see* Annotation, *Validity, Under Fourth Amendment, of Warrantless*

Search of Parolee or his Property by Parole Office, 32 ALR Fed 155; Annotation, *Validity of Requirement That, As Condition of Probation, Defendant Submit to Warrantless Searches*, 79 ALR3d 1083).

8. MOTIONS TO SUPPRESS

In New York, a motion to suppress must be made in the court having jurisdiction of the crime for which the defendant was indicted, as opposed to the court that issued the warrant (CPL 710.50; *People v Turpin*, 22 NY2d 740 [1968]; *People v Kelly*, 40 AD2d 624 [4th Dept 1972]).

If an information is pending in a local criminal court, a motion to suppress evidence must be made in that Court (CPL 710.50 [1] [c]) even though the search warrant was issued by a Supreme Court justice (*see People v P.J. Video*, 65 NY2d 566 [1985]). On a motion to suppress, the judge who issued the search warrant may, but need not, sit in review of its validity on a motion to suppress (*see People v McCann*, 85 NY2d 951 [1995]; *People v Liberatore*, 79 NY2d 208, 217 [1992]; *People v Tambe*, 71 NY2d 492, 506 [1988]). Any suggestion to the contrary (*see People v Romney*, 77 AD2d 482 [4th Dept 1980]) is incorrect (*see People v Guerra*, 65 NY2d 60, 63 [1985]). The Supreme Court has held that the question of proof necessary to sustain issuance of a warrant need not measure up to guilt beyond a reasonable doubt but whether the information provided a magistrate was "reliable or truthful" (*see United States v Harris*, 403 US 573, 582 [1971]). The reasonableness in granting a warrant is determined by a consideration of the totality of observations and information brought before a magistrate (*see People v Maldonado*, 80 AD2d 563 [2d Dept 1981].

A motion to suppress that lacks sworn allegations of fact is ineffective (*see People v Mendoza*, 82 NY2d 415 [1993]). The Court found the allegations sufficient in *People v Bennett* (240 AD2d 292 [1st Dept 1997]), but an attorney's affidavit was inadequate in *People v Lucente*, 39 AD2d 1003 (3d Dept 1972). Where the defendant did not controvert any of the facts alleged in the search warrant application, the court properly denied the defendant's request for a hearing (*People v Cusumano*, 108 AD2d 752, 753 [2d Dept 1985], *citing People v Glen*, 30 NY2d 252 [1972]).

Having failed to make a written motion challenging the warrant within 45 days after arraignment, defendant waived his claim that the search warrant was deficient (*see People v Knowles*, 112 AD2d 321 [2d Dept 1985]), citing CPL 255.20 (3); absent a waiver, the defendant must be present at the hearing or the proceedings be nullified (*see People v Restifo*, 44 AD2d 870 [3d Dept 1974]).

Upon a motion controverting a search warrant, notes used by the applicant-officer in preparing the application are not necessarily discoverable (*see People v Rossi*, 30 NY2d 936 [1972] [court examined notes in camera, owing to claimed confidentiality]; *but see People v Malinsky*, 15 NY2d 86 [1965]). As to disclosure of informants on motions to suppress, see Disclosure of Informant, *supra*, Discussion Item # 3.

A successful motion to suppress did not give rise to an action for damages (*see Martinez v City of Schenectady*, 97 NY2d 78 [2001]).

See generally Jennifer L. McDonough, *Recent Decisions: Media Participation in the Execution of a Search Warrant Inside a Home Violates the Fourth Amendment to the United States Constitution:* Wilson v. Layne, 38 Duq L Rev 1119 (2000).

9. POST-ISSUANCE: CONTROVERTING THE VERACITY OF THE PROOF

In some states, a court may review, de novo, the issue of whether the supporting proof was credible. In other jurisdictions, that issue is thought to be exclusively within the dominion of the issuing magistrate, and will not be disturbed unless the facts, as a matter of law, are insufficient.

New York has steered a middle course by allowing a hearing, at which the affiant must submit to cross-examination, if the affiant's affidavit is attacked as perjurious. But a challenge directed at the veracity of the original source informant does not put into issue the trustworthiness of the affiant's statement (*see People v Solimine*, 18 NY2d 477 [1966]; *People v Alfinito*, 16 NY2d 181 [1965]; *People v Slaughter*, 37 NY2d 596 [1975]; *People v Ingram*, 79 AD2d 1088 [4th Dept 1981]). Only wilfully false information on the part of law officials (as opposed to private citizens) will poison an otherwise valid warrant (*People v Cohen*, 90 NY2d 632 [1997]).

In *Franks v Delaware* (438 US 154 [1978]), the United States Supreme Court reversed the defendant's conviction for forcible rape on the ground that the state court's ruling– – that under no circumstances could defendant challenge the veracity of the affidavit – – denied defendant his Fourth Amendment rights. The Supreme Court ruled that the Fourth Amendment's guarantee that a warrant be based on probable cause requires that where a defendant makes a substantial preliminary showing that a false statement was knowingly or recklessly made by the affiant and that this statement was material to the finding of probable cause, defendant is entitled to a hearing. If, at the hearing, the defendant can establish that the false statement was perjurious or made with a reckless disregard for the truth, and the remaining statements in the affidavit do not independently

establish probable cause, the warrant must be voided and the evidence suppressed. In *Franks*, defendant had alleged that the officer affiant had lied when he swore that he had talked to defendant's employer and that they had told him that defendant habitually dressed in the same clothes that the complainant had described her assailant as wearing.

