

SEARCHING FOR NARCOTICS IN SAN DIEGO: PRELIMINARY FINDINGS FROM THE SAN DIEGO SEARCH WARRANT PROJECT

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“Search Warrants are so easy and they can’t argue with you once you do them.”

A Veteran San Diego Police Officer

INTRODUCTION

The right of all citizens to be secure in their homes against unreasonable search and seizure is guaranteed by the Fourth Amendment of the Constitution of the United States.¹ Decisions by the United States Supreme

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We dedicate this article to the memory of Kent Pedersen, who as former Assistant Executive Officer, was instrumental in helping to make this study possible.

1. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. The Fourth Amendment was made applicable to the states. *See Wolf v. Colorado*, 338 U.S. 25 (1949). Evidence obtained in violation of the Fourth Amendment is generally inadmissible in state courts. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

Court in the 1980s relaxed the standards for obtaining search warrants² and also created a “good faith” exception to the exclusionary rule which is the judicial mechanism for enforcing those standards.³ Such decisions gave rise to concerns that the judiciary would no longer be an effective guardian of Fourth Amendment rights.⁴ Subsequent studies documenting widespread reliance by police upon secret “confidential” informants also raised fears that government intrusions into the home could be based on information provided by sources of doubtful reliability and integrity.⁵ Newspaper headlines highlighting mistaken drug raids by armed police SWAT teams which traumatized innocent families and even resulted in the deaths of innocent citizens also lent credence to the fear that personal privacy and security were becoming unintended casualties of the war on drugs.⁶ After a

2. A search warrant is a written order signed by a magistrate, directed to a peace officer, commanding him or her to search for and seize specified items listed in the warrant. *See* CAL. Penal Code §1523 (West 2000).

3. In *Illinois v. Gates*, 462 U.S. 213 (1983) the Supreme Court substituted a less rigorous “totality of the circumstances” analysis for strict compliance with the two-pronged test established in *Aguilar v. Texas* 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). Under the *Aguilar-Spinelli* test an informant’s tip could not be used to establish probable cause unless a factual showing was first made to establish: (1) that the informant was credible and (2) that the informant had personal knowledge of the facts asserted or had otherwise obtained their information in a reliable way. In *Spinelli*, the Court had required strict adherence to both prongs of the test. If either the credibility prong or the reliable basis of knowledge prong was not satisfied, the tip could not be used to color otherwise innocent conduct with suspicion. In *Gates*, however, the Court abandoned strict compliance with the two prong test and upheld a search warrant based upon an anonymous tip. Although the credibility of the tipster was unknowable, the Court found under a “totality of the circumstances” approach that independent police investigation had corroborated the tip sufficiently to establish probable cause. In *United States v. Leon*, 468 U.S. 897 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), the Court held that if police act in reasonable reliance upon a search warrant, evidence obtained pursuant to that warrant will be admissible despite the absence of probable cause or other technical defect in the warrant.

4. *See Gates*, 462 U.S. at 291 (Brennan, J. dissenting); *see also Preface, Guidelines for the Issuance of Search Warrants*, American Bar Association, Criminal Justice Section (1990).

5. *See* RICHARD VAN DUIZEND, L. PAUL SUTTON & CHARLOTTE A. CARTER, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES*, 30-35, 99-101 (1984) [hereinafter *THE SEARCH WARRANT PROCESS*]; *see also* Clifford Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 *HASTINGS CONST. L.Q.* 81 (1994); Mark Curriden, *The Informant Trap, First in a Series: Secret Threat to Justice*, *NAT’L L.J.*, Feb. 20, 1995, at A1 (reporting the dramatic rise in use of unidentified informants).

6. *See* Joe Cantlupe, *A Father’s Fears About Drugs and His Children Are Revealed*, *SAN DIEGO UNION TRIBUNE*, May 15, 1988, at A16 (reporting the killing of two people during separate drug raids in March of 1988. One of the victims, shot and killed in his home in southeast San Diego, was an innocent father whose son was suspected of selling drugs); Terry L. Colvin & Graciela Sevilla, *Mix-up: A Warranted Search?*, *SAN DIEGO UNION TRIBUNE*, Oct. 4, 1991, at A1 (reporting drug raid on innocent family in North San Diego County); Ron Sobel, *Scott: Reclusive Millionaire Killed in Drug Raid that Came Up Empty*, *L.A. TIMES*, Oct. 12, 1992, at A1 (reporting death of an innocent businessman, aged 61, shot by drug task force members in his home in Malibu, California); Mark Curriden, *Informant’s Lies Trigger a Tragedy*, *NAT’L L.J.*, Mar. 6, 1995, at A1 (reporting \$2.5 million settlement awarded to San Diego businessman who was shot in his home in Poway, San Diego County, during a

bogus tip from an unreliable informant led to the unjustified shooting of a Fortune 500 vice-president during the nighttime raid of his home in Poway, a San Diego suburb, the use of confidential informants reportedly came under stricter scrutiny in San Diego County.⁷

In order to assess the effect of the Supreme Court's relaxation of the standards for determining the reliability of informants, evaluate how search warrants were processed in San Diego County at the close of the twentieth century, and provide a base line for future research, we embarked on an extensive study of search warrants issued in San Diego County, known as the San Diego Search Warrant Project. That research, which includes a comparative study of search warrants issued prior to the *Gates* and *Leon* decisions is still on-going. In this article we report our preliminary findings with respect to one subset of that data - search warrants issued for narcotics. This analysis is limited to search warrants issued in 1998 in the most urban judicial district in San Diego County, the San Diego Judicial District.⁸

Overall this article reports findings which generally show San Diego law enforcement in a favorable light. For example, our examination of police affidavits, filed in support of the request for a search warrant, showed that while police frequently utilized confidential informants and anonymous tips, they also routinely took steps in those cases to corroborate the validity of such tips. Our study also reveals, however, some surprising findings concerning: (1) the extent to which "probable cause" in police affidavits is based upon pre-packaged and computerized "boilerplate" rather than concrete, narrative descriptions of fact; (2) the discovery that only a small number of judges issue most of the search warrants (giving rise to the appearance of what has been termed "judge shopping"); (3) the extent to which there is racial disparity with respect to those targeted by search warrants for narcotics; (4) the extent to which narcotics search warrants, once issued, are not promptly executed; (5) the significant correlation between failure rate and delay in execution of search warrants; (6) the extent to which search warrants for narcotics are never executed; and (7) the apparent under-utilization of existing statutory procedures for telephonic and electronic search warrants. These preliminary findings thus raise a number of questions which will require further research. We also conclude with a caution that present trends we have observed may create conditions which in the future could allow abuses to occur.

nighttime drug raid by U.S. Customs and Drug Enforcement Administration officers in August of 1992); Dwight C. Daniels, *Cops Terrify Family in Case of Wrong I.D.*, SAN DIEGO UNION TRIBUNE, Aug. 11, 1994, at A1 (reporting traumatizing after-effects of armed raid on children of innocent couple).

7. See Curriden, *supra* note 6, at A1.

8. The San Diego Judicial District primarily encompasses the city of San Diego. This article does not report on search warrants issued in the North County Judicial District, South Bay Judicial District or El Cajon Judicial District.

I. METHODOLOGY

Prior to formulating our research design we conducted a literature review of previous search warrant studies, and examined relevant statutory materials and case law governing the issuance of search warrants.⁹ *The Search Warrant Process*,¹⁰ a comprehensive study of seven jurisdictions conducted by the National Center for State Courts, in the early 1980s, was extremely helpful in identifying the type of information which was available and the problems we would likely encounter. We then familiarized ourselves with how search warrant applications were processed, collected and filed in the San Diego Judicial District. We obtained written procedures prepared by the clerk's office, examined record keeping logs and determined that study of a random sample of search warrants issued in 1998 would be appropriate.