Under *Franks*, a defendant who claims that the search warrant applicant supplied the judge with statements he or she knew to be false or made with reckless disregard for truth has the burden to establish this (*see* Annotation, *Disputation of Truth of Matters Stated in Affidavit in Support of Search Warrant—Modern Cases*, 24 ALR4th 1266; *see also People v Cohen*, 90 NY2d 632, 638 [1997]; *People v Ingram*, 79 AD2d 1088 [4th Dept 1981]; *People v Cotroneo*, 199 AD2d 670 [3d Dept 1993]; *People v Reilly*, 195 AD2d 95 [3d Dept 1994] [slight deviation between suppression motion testimony and application insufficient to establish *Franks* violation]; *People v Ortiz*, 234 AD2d 74 [1st Dept 1996]; *People v Rayner*, 171 AD2d 820 [2d Dept 1991]; *People v Nunziato*, __ AD3d __ [2nd Dept 2004]). In *People v Fonville* (247 AD2d 115 [4th Dept 1998]), a wiretap case, the court held that the *Franks* rule pertains not only to affirmative misrepresentations, but misleading omissions of material fact citing *People v Seybold* (216 AD2d 935 [4th Dept 1995]).

In *People v Tambe* (71 NY2d 492 [1988]) the defendant failed to meet the burden. Moreover, even if the statement was knowingly false the remedy is to delete the statement and review the adequacy of what is left (*id.* at 505; *see also People v Bartolomeo*, 53 NY2d 225 [1981]; Annotation, *Propriety in Federal Prosecution of Severance of Partially Valid Search Warrant and Limitation of Suppression to Items Seized Under Iinvalid Portions of Warrant*, 69 ALR Fed 522; Annotation, *Propriety in State Prosecution of Severance of Partially Valid Search Warrant and Limitation of Suppression to Items Seized Under Invalid*

Portions of Warrant, 32 ALR4th 378).

Prior to *Franks*, courts generally held that error not amounting to willful falsification would not affect validity (*see United States v Pond*, 523 F2d 210 [2d Cir 1975]; *United States v Gonzalez*, 488 F2d 833 [2d Cir 1973]). *Franks* confirmed that errors which are neither willful nor reckless should not be disturbed.

New York courts have generally held that a defendant may challenge only the veracity of the affiant and not the veracity of the informant from whom the affiant obtained his information (*see People v Porter*, 44 AD2d 251 [1st Dept 1974]; *People v Barton*, 51 AD2d 1044 [2d Dept 1976]; *People v Ascani*, 56 AD2d 891 [2d Dept 1977]; *but see People v Callahan* (85 Misc 2d 1083 [Sup Ct, Bronx County 1976]), where the citizen-informant perjuriously swore to the issuing judge that she had seen marihuana and pills in the defendant's apartment; while the district attorney and the affiant police officer were aware that the informant held a personal grudge against the defendant, they failed to reveal this information to the judge and instead made every effort to bolster her credibility.

In *People v Nunziata* (__ AD3d __ [2nd Dept 2004]), the court sustained a search warrant in which the informant at a *Franks* hearing testified that she did not make certain statements the detective attributed to her in the warrant application, and the hearing court found her testimony not credible.

Discrepancies in the description given of the perpetrator did not warrant a *Franks* hearing (*see People v Christopher*, 101 AD2d 504, 529 [4th Dept 1984] *revd on other grounds*, 65 NY2d 417 [1985]). Moreover, affiants need not present all the information they possess (*see United States v Charlton*, 409 F Supp1327, *affd* 565 F 2d 86, *cert*

denied sub nom Jacek v United States, 434 US 1070, *citing Franks v Delaware*, 438 US 154 [1978]). In *People v Windrum* (128 Misc 2d 1043 [Monroe County Court 1985]) however, the court suppressed the evidence where the search warrant was based on an informant's statement, while police deliberately excluded a prior contradictory one *(see also United States v Morales* (568 F Supp 646 [1983]).

The principle of collateral estoppel precludes the People from offering suppressed evidence against a defendant who was not a party to the successful motion to controvert the warrant (*see People v Nieves*, 106 Misc 2d 395 [Sup Ct, Bronx County 1980]; *People v McGriff*, 130 AD2d 141 [1st Dept 1987]; *see also People v Plevy*, 52 NY2d 58 [1980]).

See generally Annotation, *Disputation of Truth of Matters Stated in Affidavit in Support of Search Warrant– Modern Cases*, 24 ALR4th 1266.