The next stage entailed designing the Field Data Collection Instrument. This Instrument was used to record information obtained by an examination of each individual search warrant, the affidavit filed by the officer setting forth probable cause for the search, and the Receipt & Inventory Form listing the items seized. The initial design of this Instrument was further refined after being field tested on a random sample of search warrants. It collected data with respect to more than seventy-five variables concerning the application process and the execution of each search warrant.

From the Search Warrant Log kept for the year 1998, we then selected every odd-numbered search warrant issued between January 1, 1998 to June 1, 1998.¹¹ If a search warrant selected to be in the sample was sealed or otherwise not available, the next even numbered search warrant below the selected number was substituted.¹² In this manner 248 search warrants were selected for study.¹³ Within this random sample, the primary target of the search was narcotics in 122 (49.2%) cases.¹⁴ The characteristics of this subset of warrants comprise the subject of this article. These search warrants were sought by a variety of law enforcement agencies including the San Diego Police Department, the San Diego County Sheriff's Department, the U.S. Drug Enforcement Administration, the California Department of Justice, and other municipal police departments within San Diego county.

9. See *supra* notes 3-5.

10. See *THE SEARCH WARRANT PROCESS*, *supra* note 5.

11. The January to June time period was also used by earlier researchers and found broad enough "to reduce the possible biases of seasonal patterns of crime or criminal investigation." *THE SEARCH WARRANT PROCESS*, *supra* note 5, at 7.

12. Eleven search warrants which would otherwise have been selected were found to be sealed. This represented 4% of the total sample. It is of course not known whether any of these sealed search warrants involved narcotics.

13. There were 953 search warrants issued during the entire 1998 calendar year. Four hundred and ninety-four (52%) were issued between January 1, 1998 and June 30, 1998.

14. The remaining search warrants sought records, fruits of crime, physical evidence for forensic testing, weapons, instrumentalities of crime, or other items having evidentiary significance.

II. HOW SEARCH WARRANTS ARE OBTAINED

A police officer seeking a search warrant prepares an affidavit stating the grounds (probable cause) for believing that contraband or evidence of crime will be in the location to be searched.¹⁵ A search warrant is also prepared according to a prescribed form, describing the place to be searched and the items to be seized.¹⁶

Some seventy different officers and detectives were involved in requesting search warrants. The highest number of search warrants sought by any individual officer was six. Eleven officers obtained more than three warrants during the six-month period covered by our random sample. While police officers receive rudimentary training about when search warrants are required at the Police Academy, learning how to prepare a proper affidavit is not part of that basic curriculum.¹⁷

The lack of training for officers (other than detectives) is compensated for, however, by assigning a Deputy District Attorney to serve as Legal Advisor to the police department. This experienced attorney actively assists officers in preparing the affidavit and search warrant and even assists inexperienced officers in appearing before a judge. We found that 98.4% of the search warrant affidavits in our sample indicated that a legal advisor had reviewed the affidavit for legal sufficiency.

The affidavit and search warrant are then presented to a judge by the requesting officer who signs the affidavit under oath.¹⁸ If the judge approves the search, he or she signs the affidavit indicating both the date and the time that the affidavit was signed under oath by the requesting officer. The judge then signs the search warrant indicating the date it was issued. The police officer takes the signed search warrant and affidavit to the Clerk of the Court, where the court's seal is placed over the judge's signature.¹⁹

15. In addition to the Fourth Amendment, the California Constitution also mandates that a "warrant may not issue except on probable cause supported by oath or affirmation." CAL. CONST. art. 1 §13. The California Penal Code also provides: "A search warrant cannot be issued but upon probable cause supported by affidavit, naming or describing the person to be searched or searched for and particularly describing the property, thing or things and the place to be searched." CAL. PENAL CODE §1525 (West 2000). The Code further provides that the affidavit "must set forth the facts tending to establish the grounds of the application, or probable cause for believing they exist." CAL. PENAL CODE §1527 (West 2000).

16. See CAL. PENAL CODE §1529 (West 2000).

17. Interview with former San Diego Police Department training officer, February 17, 2000. Training courses on the particulars of search warrant preparation do exist, however, for detectives who deal with search warrants on a more regular basis.

18. While the Fourth Amendment requires that no search warrant "shall issue but upon probable cause, supported by oath or affirmation . . ." U.S. CONST. amend. IV, the requesting officer's oath does not mean that he or she has sworn to the truth of every factual allegation asserted in the affidavit. See *infra* text accompanying note 54.

19. The Clerk's office has detailed written procedures for the processing of the search warrant and affidavit at this stage. These procedures are described in *Desk Notes for Search Warrants*. The Clerk determines the next available number from the Search Warrant Log, enters the search warrant in the Log and records the number on the original search warrant

Special statutory provisions authorize and regulate the procedure for obtaining search warrants by telephone or electronic mail.²⁰ Only 11.5% of the search warrants studied fell into this category which we have labeled “telephonic warrants.”

III. WHO ISSUES SEARCH WARRANTS

Over 95% of the search warrants were issued by judges of the San Diego Municipal Court.²¹ Altogether twenty-four judges issued one or more search warrants. As Table 1 reflects, however, there was a significant disparity among judges in the distribution of this workload. Six judges issued almost three-fourths (73%) of all search warrants in our random sample.²² Over one-third (38%) were issued by just three judges. The highest number of search warrants issued by a single judge was twenty. Most judges issued three or fewer warrants. We found that most warrants (86%) were issued during regular working hours, between 9:00 a.m. and 5:00 p.m. About half were obtained in the afternoon, between 12:00 noon and 5:00 p.m. Approximately 7% were issued between 5:01 p.m. and 12:00 midnight, and 7% were issued after midnight. Nine of the fourteen telephonic search warrants were issued after 5:00 p.m.

and affidavit. The Clerk then makes certified copies of both the warrant and affidavit. The original search warrant is returned to the officer along with a certified copy of the affidavit. The original affidavit and a certified copy of the search warrant are retained and filed in the Clerk's safe. *See Desk Notes for Search Warrants* on file with the Supervising Deputy, Criminal Records, San Diego Superior Court.

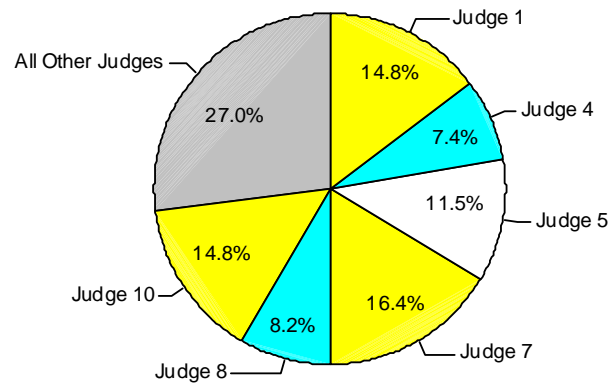
20. *See* CAL. PENAL CODE §1526 (West 2000).

21. The remaining 5% were issued by Superior Court judges. As a result of unification on January 1, 1999 the Municipal Court has now merged with the Superior Court so that the distinction between Municipal and Superior Court judges is no longer relevant.