10. ARREST OF SUSPECT IN A RESIDENCE: WARRANT REQUIREMENT

In *Payton v New York* (445 US 573 [1980]), the Supreme Court held that the police had to obtain an arrest warrant before they could enter a suspect's home to make an arrest unless exigent circumstances existed or the police entered by consent (*see generally* William C. Donnino and Anthony J. Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 Alb L Rev 90 [1980]) . The next year the Court held that an arrest warrant adequate to allow the police to enter a suspect's home was not enough to protect the Fourth Amendment interests of a third party in whose home the police reasonably believe they will find a suspect. To gain entry to the third party's residence, the police must obtain a search warrant—even if they already have an arrest warrant which authorizes their entry into the suspect's residence *(see Steagald v United States*, 451 US 204 [1981]; CPL

690.05 [2] [a] and n 34 of this work).

11. USE OF SUBPOENA TO SECURE EVIDENCE

A subpoena duces tecum serves purposes similar to that of a search warrant since it may be issued to secure evidence of wrongdoing. The Fourth Amendment guards against abuse of subpoenas that are overbroad or too indefinite as to the evidence sought (*see Oklahoma Press Publishing Co v Walling*, 327 US 186, 208 [1946]). Unlike a warrant however, a subpoena does not constitute a "seizure" and presents no requirements for a preliminary showing of probable cause before issuance (*see United States v Dionisio*, 410 US 1 [1973]; *Hynes v Moscowitz*, 44 NY2d 383 [1978]). Moreover, once an indictment is issued, a grand jury subpoena is no longer available if its sole or dominant purpose is to gather evidence in preparation for trial (*see Hynes v Lerner*, 44 NY2d 329 [1978]). CPL 610.25 permits limited retention of subpoenaed items and allows photocopying before they are returned to the owner. The prosecutor, acting for the grand jury, exercises control over subpoenaed items, and need not seek an order of impoundment since the right of possession arises from the subpoena itself. The party subpoenaed must challenge possession *(see Matter of Brunswick Hospital Center, Inc v Hynes*, 52 NY2d 333 [1981]). A challenge to a subpoena stays its execution and grand jurors may not review evidence until the motion is resolved; there is no similar threshold challenge to a search warrant that demands immediate compliance with lawful authority. A grand jury subpoena enjoys a presumption of validity that requires the challenger to demonstrate by concrete evidence that material requested is irrelevant to the matter under investigation (*see Virag v Hynes*, 54 NY2d 437 [1981]). For a more detailed treatment of this subject , see LaFave, Search

and Seizure, § 4.13 [West Pub Co 1978]). *See also* David Horan, *Breaking the Seal on White Collar Criminal Search Warrant Materials*, 28 Pepp L Rev 317 [2001]; Annotation, *Supreme Court's Views as to Application of Fourth Amendment Prohibition Against Unreasonable Searches and Seizures to Compulsory Production of Documents*, 48 L Ed 2d 884.

12. SECURING THE SCENE FOR A SEARCH WARRANT

If, while lawfully at a location the police have reason to believe contraband is present they may secure the object or premises while applying for a search warrant. Because the police had probable cause as to contraband in defendant's house, defendant was prevented from entering his home while the police secured a search warrant; this was upheld in *Illinois v McArthur*, (531 US 326 [2001]). In *Matter of Marrhonda G.* (81 NY2d 942 [1983]), the officer had handled the outside of the defendant's bag and it felt like it had the outline of a gun. The Court held that he should not have searched the bag, but *could* have secured it and obtained a search warrant (*see also People v Farmer*, 198 AD2d 805 [4th Dept 1993]). In appropriate cases police may secure the object or the scene and post a guard while acquiring a search warrant (*see People v Rodriguez*, 69 NY2d 159 [1987]; *People v Clements*, 37 NY2d 675 [1975]; *People v Harris*, 62 NY2d 706 [1984]; *People v Arnau*, 58 NY2d 27 [1982]) [or perhaps even a telephonic search warrant]; *see also United States v Johnson*, 22 F3d 674 [6th Cir 1994]; *Segura v United States*, 468 US 796 [1984]; *United States v Wilson*, 36 F3d 1298 [5th Cir 1994]; *United States v Hoyos*, 892 F2d 1387 [9th Cir 1989]; *United States v Padin*, 787 F2d 1071 [6th Cir 1986]; *see also California v Acevedo*, 500 US 565 [1991]).

13. ORAL SEARCH WARRANT (A/K/A TELEPHONIC SEARCH WARRANTS)

This provision was added in 1982 (L. 1982, ch. 679). The authorization is designed for swiftness and the requirements must be followed strictly. There are a number of conditions and steps entailed:

1. The applicant may communicate with the judge by telephone, radio, or other means of electronic communication (CPL 690.36). No New York case deals with fax transmissions. A fax transmission was upheld in *People v Snyder* (181 Mich App 768, 449 NW2d 703 [1989]; s*ee also United States v Hessman*, 369 F3d 1016 [8th Cir 2004]; *United States v Allard*, 47 F3d 1170 [6th Cir 1995]).