22. Chi-square (df 23) = 174.262, $p < .001$; $n = 122$. Chi-square is a method of analysis within a class of statistical procedures known as non-parametric tests. A chi-square analysis compares the observed, or actual frequency, to what would be expected based on a random assignment. For example, if 10 judges were available to issue 100 warrants, an expectation based on random assignment would be that each judge would issue about 10 warrants. To the extent that the actual, or observed number of warrants issued by the judges deviates from a random assignment, the value of chi-square increases. The chi-square value is deemed “significant,” when the deviation from randomness is so great that one is justified in ruling out the possibility that the deviation was due to chance. For example, where the probability of obtaining a deviation from randomness exceeds five in 100 (i.e., $p < .05$), it is accepted practice in scientific research to assume that the results are not due to chance, but rather to some systematic pattern of behavior. *See* Dennis P. SACCUZZO, *PSYCHOLOGY: FROM RESEARCH TO APPLICATIONS* (1987). In the instant case, the value of chi-square was quite significant: The probability that the results reported in Table 1 were due to chance was less than 1 in 1,000.

TABLE 1

**Percent of Narcotics Search Warrants
Issued by Individual Judges**



From judicial and police interviews it appears that a combination of factors contribute to the uneven distribution of the judicial workload involved in reviewing and issuing search warrants. Although there is a system for assigning judges on a rotating basis for after-hours search warrant duty, any judge can in theory be approached during regular working hours. One of the six judges who frequently issued search warrants believed that he handled a high volume of search warrants because it was his policy never to keep an officer waiting. If an officer needed a warrant and the judge was on the bench, this judge indicated that the bailiff would swear the officer under oath and take the affidavit and search warrant to the judge who would review it while still presiding over court proceedings.²³ A veteran officer we interviewed stated that the reason only a few judges tend to handle the lion's share of the search warrant applications is because the officers go to those judges who are experienced in criminal matters and are willing to make themselves available to handle search warrants. This officer also candidly admitted, however, that some judges were known for being liberal in

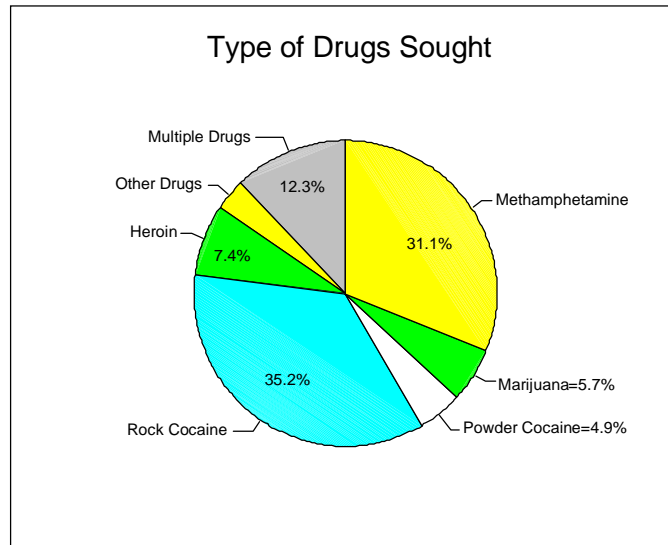
23. Interview with Judge #1 on March 9, 2000. As was the practice in the National Center for State Court's study and in order to promote candor, we agreed not to identify persons interviewed by name. See THE SEARCH WARRANT PROCESS, *supra* note 5.

granting search warrants.²⁴ We found that of the six judges who authorized the bulk of the search warrants, five were former prosecutors.²⁵ However, one judge who ranked second highest in issuing narcotics search warrants had no apparent prior criminal court experience, either as a prosecutor or a defense counsel.²⁶

IV. WHAT TYPE OF DRUGS ARE SOUGHT?

The drugs most frequently searched for were rock cocaine (35.2%) and methamphetamine (31.1%). See Table 2. Only 4.9% of the warrants sought powder cocaine. Heroin (7.4%) and marijuana (5.7%) were also sought infrequently. Other drugs (3.3%) included LSD and prescription drugs.

TABLE 2²⁷



24. Interview with veteran officer, February 17, 2000.

25. Based on examination of SOUTHERN CALIFORNIA JUDICIAL PROFILES, Vol. 1 (1998). See *infra* text following note 105 which reports that four out of five of these judges had good success rates in recovering drugs when search warrants they issued were promptly executed.

26. See *id.* Two judges tied for second place in terms of the number of warrants issued.

27. Table 2 slightly underestimates the number of search warrants seeking a particular drug, because it does not count search warrants which issued for multiple drugs. However, as pointed out in the text, because search warrants for multiple drugs were often based upon the undifferentiated multi-drug response of a narcotics detector dog, which indicated the possible presence of as many as five different drugs, reliance upon that data would have also skewed the results. The data for single drug search warrants was therefore judged to be the most representative.

About 12% of the warrants sought more than one drug. However in two-thirds of the multiple drug cases, probable cause for the warrant was based upon the reaction of a narcotics detector dog. Affidavits in these cases sought multiple drugs because the dogs are trained to alert to the presence of several different drugs and their alert does not differentiate which one is present. Table 2 compares the number of search warrants seeking only a single drug.

V. WHAT PLACES ARE SEARCHED?

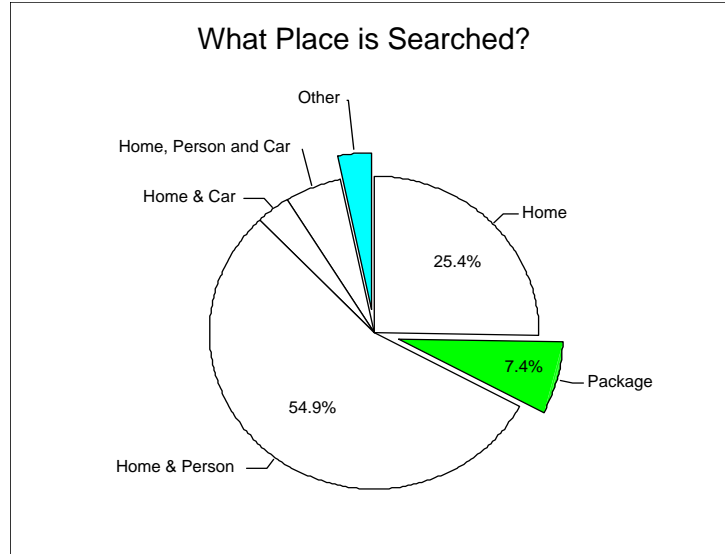
Table 3 reflects that the overwhelming majority of search warrants (89%) were directed at private homes. In ten cases, the search warrant was obtained to open a package. Search warrants were also obtained to search luggage, a storage facility, motel rooms, and a detached garage. In well over half of the cases (62.3%) the search warrant also authorized the search of a named or described person if found on the premises. In eleven cases, the search warrant for a home also sought to search an automobile.²⁸

VI. LOCATION OF HOMES SEARCHED

Table 4 displays the location of search warrants by zip code within the San Diego Judicial District. The district is for the most part co-terminus with the boundaries of the city of San Diego. As Table 4 reveals, the majority of the narcotics search warrants were for locations clustered in zip code areas in the southeast portion of the city.

28. The United States Supreme Court has repeatedly held that a search warrant is not necessary to search or seize a car which is "readily mobile" if there is probable cause for the search. *See Pennsylvania v. Labron & Kilgore*, 518 U.S. 938 (1996); *Florida v. White*, 526 U.S. 559 (1999). While a distinction might have once been made between automobiles parked in public and those found on private property, this distinction was apparently abolished in *Kilgore*, which upheld a warrantless search of a vehicle parked at the rear of a farm house. It should be noted that the searches involving cars in our sample were searches also involving the home. No search warrant was obtained exclusively to search only an automobile. It may that where police are aware of a specific car, it is included in the search warrant because under the *Leon* good faith exception any evidence will be admissible even if it later turns out there was no probable cause for the search. *See U.S. v. Leon*, 468 U.S. 897 (1984).

TABLE 3



VII. WHO IS SEARCHED?

Where the search warrant authorized the search of a person who owned or controlled the premises to be searched, a description of the race and gender of that person was given. It was therefore possible to collect this information for 74.6% of the cases. As reported below, we found that the majority of these search warrants were served on Black and Hispanic residences. The judicial district from which our sample was drawn includes San Diego's inner city, which demographically comprises significant Black and Hispanic populations. That judicial district also includes many areas which are predominately White. Several factors have been suggested which may have had an influence in causing this disparate impact in terms of race. For example, it has been suggested that because police resources are concentrated in high crime areas, which tend to have large minority populations, this naturally leads to more information becoming available about illegal drug activities in those neighborhoods and thus more searches in those areas. The heavy reliance upon confidential informants, reported *infra*, also may play a role in determining where searches will be carried out. Finally, as reported below, we found that there were racial differences between the two major drugs sought: methamphetamine and rock cocaine. When examining only search warrants for methamphetamine, for example, we found that substantially more White residences were searched than Black residences. The reverse was true with respect to rock cocaine.

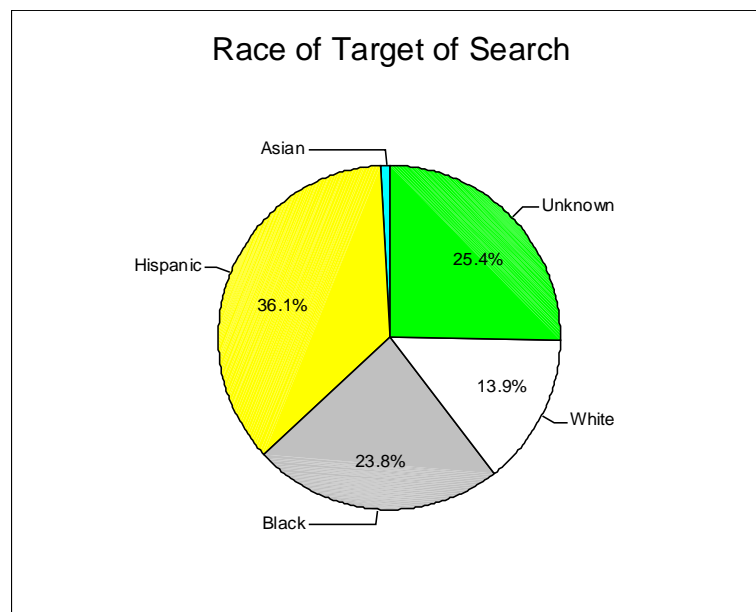
TABLE 4²⁹
DISTRIBUTION OF SEARCH WARRANTS
WITHIN THE SAN DIEGO MUNICIPAL JUDICIAL DISTRICT
JANUARY 1 TO JUNE 30, 1998

(Map not available electronically)

29. Warrants to search packages and search warrants issued for areas outside the San Diego Municipal Judicial District were excluded from the table. N = 95.

Table 5 reflects the racial characteristics of the subjects of the search warrants in our sample. Since drug use is not the exclusive province of any racial group, it might be expected that the race of the targets of search warrants would model their proportion of the population of the city of San Diego.³⁰ This did not turn out to be the case. While approximately 56% of the population of the city of San Diego was White at the time of these searches, only 14% of the search warrants in our sample targeted White suspects.³¹ While 23% of the population was Hispanic, 36% of the search warrants involved Hispanic suspects. While only 9% of the population was Black, 24% of the search warrants involved Black suspects.³² By contrast while 13% of the population was Asian, only one search warrant involved an Asian suspect.³³ Even if the subjects of search warrants for whom race was unknown (25%) were all assumed to be White, and were added to the White total, the majority of the search warrants (61%) would still involve non-white suspects.

TABLE 5



30. The San Diego Judicial District, from which our sample was drawn, is for the most part congruent with the boundaries of the city of San Diego.

31. See *San Diego Population by Ethnicity*, 1996, (visited on Feb. 14, 2000) <<http://www.sddt.com/features/statsheets/sdstats/bigpicture/population/ethnicity.html>>.

32. *See id.*

33. *See id.*

This data suggests that Black San Diegans are thus about four times more likely to be the subject of a search warrant for narcotics than Whites. Members of the Hispanic community are about twice as likely as Whites to experience such a search.³⁴ When one controls for the type of drug sought, however, a slightly different perspective emerges. Half of the search warrants for methamphetamine, for example, targeted White suspects, while 79% of the search warrants for rock cocaine targeted Black and Hispanic suspects. Data from the Arrestee Drug Abuse Monitoring program (ADAM) conducted by the San Diego Association of Governments in 1998, the same year as our sample, suggests that this difference results from the fact that the different ethnic groups have different drug use patterns. Comparing our data and the data collected by ADAM we found that that search warrants for methamphetamine were sought in roughly the same proportion as admitted drug use by particular racial groups. ADAM reported that 46% of adult White arrestees tested positive for methamphetamine use. This was more often than either adult Black or Hispanic arrestees. Only 12% of adult Black arrestees tested positive for methamphetamine while 34% of adult Hispanic arrestees tested positive.³⁵ In a special study of methamphetamine users

34. Using statistical methodology developed by Dr. John Lamberth of Temple University and reported in David A. Harris, *The Stories, the Statistics and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, n.63 and n.103 (1999), the likelihood ratio is calculated as follows: (1) Calculate the ratio of Blacks searched to Blacks in the population subject to search. (2) Calculate the ratio of Whites searched to Whites in the population subject to search. (3) Divide the first number by the second number. Thus the ratio of Blacks searched to Blacks in the city of San Diego was $.238 \div .09 = 2.644$. To determine the ratio of Whites searched we assumed that all cases in which race was unknown involved White suspects. Thus $.14$ (actual percent searched which were White) + $.234$ (percent race unknown, but assumed White) = $.393 \div .56 = .702$. Then $2.644 \div .702 =$ a likelihood ratio of 3.766. The calculation for Hispanics is as follows: $.361 \div .23 = 1.570 \div .702 =$ likelihood ratio of 2.236. In view of our assumption that all cases where race was unknown involved White suspects, the ratios we derived represent an extremely conservative figure.

For other studies on the relationship between race and law enforcement see CHARLES J. OGLETREE, JR. MARY PROSSER, ABBE SMITH & WILLIAM TALLEY, JR., *BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES* (1995); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L. J. 659 (1994); Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994); Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L. J. 621 (1993); Tracey Maclin, *Black and Blue Encounters: Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter*, 26 VAL. U. L. REV. 243 (1991); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988). See also John Gibeaut, *Profiling: Marked for Humiliation*, A.B.A. JOURNAL, Feb. 1999, at 46-7 (reporting that 60% of the 1772 airline passengers subjected to strip searches by U.S. Customs officials in 1997 were Black or Hispanic while these groups may make up less than 5% of the traveling public).