2. The communication must be recorded by electronic recorder or verbatim stenography or verbatim longhand notes. Electronic recording is obviously the most exact. Everything should be recorded, including the oaths (CPL 690.36 [3]). The failure to have an adequate record of what transpired will void the warrant (*see People v Taylor*, 73 NY2d 683 [1989]).

3. The applicant introduces himself or herself and tells the judge the purpose of the communication (CPL 690.36 [2]). The judge should identify himself or herself and the name of the court.

4. The judge swears in the applicant. The judge must also, then or at the appropriate time, swear in anyone else providing information (CPL 690.36 [2]).

5. The applicant makes a statement pursuant to CPL 690.35 (3) (b):

> that there is reasonable cause to believe that property of a kind or character described in [CPL] section 690.10 may be found in or upon a designated ... place, vehicle or person, or in the case of an application for a search warrant as defined in CPL 690.20 (2) (b), a statement

> that there is reasonable cause to believe that the person who is the subject of the warrant of arrest may be found in the designated premises.

The applicant must then present allegations of the fact supporting the above statement. Such allegations of fact may be based upon personal knowledge of the applicant or upon information and belief, but the source of such information and the grounds of such belief must be stated. In support, the applicant may also submit depositions of other persons containing allegations of fact (CPL 690.35 [3] [c]).

The allegations may be supplied to the judge by someone, properly identified, other than the applicant (CPL 690.36 [2]; *People v Farmer*, 198 AD2d 805 [4th Dept 1993]).

6. The applicant may ask for and receive a nighttime/no-knock warrant of the kind described in CPL 690.35 (4) (a) and (b).

7. In accordance with CPL 690.40 (2), the judge must be satisfied that there is probable cause before granting the application.

8. When the judge determines to issue a search warrant the applicant must prepare a warrant with all the formalities of CPL 690.45 and must read the warrant *verbatim* to the judge (CPL 690.40[3]; *People v Crandall*, 108 AD2d 413 [3d Dept 1985]). This is essential because the judge is not signing the search warrant (CPL 690.45 [1]; *Crandall*, 108 AD2d at 417). Without this step, the warrant was held to have failed in *People v Farmer*, (188 AD2d 1063 [4th Dept 1992]), inasmuch as the court had no way of determining whether the warrant comported with what the court was authorizing (*see also People v Price*, 204 AD2d 753 [3d Dept 1994], *opinion after remand* 211 AD2d 943). It is conceivable that notwithstanding an invalid telephonic warrant a seizure may be based on

warrantless exigencies (*see People v Hughes*, 124 AD2d 344 [3d Dept 1986]; *People v Crandall*, 69 NY2d 459 [1987]).

9. If a voice recording device is used or a stenographic record made, the judge must have the record transcribed, certify to the accuracy of the transcription and file the original record and transcription with the court, within twenty-four hours following the issuance of the warrant. If longhand notes are taken, the judge must subscribe a copy and file it with the court within twenty-four hours after the issuance of the warrant.

In *People v Brinson*, (177 AD2d 1019 [4th Dept 1991]), the issuing magistrate failed to have the application transcribed or to certify the accuracy of the transcription (CPL 690.36 [3]), but the appellate division held the seizure valid, considering that the magistrate had filed the original audiotape within twenty-four hours after issuing the search warrant (*see also People v Camarre*, 171 AD2d 1003 [4thDept 1991]).

See generally Geoffrey P. Alpert, *Special Topic: Telecommunications in the Courtroom: Telephonic Search Warrants*, 38 U Miami L Rev 625 [1984].

14. INFORMATION SUPPLIED BY CHILDREN

A sworn affidavit by a named 9-year-old was held sufficient to justify the issuance of a search warrant that otherwise passed the *Aguilar-Spinelli* tests, in that the stricter evidentiary standard for childrens' trial testimony (CPL 60.20) does not apply to search warrants (*see People v Hetrick*, 80 NY2d 344 [1992]; *see also People v Israel*, 161 AD2d 730 [2d Dept 1990]). Child's statement satisfied *Aguilar-Spinelli* in *People v Younis* (265 AD2d 931 [4th Dept 1999]). *See, also, People v. Tinkham*, 273 AD2d 619 [3d Dept 2000]; *People v. Gonzalez*, 138 AD2d 622 [2d Dept 1988].

15. BEEPERS (A/K/A TRACKING DEVICES, TRANSPONDERS, BEACONS)

Under federal constitutional law the use of beepers (e.g., to track a car's movement) does not infringe any reasonable expectation of privacy (*see United States v Knotts*, 460 US 276 [1983]; *United States v Karo*, 468 US 705 [1984]; *United States v Moore*, 562 F2d 106 [1st Cir 1967]; *but see United States v Chavez*, 603 F2d 143 [10th Cir 1979]. *See also People v Colon*, 96 Misc 2d 659 [Sup Ct, Bronx County 1978], *modified on other grounds* 128 AD2d 422; *Public Service Commission Review Concerning Privacy in Communications*, case 90-C-0075, 1990 NY PUC Lexis 24; Annotation, *Use of Electronic Tracking Device [Beeper] to Monitor Location of Object or Substance Other Than Vehicle or Aircraft as Constituting Search Violating Fourth Amendment*, 70 ALR Fed 747; Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 Hastings LJ 645).