35. See Joe Ellett & Susan Pennell, *ADAM: Arrestee Drug Abuse Monitoring*, 1998, San Diego Association of Governments, April 1999 ("ADAM") p. 26, Tbl. 6. This study was based upon a sample of 384 White, 238 Black and 247 Hispanic adult arrestees who voluntarily participated in confidential interviews and testing at the downtown Central Jail or the women's facility at Las Colinas. This study showed considerable differences between ethnic groups in drug use patterns. While methamphetamine use, as reported above, was most

during the period 1996-98, reflected in Table 6 below, it was also reported that Whites participated in illegal drug trafficking activities involving methamphetamine far more than either Blacks or Hispanics.³⁶

White	58%
Black	10%
Hispanic	29%

Table 7 compares the race of the target of a search warrant with the type of drug sought. Race was known for 54% of the search warrants issued for methamphetamine ('meth'). We found that White residences were subject to search warrants for meth far more often than Black residences. While 50% of meth warrants targeted White residences, only 7% targeted Black residences. Search warrants for meth thus appear to have targeted Blacks and Whites in roughly the same proportion as their reported drug use. This data also reflects roughly the same proportion as that shown in Table 6 and suggests that search warrants for meth were targeted in terms of race in about the same proportion as both racial groups were reported to have engaged in distribution activities involving meth during the same period.

Conducting the same type of comparative analysis for Hispanics produces somewhat mixed results. The proportion of search warrants for meth which involved a Hispanic subject is roughly comparable to the reported drug use by this group. Thirty-four percent of adult Hispanic arrestees reported meth use in 1998. In 39.3% of the search warrants for meth, the subject was Hispanic. This produces a likelihood ratio of 1.35. If one constructs a likelihood ratio for Hispanics based upon reported drug *distribution* activities, however, it appears Hispanics are about one-and-a-half times more likely than Whites to be the subject of a search warrant for meth. (The calculation is as follows: $29\% \text{ of adult Hispanic arrestees admitted meth distribution activities. Thus } .393 \div .29 = 1.36 \div (50\% \text{ Whites searched } \div 58\% \text{ Whites distribute} = .86) = \text{likelihood ratio of } 1.58$).

frequently a White phenomenon, 45% of adult Black arrestees tested positive for cocaine; more than either White (9%) or Hispanic (13%) arrestees. Twelve percent of adult Hispanic arrestees tested positive for heroin, as compared to 9% for Whites and 5% for Blacks. The study also found only 3% of Black juvenile arrestees (age 18 and under) tested positive for methamphetamine, while Hispanic juvenile arrestees had a slightly higher rate of methamphetamine use (16% tested positive) than White juvenile arrestees (14% tested positive). *See id.* at 31, tbl. 11.

36. *See id.* at 49, tbl. 23. Table 6 reflects the percent of arrestees who admitted in confidential interviews that they participated in drug distribution activities. It excludes arrestees for whom race was recorded as "other" (3%).

Drug	White	Black	Hispanic	Asian	Unknown	Total
Meth	14	2	11	1	24	52
Rock Cocaine	1	23	22	0	11	57
Powder Cocaine	2	0	4	0	14	20
Heroin	1	2	9	0	11	23
Marijuana	2	0	5	0	14	21
Other Drug	1	2	0	0	2	5
TOTAL	21*	29*	51*	1*	76*	178*

* Does not represent total number of warrants issued by race. See footnote 37

As Table 7 reveals, racial disparity also appears in search warrants for cocaine. For example, in those cases where race was known, all but one of the warrants seeking rock cocaine were directed at Black and Hispanic subjects. However, the 1998 ADAM report showed that drug testing of arrestees indicated that 45% of Black adult arrestees tested positive for cocaine use, as opposed to only 9% for Whites and 13% for Hispanics.³⁷ The ADAM statistics thus indicate that search warrants for rock cocaine targeted Black suspects in the same proportion as that group's reported involvement in use of that drug. (44% of search warrants for rock cocaine involved Black suspects, while ADAM reported 45% of Black arrestees tested positive for cocaine.) However, by the same analysis it appears that Hispanics were three times more likely to be the subject of a search warrant for rock cocaine as Blacks, the group most frequently using that drug. (Only 13% of adult Hispanic arrestees tested positive for cocaine, while 42% of the search warrants for cocaine involved an Hispanic suspect. Thus the likelihood ratio is calculated as: $.42 \div .13 = 3.23 \div (.44 \div .45 = .98 \text{ ratio for Blacks}) = 3.30$).

Obviously, in this report of our preliminary findings, we have only begun to scratch the surface with respect to this issue. Further research needs to be undertaken, for example, to understand why rock cocaine was sought so frequently while powder cocaine, reportedly used by Whites, was sought so infrequently. See Table 2, *supra*. Using the ADAM arrestee data for purposes of comparison may also be problematic. It may be that white middle class cocaine users living in bedroom communities are simply not arrested in the same proportion as Black cocaine users living in the inner

37. The total (178) exceeds the number of search warrants issued because a number of search warrants sought more than one drug. See discussion of drug detector dogs, *supra* n 27. The table thus does not necessarily reflect the total number of warrants issued by race.

38. See *id.* at 26, tbl. 6. The ADAM report did not differentiate between powder cocaine and rock cocaine. Rock cocaine is also referred to as coke base. The ADAM report also did not do a comparable report during the relevant time period on the racial characteristics of San Diego arrestees who engaged in rock cocaine distribution activities.

city. Other studies have indicated that overall drug use by Blacks and Whites is roughly the same as the presence of each group in the population as a whole.³⁹

We note that the San Diego Police Department is a nationally recognized leader in community policing, which seeks to involve the community and employs proactive problem solving approaches to the crime problem. We note also that both the current and immediate past Chiefs of Police have undertaken initiatives to combat racial profiling. Nevertheless the undeniable impact which race has upon the overall distribution of search warrants is perplexing and demands further attention and research.

VIII. GENDER

We were also able to determine the gender of 93.4% of the targets of the search warrants in our sample. Over half (58%) of these gender identified search warrants targeted men. One in four targeted women and 10% targeted both men and women. Table 8 compares gender of the target with the type of drug sought and shows women were more likely to be targets of search warrants involving methamphetamine and cocaine than marijuana or heroin.

TABLE 8					
Drug Sought by Gender of Target					
Number of Search Warrants Issued					
Drug	Men	Women	Both Sexes	Unknown	Total
Meth	25	15	5	7	52
Rock Cocaine	33	13	6	5	57
Powder Cocaine	7	2	5	6	20
Heroin	12	1	5	5	23
Marijuana	9	2	5	5	21
Other Drug	2	2	1	0	5
TOTAL	88*	35*	27	28	178

* Does not represent the total number of warrants issued by gender. See note 37

IX. SOURCES OF PROBABLE CAUSE

The affidavit supporting the application for a search warrant for narcotics must set forth facts which establish reasonable grounds to believe that specified narcotics will be found in the particular place to be searched.⁴⁰

39. See Harris, *supra*, note 34 at 296-97.

40. See CAL. PENAL CODE §§ 1525 and 1527 (West 2000). This is known as the "probable cause" requirement. The United States Supreme Court has held that in order to be a reasonable search under the Fourth Amendment, probable cause cannot be based upon bare

The information upon which probable cause is based must also be shown to be reasonably trustworthy.⁴¹ Where the affidavit contains information based upon the officer's own personal knowledge, the trustworthiness of the information upon which probable cause is based is rarely an issue. The oath required by the affidavit serves as a guarantee of truthfulness of the source of the information.⁴² Because the information is based upon the personal observations of a trained police officer, it is likewise reasonable for the judge to conclude that the information is reliable. Where the information establishing probable cause comes from sources other than the officer swearing out the affidavit, however, issues can arise concerning the credibility of the source of the information. Likewise, even if the source is shown generally to be a truthful person, issues can arise concerning whether the informant acquired his information in a reliable manner. Because of these concerns the Supreme Court at one time required that information provided by informants strictly comply with a two pronged test.⁴³ This test required that a showing be made as to the informant's credibility and that it also appear that the informant had obtained his information in a reliable way. In *Illinois v. Gates*,⁴⁴ the Supreme Court abandoned rigid adherence to this two-pronged test in favor of a more general approach which determined probable cause based upon the "totality of the circumstances."⁴⁵ The Court acknowledged, however, that both prongs of the analysis are still "highly relevant" factors in assessing an informant's tip.⁴⁶ Table 9 shows the extent to which various sources, other than regular law enforcement officers, were involved in providing information establishing probable cause.⁴⁷

conclusions of the officer. Instead, the affidavit must state facts upon which the judge can make the determination of probable cause. See *Aguilar v. Texas* 378 U.S. 108 (1964).

41. The classic definition of probable cause was stated by the Supreme Court as follows: "Probable cause exists where the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Draper v. United States*, 358 U.S. 307, 313 (1959) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). The Court has subsequently referred to the quantum of suspicion sufficient to establish probable cause as a "substantial chance" or a "fair probability." *Illinois v. Gates*, 462 U.S. 213, 238, n.13, 243 (1983).

42. *But see* *Franks v. Delaware*, 438 U.S. 154 (1978) (establishing the procedure for challenging the truthfulness of factual statements in an affidavit for a search warrant).

43. *See supra* note 3.

44. *Gates*, 462 U.S. 213.

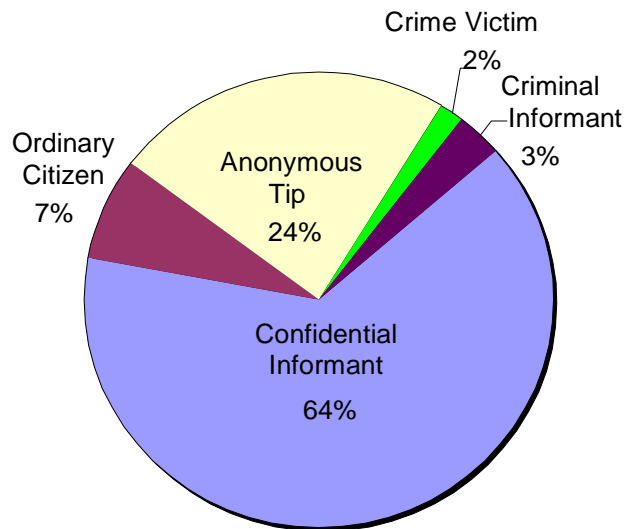
45. *Id.* at 238.

46. *Id.* at 230.

47. Table 9 reflects the total number of cases in which a particular source, outside ordinary law enforcement, provided information relevant to probable cause. It therefore includes cases in which the source was the exclusive source of probable cause and cases in which the source was one of several sources of information.

TABLE 9

Major Sources of Probable Cause



While almost all affidavits in our sample reflected some observation made by the attesting officer, probable cause was based solely upon observations by law enforcement in only 21.3% of the search warrant applications. In 41% of the cases there were multiple sources of information. In more than one of out three cases (37.7%) probable cause was based on a single source other than law enforcement. As Table 9 indicates, almost one quarter of the search warrant applications involved an anonymous tip. Sixty-four percent of the cases involved a confidential informant (“CI”).⁴⁸ Other sources of information included ordinary citizens (7%), criminal informants⁴⁹(3%) and crime victims (2%).

48. Also referred to as “confidential source,” the “CI” is an informant who is known to the police but is not identified by either name, status or description in the affidavit.

49. A criminal informant is a person who has been arrested for a crime and provides information to police usually in an effort to obtain some benefit for himself. Only four cases involved a criminal informant. In several cases subjects arrested with drugs on them told police where they had purchased the drugs. In one case, a prostitute was arrested by a

X. CONFIDENTIAL INFORMANTS

Almost two-thirds (63.9%) of the affidavits we examined contained information provided by an unnamed and unidentified informant. In over one-third of the cases (36.1%) probable cause was based primarily upon the CI's information and related law enforcement information about the CI and the CI's activities. In the overwhelming number of affidavits examined (95%) the reason given for not revealing the name of the informant was a standard boilerplate paragraph. The following paragraph is typical:

I desire to keep said informant anonymous because CI has requested me to do so, and because it is my experience that informants suffer physical, social and emotional retribution when their identities are revealed, because it is my experience that to reveal the identity of such informants seriously impairs their utility to law enforcement, and because it is my experience that revealing such informants identities prevents other citizens from disclosing confidential information about criminal activities to law enforcement officers.

As is readily apparent this boilerplate language contains no factual statements relating to any circumstances surrounding the informant in the case at hand. Indeed there is only a universal blanket conclusion based upon the officer's experience, unsupported by any factual statement showing that the case at hand comes within that experience. A public entity is granted a privilege to refuse to disclose the identity of an informant only if the public interest requires it because the "necessity for preserving the confidentiality of [the informant's identity] outweighs the necessity for disclosure in the interests of justice."⁵⁰ As a result of this privilege portions of an affidavit may be sealed by judicial order in order to prevent exposure of the CI's identity.⁵¹ The use of boilerplate in the manner described above, however, bypasses this entire process and indeed denies judges the very information

neighborhood policing team and gave the officers information about a person selling drugs. A controlled buy was conducted to corroborate this information and a telephonic warrant obtained which was immediately executed and a successful recovery of drugs made.

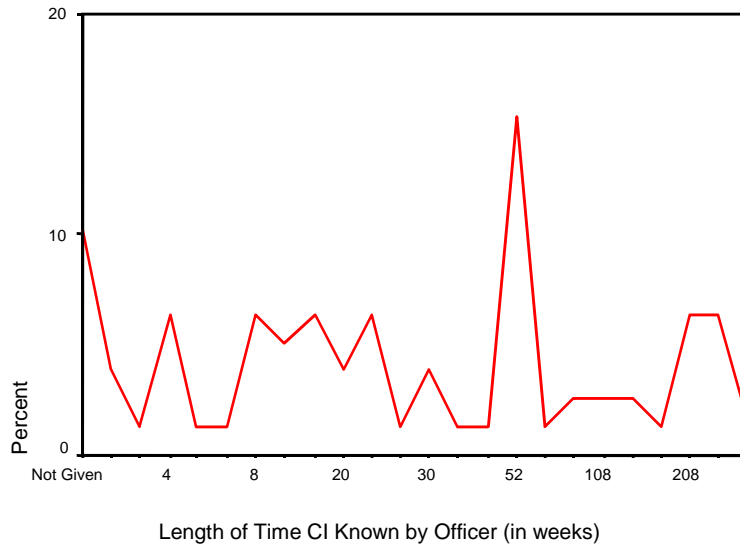
50. Although CAL. PENAL CODE § 1534(a) (West 2000) provides that a search warrant and its supporting affidavit become a public record after the warrant has been executed, the California Evidence Code gives a public entity a privilege to refuse to disclose the identity of an informant who has given a law enforcement officer information about a violation of law, if "there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interests of justice." CAL. EVID. CODE § 1041 (West 2000). The Evidence Code also provides that where a search warrant is valid on its face, a "public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search." CAL. EVID. CODE § 1042(b) (West 2000).

51. *See People v. Hobbs*, 7 Cal. 4th 948 (1994).

they would be required to have in order to make a determination that the CI's identity should not be revealed.⁵²

Typically the affidavit stated how long law enforcement personnel had known the confidential informant. The time period ranged from as little as two weeks to as many as eight years. In ten percent of the affidavits the extent of contact with the informant was not provided. The most frequent time period given was one year. Tables 10 and 11 reflect the length of time CI's were known to law enforcement personnel before the date of the affidavit.