On the horizon there appear to be a great many other devices developed for surveillance purposes. In time these will be debated in the Fourth amendment context. As one researcher noted:

> Some examples of the technology currently in use or being developed include: electronic tracking devices, satellite remote sensing technology, computer encryption chips, chemical tracers, electromagnetic wave images, and, of particular importance to this Comment, infrared thermal images

(Hale, Case Comment: *United States v. Ford: The Eleventh Circuit Permits Unrestricted Police Use of Thermal Surveillance on Private Property Without a Warrant*, 29 Ga L Rev 819, 820).

The use of a "beeper" tracking device is distinguishable from wiretapping or

eavesdropping because it is merely an aid in surveillance operations. Where it can be shown that it was "reasonable" to attach such a device to a vehicle, there is no inflexible requirement that a search warrant first be obtained (*see People v Colon*, 96 Misc 2d 659 [Sup Ct, Bronx County 1978]; *see United States v Moore*, 562 F2d 106 [1st Cir 1977]; *United States v Bailey*, 628 F2d 938 [6th Cir 1980]; *United States v Knotts*, 460 US 276 [1983]; *but see United States v Chavez*, 603 F2d 143 [10th Cir 1979] [installation and use of beepers to track airplanes constitutes a search within the meaning of the Fourth Amendment requiring a search warrant]); Annotation, *Attachment or Use of Transponder (Beeper) to Monitor Location of Airplane or Automobile as Constituting "Search" Within Fourth Amendment*, 57 ALR Fed 646.

16. DOGS

See *United States v Place* (462 US 696 [1983]), which holds that under federal law there is no Fourth Amendment violation when dogs are used to sniff drugs; Timmons, *Re-examining the Use of Drug-Detecting Dogs Without Probable Cause*, 71 Geo LJ 1233 (April 1983); Honsinger, *Katz and Dogs, Canine Sniff Inspections and the Fourth Amendment*, 44 La L Rev 1093 (March 1984); Hall, *Sniffing Out the Fourth Amendment: United States v. Place—Dogs Sniffs—Ten Years Later*, 46 Me L Rev 151 (1994); Annotation, *The Use of Trained Dog to Detect Narcotics or Drugs as Unreasonable Search in Violation of Fourth Amendment*, 150 ALR Fed 399; Annotation, *Use of Trained Dog to Detect Narcotics or Drugs as Unreasonable Search in Violation of State Constitutions*, 117 ALR5th 407.

Although it does not constitute a search under federal law (*see People v Price*, 54 NY2d 557 [1981]), in New York, a "canine sniff" constitutes a "search" under state constitutional law, but because it is less intrusive than a full-blown search, a dog may be used, without a warrant and without probable cause, provided there is "reasonable suspicion" (*People v Dunn*, 77 NY2d 19 [1990]; *People v Offen*, 78 NY2d 1089 [1991]).

17. THERMAL SURVEILLANCE DEVICES

Invasive thermal imaging requires a warrant (*see Kyllo v United States*, 533 US 27 [2001]; *see also United States v Ford*, 34 F3d 992 [11th Cir 1994]; Note, *Recent Cases: Criminal Procedure—Search and Seizure—Tenth Circuit Finds That Thermal Imaging Scan of a Home Constitutes a Search*—United States v Cusumano*, 67 F3d 1497 (10th Cir. 1995)*, 109 Harv L Rev 1445 [April 1996]; Zabel, *A High-Tech Assault on the "Castle": Warrantless Thermal Surveillance of Private Residences and the Fourth Amendment*, 90 NWU L Rev 267 [Fall 1995]; O'Mara, *Thermal Surveillance and the Fourth Amendment: Heating up the War on Drugs*, 100 Dick L Rev 415 [Winter 1996]); Troy J. LeFevre, Case Comment, *Constitutional Law–Search and Seizure: Supreme Court Addresses Advances in Technology and Rules that Thermal Imaging Devices May Not Be Used Without a Search Warrant*, 78 N Dak L Rev 99 [2002].

18. SEARCH WARRANTS FOR CORPOREAL EVIDENCE (BLOOD, SCRAPINGS, TEETH, ETC.)

Pursuant to CPL 690.05(2) a court may issue a warrant to provide samples such as

blood (*Matter of Abe A.*, 56 NY2d 288 [1982]), fingernail scrapings *(People v Rhoads*, 126 AD2d 774 [3d Dept 1987]), chemical blood test (*People v Goodell*, 79 NY2d 869 [1992]; *People v Casadei*, 66 NY2d 846 [1985]), blood, hair, and dental impressions (*People v Koberstein*, 204 AD2d 1016 [4th Dept 1994]), hair samples (*Matter of Barber v Rubin*, 72 AD2d 347 [2d Dept 1980]; *People v Pierce*, 150 AD2d 948 [3d Dept 1989]), dental impressions (*People v Smith*, 110 Misc2d 118 [Dutchess County Court 1981]; *People v Randt*, 142 AD2d 611 [2d Dept 1988]).

There are limits, of course, and the extent of the intrusion may turn on the degree of danger to which the defendant is put, as with invasive surgery (*see e.g. People v Smith*, 80 Misc2d 210 [Sup Ct, Queens County 1974], *affd* 110 AD2d 669, *rev'd on other grounds* 68 NY2d737, *cert. denied* 479 US 953; *Bloom v Starkey*, 65 AD2d 763 [2d Dept 1978]; *Rochin v California*, 342 US 165 [1952]; *Winston v Lee*, 470 US 753 [1985]); Annotation, *Propriety of Search Involving Removal of Natural Substance or Foreign Object from Body by Actual or Threatened Force*, 66 ALR Fed 119.

19. SEARCH WARRANTS FOR VIDEO-TYPE SURVEILLANCE

This was authorized in *People v Teicher* (52 NY2d 638 [1981]) for a dentist's office. *See also United States v Biasucci* (786 F2d 504, 509 [2d Cir 1986] *cert. denied* 479 US 827); *United States v Torres (*751 F2d 875, 883 [7th Cir 1984] [t.v. surveillance]); *United States v Taborda (*635 F2d 131 [2d Cir 1980] [telescope]). *See generally* CPL article 700.

20. SEARCH WARRANTS FOR COMPUTER CONTENTS

In *People v Cahill*, 2 NY3d 14 (2003), the Court upheld the seizure, based on a search warrant, of data from the defendant's hard drive and "SLACK." *See also United States v Lacy*, 119 F3d 742, 757 [9th Cir 1997]; *United States v Hay*, 231 F3d 630 [9th Cir 2000]; *United States v Sassani*, 139 F3d 895 [4th Cir 1998]; *Davis v Gray*, 111 F3d 1472, 1478-79 [10th Cir 1997] [description not overly broad]; *United States v Simpson*, 152 F3d 1241 [10th Cir 1998] [same]; *but see United States v Kow*, 58 F3d 423, 427 [9th Cir 1995] [overbroad]; *United States v Bridges*, 344 F3d 1010 [9th Cir 2003] [same].

21. PEN REGISTERS / TRAP AND TRACE DEVICES

Pen registers and "trap and trace" devices are governed by CPL 705 et. seq (L. 1988, ch 744). The standard for issuance is reasonable suspicion (CPL 705.10 [2]), a lesser standard than probable cause for search warrants. (For distinctions between these devices and wiretaps, *see People v Bialostok*, 80 NY2d 738 [1980]; *see also People v Martello*, 93 NY2d 645 [1999]).

22. TO WHOM THE SEARCH WARRANT IS ADDRESSABLE AND WHO MAY EXECUTE IT: CPL 690.25(1)(2)

Pursuant to CPL 690.25(1), a search warrant must be addressed to a police officer whose geographical area of employment:

(1) embraces the county of issuance , or

(2) is embraced by the county of issuance, or

(3) is partly embraced by the county of issuance.

The warrant need not name a specific police officer, but may be addressed

(1) to any police officer of a designated classification, or

(2) to any police officer of any classification employed or having general jurisdiction to act as a police officer in the county.

Executability (CPL 690. 25 [2]) - - A police officer, as above, may execute the warrant:

(1) anywhere within the county of its issuance, or

(2) in an adjoining county

Beyond that, if the police officer's geographical area of employment embraces:

(1) the entire county of issuance (e.g., state police, county sheriff, county police), or

(2) if the police officer is a member of the police department of a city within the county of issuance (e.g. City of Poughkeepsie Police Department within the county of issuance, Dutchess), the police officer may execute the warrant anywhere in the state.

Thus, a police officer with the Village of Fishkill Police Department, or the Town of Hyde Park Police Department, may not execute the search warrant beyond Dutchess County or an adjoining county, such as Putnam or Columbia Counties.

Also, if, for example, an Erie County Court judge issues a search warrant directing the search of a Westchester County premises (such a court may do so under CPL 690.20 [1]), the warrant may be executed only by

(1) a state police officer, or

(2) an Erie County deputy sheriff, or

(3) a Buffalo City police officer.

It cannot be executed by a town or village officer of Erie County. It may not be executed by a Westchester County deputy or a police officer of any department within Westchester County (*see* Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 690.25, p. 439). *See also* footnotes 1 and 33, *supra*.

23. OUT OF STATE WARRANTS

Out of state warrants need not comply with New York's search warrant provisions when the warrants are acquired and executed out of state (*see People v Vega*, 225 AD2d 890 [3d Dept 1996]). For execution of search warrant on Indian Reservations, see *Nevada v Hicks*, 533 US 353 [2001]; *Inyo County v Paiute-Shoshone Indians*, 538 US 701 [2003]; Jon W. Monson, Note, *Tribal Immunity from Process: Limiting the Government's Power to Enforce Search Warrants and Subpoenas on American Indian Land*, 56 Rutgers L Rev 271 [2003]; Douglas R. Nash and Christopher P. Graham, *"The Importance of Being Honest"; Exploring the Need for Tribal Court Approval for Search Warrants Executed in Indian Country after* State v Mathews*,* 38 Idaho L Rev 581 [2002]. For cases holding that

courts lack authority to issue search warrants in other states, *see State v Intercontinental, Ltd*, 302 Md 132, 486 A2d 174 [1985]; *State v Szepanski*, 198 Conn Super LEXIS 3779 [1998].