TABLE 10
Length of Time Confidential Informant
Known by Law Enforcement



52. This practice would also appear to short-circuit the practice recently outlined by the California Supreme Court in *People v. Hobbs*, to “compel [law] enforcement officers to respect the constitutional security of all of us under the Fourth Amendment.” *Id.* at 968. In *Hobbs*, the California Supreme Court recognized that if, as a result of sealing the affidavit, the defendant is unable to challenge the truthfulness of facts stated in the affidavit “or otherwise make an informed determination whether sufficient probable cause existed for the search” the trial judge is required to conduct an in camera hearing. *Id.* at 972. At this hearing the court stated: “It must first be determined whether sufficient grounds exists for maintaining the confidentiality of the informant’s identity. It should then be determined whether the . . . extent of the sealing is necessary to avoid revealing the informant’s identity.” *Id.* This requires an individualized case by case determination. In light of *Hobbs*, it is difficult to understand how blanket non-disclosure of a CI’s identity can be proper without supplying any particularized factual basis for non-disclosure to the *issuing* magistrate in the first place.

Not Given	10%
Less than 6 months	35%
6 months to 1 year	29.5%
Over 1 year	24.5%
n=78	

A. PHANTOM AFFIDAVITS

We discovered that in half of the affidavits in our sample, the confidential informant was not personally known to the officer making the affidavit under oath. Rather, the officer simply related information given to him by another officer who did not join in signing the affidavit. Thus, Officer A swears under oath that Officer B told him that there was a CI who gave him certain information. This practice results in no officer ever having to state under oath that a CI even existed. As other researchers have recognized, this seems to be an anomaly since the Fourth Amendment literally requires that “No Warrant shall issue but upon Probable Cause supported by Oath or Affirmation.”⁵³ If the officer making the affidavit only relates what another officer told him regarding the CI’s observations and those observations are essential for probable cause to exist, then it is hard to see how the Fourth Amendment’s oath requirement is being complied with. Nevertheless the practice has been upheld without apparent recognition of the anomaly.⁵⁴ While we do not mean to suggest that law enforcement officers are making up fictitious CIs and insulating the search warrant affiant from possible perjury charges by this practice, the potential for such abuse is apparent. The minor inconvenience of having the officer with first hand information give a telephonic affidavit to the judge, as specifically provided for by §1526(b)(1) of the California Penal Code, would at least insure that the search warrant process is not based upon blind trust.

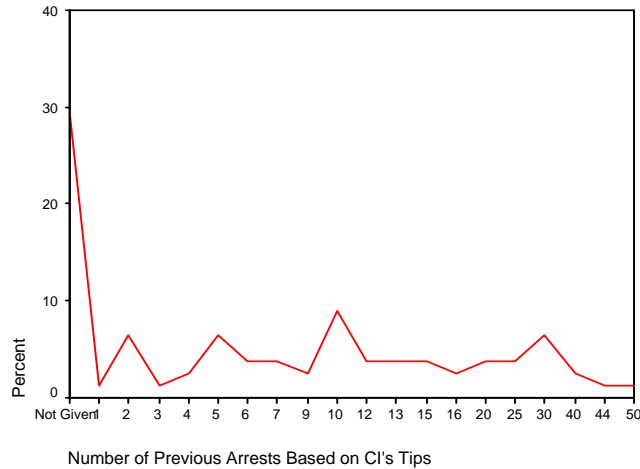
B. TRACK RECORD OF CONFIDENTIAL INFORMANTS

In order to establish a track record of reliability for the CI, an affidavit also routinely reported that the CI had furnished information leading to a specified number of arrests in the past. In 29% of the cases no prior arrests were indicated. Table 12 reflects the number of arrests reported, which ranged from as few as two to as many as fifty.

53. U.S. CONST. Amendment IV; *see also*, THE SEARCH WARRANT PROCESS, *supra* note 5, at 55-6.

54. *See* People v. Senkir, 26 Cal. App. 3d 411 (1972). The United States Supreme Court has also ruled that probable cause can be based upon hearsay. *See* Draper v. Illinois, 358 U.S. 307 (1959). However, the practice mentioned in the text above would involve double hearsay.

TABLE 12
Track Record Measured by Arrests



Curiously, none of the affidavits reported that the arrests had led to any convictions. This would be understandable if the CI had been known for just a short time. However, considering that 40% of the CIs were reportedly known for more than one year, the absence of any mention of convictions was puzzling. It appears, however, that this information is not requested by the computer program which is used to construct the search warrant and affidavit in many cases. This program, which can be used to design a search warrant and supporting affidavit for over 200 crimes, structures the affidavit through the use of boilerplate language with blanks to be filled in. Thus, only the information requested in this pre-packaged format will normally be provided by the officer.

The use of boilerplate language in affidavits was also observed in the study conducted by the National Center for State Courts which commented :

It is easy to imagine how a magistrate, seeing the same recitation over and over, can be tempted to skim over these important pieces of evidence But the question of their truthfulness is far more critical. This latter concern is more than argumentative, for it seems that one of the more insidious qualities of boilerplate presentations is that the affiant (officer) may take them only half-seriously, as part of the game that must be played, as form rather than substance.⁵⁵

55. See THE SEARCH WARRANT PROCESS, *supra* note 5, at 52-3.

C. CORROBORATION OF CONFIDENTIAL INFORMANTS' TIPS

Fortunately, the significant problems in assessing the reliability of CIs based on a mind numbing recitation of pre-packaged boilerplate, were largely countered in San Diego by an unexpected finding. This concerned the extent to which informants' tips were corroborated by conducting a controlled buy.⁵⁶ The National Center for State Courts study, while mentioning this practice, did not indicate its widespread use.⁵⁷ In fact, that study reported that in thirty percent of its nationwide sample, no effort of any kind was undertaken to corroborate the accuracy of a CI's information.⁵⁸ By contrast in our San Diego sample, a controlled buy was conducted by the CI or an undercover police officer in the overwhelming majority (95.6%) of cases in which a CI was the only significant source of information.⁵⁹ The

56. A "controlled buy" describes a police procedure in which narcotics are purchased from the location which will be the target of the search warrant. The informant is first searched to ensure he does not have contraband already in his possession. He is then given money to make the purchase. The informant is then continuously kept under surveillance by police until he enters the premises to be searched. After the informant exits the building he again is kept under surveillance until he meets the police officer some distance away and surrenders the narcotics which were purchased. The informant is again at this time searched for money and contraband.

57. See THE SEARCH WARRANT PROCESS, *supra* note 5, at 45, n.17.

58. See *id.* at 34, tbl. 16.

59. It should perhaps be noted, however, that even here the description of the controlled buy contained in the affidavit is primarily boilerplate. The following language was common with only minor variations:

Within the past 10 days, I conducted a controlled buy at the described premises. CI was searched for money and contraband with negative results. CI was then provided with a certain amount of money, and surveillance was maintained as CI went to the above described premises. SDPD detectives saw CI approach the premises and walk up to the front door.

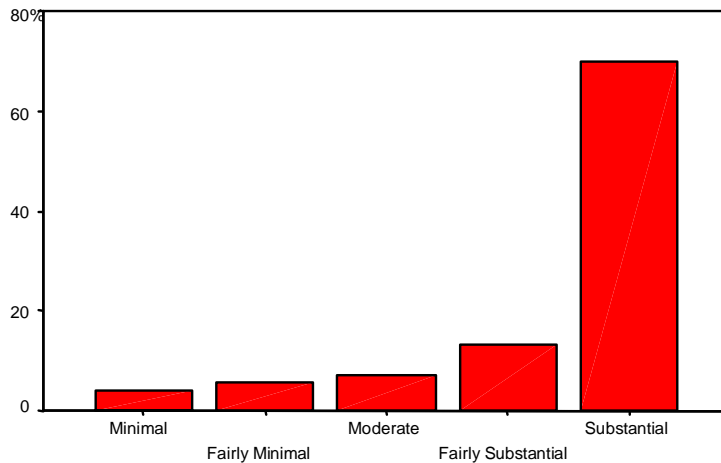
After a short period of time, CI was seen leaving said premises and met with me at a location away from the premises. There CI gave me a quantity of loose wafers, which appeared to me to be consistent with cocaine base. CI was searched again for money and contraband and neither was found. CI was continually watched by officers, except for the time period CI was inside said premises during the controlled buy.