24. REISSUANCE

A Court may reconsider a previously issued but unexecuted search warrant when additional information is discovered and may reissue the warrant without a new application provided the proof is not stale (*see People v Moon*, 168 AD2d 110 [3d Dept 1991]; *see also Sgro v United States*, 287 US 206 [1932]; *People v DeJesus*, 125 Misc 2d 963 [Sup Ct, Kings County 1984], as to the reissuance or renewal of search warrants. See footnote 18 of this work.

25. STANDING

Because these cases turn on their facts, it is useful only to catalogue several (*see generally People v Kramer*, 92 NY2d 529 [1998]; *see also People v Wesley*, 73 NY2d 351 [1989]; *People v Millan*, 69 NY2d 514 [1987]; *People v Ponder*, 54 NY2d 160 [1981] [automatic standing rule rejected]).

Held, no standing, in *People v Wright*, 5 AD3d 873 [3d Dept 2004]; *People v Chaney*, 298 AD2d 617 [3d Dept 2002]; *People v Williams* (275 AD2d 753 [2d Dept 2000]; *see also People v Ladson*, 298 AD2d 314 [1st Dept 2002]; *People v Desir*, 285 AD2d 655 [2d Dept 2001]; *People v Sapp*, 280 AD2d 906 [4th Dept 2001]; *People v Prodromidis*, 276

AD2d 912 [3d Dept 2000]; *People v Williams*, 275 AD2d 753 [2d Dept 2000]; *People v Vaccaro*, 272 AD2d 871 [4th Dept 2000]; *People v Christian*, 248 AD2d 960 [4th Dept 1998]; *People v Abreu*, 239 AD2d 434 [2d Dept 1997]; *People v McMahon*, 238 AD2d 834 [3d Dept 1997]).

Standing satisfied in *People v Rodriguez* (303 AD2d 783 [3d Dept 2003]) and *People v Fonville* (247 AD2d 115 [4th Dept 1998]).

See generally Annotation, *Interest in Property as Basis for Accused's Standing to Raise Question of Constitutionality of Search or Seizure– Supreme Court Cases*, 123 L Ed 2d 733; Annotation, *Interest in Property as Requisite of Accused's Standing to Raise Question of Constitutionality of Search and Seizure*, 4 L Ed 2d 1999.

26. CLOSED CONTAINERS

When it authorizes a search to look for items that can fit in closed containers, the warrant need not specifically authorize the executing officer to open closed containers (*see generally State v Rogers*, 85 ORE APP 303, 736 P2d 1024 [1987]; *State v Simonson*, 91 WN APP 874, 960 P2d 955 [1998]; *See also People v Stewart*, 166 MICH APP 263, 420 NW2d 180 [Mich 1988]; *Whittington v State*, 165 GA APP 763, 302 SE2d 617 [1983]; *Kashiwabara v United States*, 1994 US APP LEXIS 13169 [9th Cir 1994]. *See generally* Zachary H. Johnson, Comment, *Personal Container Searches Incident to Execution of Search Warrants: Special Protection for Guests?*, 75 Temple L Rev 313 [2002].

In *California v Acevedo*, 500 US 565 [1991], the Supreme Court held that police do

not need a search warrant to search a container in a vehicle that probably contains contraband, when the reasonable cause was established before the container was placed in the vehicle. There is no greater expectation of privacy in the container then in the vehicle itself. *See also People v Langen*, 60 NY2d 170 [1983]; B. Kamins, New York Search and Seizure, 14th 3d 2004, 292, 445 n375; *People v Avery*, 129 AD2d 852 [3d Dept 1987]; *United States v Atwell*, 289 F Supp 2d 629 [WD Pa 2003]; *but see State v Lunati*, 665 SW2d 739 [Tenn 1983].

This is not to say that an executing officer may open containers under any circumstances. If the officers are authorized to search only for an abducted circus elephant, police would have no right to rummage through containers, desk drawers, or the like.

27. DISPOSITION OF SEIZED PROPERTY

Pursuant to CPL 690.55, the court, upon receiving property seized by a search warrant, must retain it pending further disposition [CPL 690.55(1)(a)] or direct that it be held in the custody of the applicant or executing officer or agency subject to further court order [CPL 690.55(1)(b)]. The retaining court must, upon request, give the property over to the criminal court in which the pertinent action is pending [CPL 690.55(2)].

28. SEARCH WARRANTS BY EMAIL

Although New York has not recognized search warrants by email, the issue has

arisen in another jurisdiction. *See* Michael John James Kuzmich, *Review of Selected 1998 California Legislation: Criminal Procedure: www.warrant.com: Arrest and Search Warrants by E-mail*, 30 McGeorge L Rev 590 [1999].

29. SEALING SEARCH WARRANTS

CPL article 690 does not address sealing warrants. Courts have, however, recognized the sealing of search warrant materials for such purposes as protecting the confidentiality of informants. *See, e.g.*, *People v Serrano*, 93 NY2d 73 [1999]; *People v Castillo*, 80 NY2d 578 [1992]; *People v Lee*, 205 AD2d 708 [2d Dept 1994]. *See generally* 2 LaFave, Search and Seizure, § 4.3(g); Michael D. Johnson and Anne E. Gardner, *Access to Search Warrant Materials: Balancing Competing Interests Pre-Indictment*, 25 U Ark Little Rock L Rev 771 [2003]; David Horan, *Breaking the Seal on White Collar Criminal Search Warrant Materials*, 28 Pepp L Rev 317 [2001]; James E. Phillips, David F. Axelrod, & Kevin G. Matthews, *Feature: Litigating Sealed Search Warrants: Recent Cases Limit Indefinite Seal in Pre-Indictment Investigations*, 20 Champion 7 [March 1996]; Annotation, *Right of Press, in Criminal Proceeding, To Have Access to Exhibits, Transcripts, Testimony, and Communications Not Admitted in Evidence or Made Part of Public Record*, 39 ALR Fed 871.

30. "SNEAK AND PEEK" SEARCH WARRANTS

The term "sneak and peek" is not found in New York statutory or decisional law. Sneak and peek warrants are sometimes referred to as surreptitious search warrants. Federal provisions authorize law enforcement officers to enter premises and look around,

but not seize anything. *See* 18 USC § 3103a; *United States v Freitas*, 800 F3d 1451 [9th Cir 1986]; *United States v Freitas*, 856 F2d 1425 [9th Cir 1988]; *United States v Villegas*, 899 F2d 1324 [2d Cir 1990]; *United States v Johns*, 948 F2d 599 [9th Cir 1991]; *United States v Pangburn*, 983 F2d 449 [2d Cir 1993]. *See generally* Note, United States v. Leon *and the Freezing of the Fourth Amendment*, 68 NYUL Rev 1305 [1993]; Paul V. Konovalov, Note, *On a Quest for Reason: A New Look at Surreptitious Search Warrants*, 48 Hastings LJ 435 [1997]; Kevin Corr, *Sneaky But Lawful: The Use of Sneak and Peek Search Warrants*, 43 Kan L Rev 1103 [1995]. *See also* 2 LaFave, Search and Seizure § 4.12(b).

Many articles have been written on the subject, particularly in light of the new practices being authorized under Sec. 213 of the USA PATRIOT Act, codified at 18 USC 3103a. *See United States v Green*, 2004 US Dist LEXIS 11292 [D Mass June 18, 2004] at *147 n289; Jeremy C. Smith, Comment, *The USA PATRIOT Act: Violating Reasonable Expectations of Privacy Protected by the Fourth Amendment Without Advancing National Security*, 82 NCL Rev 412 [2003]; Note, *Taking the Fear Out of Electronic Surveillance in the New Age of Terror*, 70 UMKCL Rev 751 [2002]; Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 Denv UL Rev 375 [2002]; Kim Lane Scheppele, *22d Annual Edward V. Sparer Symposium: Terrorism and the Constitution: Civil Liberties in a New America: Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U Pa J Const L 1001, 1034-37 [2004] [discussing sneak and peek warrants in the context of the USA PATRIOT Act].

31. SEARCH WARRANTS FOR NON-SUSPECTS

In *Stanford Daily v Zurcher*, 426 US 547 [1978], the Supreme Court held that there is nothing in the Fourth Amendment that prohibits the issuance of a third-party search warrant. The federal Constitution does not require authorities to show that the occupant of the place to be searched (or anyone else) is the alleged perpetrator. *Zurcher* authorized the search of a newspaper's premises. In response, Congress passed the Privacy Protection Act of 1980, 42 USC 2000aa, Pub L No 96-440, 94 Stat 1879 (*see* Adam Liptak, *Media and Law Enforcement: The Hidden Federal Shield Law: On the Justice Department's Regulations Governing Subpoenas to the Press*, 1999 Ann Surv Am L 227, 236 [1999]; Note, *What Big Eyes and Ears You Have!: A New Regime for Covert Governmental Surveillance*, 70 Fordham L Rev 1017 [2001]; Note, *Watch What You Type: As the FBI Records Your Keystrokes, the Fourth Amendment Develops Carpal Tunnel Syndrome*, 40 Am Crim L Rev 1271 [2003]). It remains, however, that property possessed by an innocent person may be searched for and seized under a *valid* warrant (*see, eg*, *United States v Taketa*, 923 F2d 665 [9th Cir 1991]; *United States v Tehfe*, 722 F2d 1114 [3d Cir 1983]; *Mays v City of Dayton*, 134 F3d 809 [6th Cir 1998]; *United States v Myers*, No. 98-5767, 1999 US App LEXIS 30082 [6th Cir Nov 15, 1999 unpublished]). *See also* Footnote 34, searching for the suspect in a third-person's premises; Discussion Item 9; Footnote 7, involving the search of anyone at a described premises.

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