CI told me that when CI went inside the premises, CI contacted the above described person, who CI said appeared to be an occupant of the described premises, based on the fact that the described person allowed him access to the house, paid said person the funds I gave CI and in return received the *package(s)* which CI gave to me. CI indicated the person represented the substance contained within the *package(s)* to be cocaine base. (emphasis added)

The tell tale reference to "*package(s)*" which was found repeatedly in other affidavits reveals the boilerplate origins of this passage. The search warrant this passage was taken from (#23819) authorized the search of a home in which an unnamed "Hispanic female, approximately 18-19 years old . . . [was] believed to be residing." The affidavit consisted almost entirely of boilerplate and conclusions based only upon the officer's training and experience in drug enforcement which was "about 15 months." Only the CI's bare accusation

majority of these cases were handled by the San Diego Police Departments Narcotics Section. However, controlled buys were done across the board by all agencies, when a tip by a CI was the only source of probable cause. This was also true with respect to anonymous tips. No search warrant issued by the judges in the San Diego Judicial District relied solely upon an anonymous tip. In almost three fourths of the anonymous tip cases (72%) the tip was confirmed by having a CI conduct a controlled buy at the suspected premises. Altogether controlled buys were done in almost two thirds (66%) of all search warrant applications. Other methods of corroboration included surveillance of the suspect premises and background investigation of people living there. As Table 13 indicates in over 80% of the cases a substantial or fairly substantial investigation was conducted by police.⁶⁰

TABLE 13
Extent Of Investigation Conducted



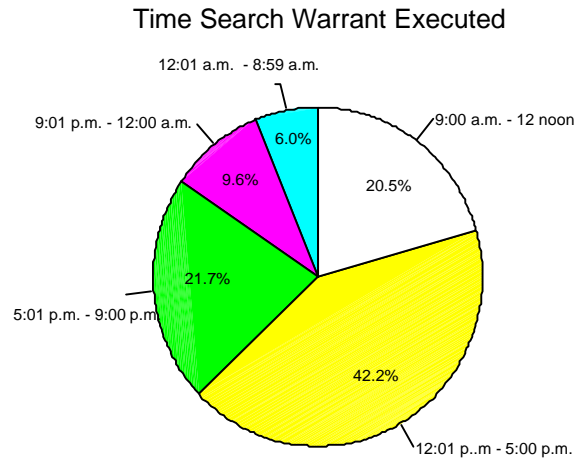
(“Within the past 10 days, CI told me that rock cocaine was being sold at the described premises by the described suspect.”) and the controlled buy, as described in the above quoted passage, furnished the grounds for probable cause. No other police investigation was done. When the search warrant was executed, no drugs were found and nothing whatsoever was seized.

60. This determination was made by assessing the police investigation reported in the affidavit on a five point scale; zero indicating nothing was done and five indicating substantial investigation was done. While this assessment is admittedly somewhat subjective, there was one objective indicator which undoubtedly also contributed to the uniformly high rating: a case involving a controlled buy was automatically given the highest mark.

XI. EXECUTION OF THE SEARCH WARRANT

Under California law a search warrant must be served within ten days of issuance or it is void.⁶¹ Normally a search warrant must be executed between the hours of 7:00 a.m. and 10:00 p.m.⁶² Upon a showing of good cause the judge may authorize the search warrant to be served at any time day or night.⁶³ Only ten (8.2%) of the search warrants in our sample authorized service after 10:00 p.m. The majority (60%) of those were telephonic warrants.⁶⁴ As Table 14 reveals most search warrants (62.7%) were executed between 9:00 a.m. and 5:00 p.m. Approximately 22% were executed between 5:00 p.m. and 9:00 p.m., while about 15% were executed after 9:00 p.m.

TABLE 14



The number of narcotics search warrants issued each month remained fairly constant with March having a high of 25 and June having a low of 17. An examination of the Clerk's Search Warrant Log disclosed a similar

61. *See* CAL. PENAL CODE § 1534 (West 2000). We discovered one search warrant which was served more than ten days after issuance.

62. *See* CAL. PENAL CODE § 1533 (West 2000).

63. *See id.*

64. The majority of the telephonic warrants (57.1%), however, were served during the regular statutorily authorized hours.

pattern of relatively even monthly distribution for all search warrants issued during the first six months of 1998. Table 15 shows the monthly distribution of the search warrants in our sample. The fact that roughly the same number of search warrants are issued each month indicates that the processing of search warrants is steady and non-cyclical in nature and may be sensitive to the allocation of criminal justice resources. As noted in Section III, the perception that only a few judges are readily available to handle search warrants may have contributed to the tendency to channel the workload to a disproportionately small number of judges. If that perception were to change, the workload might be more evenly distributed.

TABLE 15
DISTRIBUTION OF WARRANTS BY MONTH

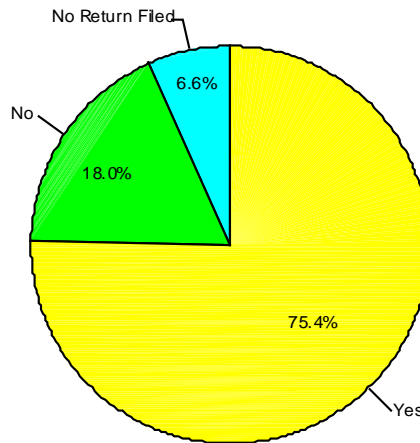
JANUARY	21
FEBRUARY	21
MARCH	25
APRIL	19
MAY	19
JUNE	17

As Table 16 indicates, only three out of four of the narcotics warrants in our sample were ultimately executed.⁶⁵ Considering the expenditure of time and energy necessary to obtain a search warrant as well as the expenditure of judicial and prosecutorial resources, the discovery that one quarter of the search warrants issued were never executed was surprising. We were told that the failure to execute a search warrant could result from many causes. As one officer speculated, the target of the search might move his or her operations to another location, or be arrested on other charges. Because the search warrants in our sample were issued in 1998, a follow up study involving more current warrants would have to be undertaken to accurately assess the reasons for the failure to execute search warrants. Nevertheless, our data did show an apparent correlation between non-execution and the use of confidential informants. While CI's were involved in 63.9% of all search warrants studied, they accounted for 95% of the search warrants which were not executed.⁶⁶

65. When a search warrant is executed the officer is required to return the search warrant together with in inventory of the items seized to the magistrate. *See* CAL. PENAL CODE § 1537. This is referred to as the "return." If a search warrant is not executed, most officers return the search warrant to the Clerk of the Court and write "not executed" either on the face of the warrant or on the Receipt and Inventory Form. Written notations on the Clerk's search warrant log documented that 18% of the warrants were never executed. In 7% of the cases, however, no return was ever filed. It is therefore not known for certain whether those search warrants were not executed or whether they were executed, but nothing was seized.

66. Similarly, all but one of the cases in which no return on the search warrant was filed were CI cases. *See supra* note 65.

TABLE 16
 Percent of All Search Warrants Executed



The percentage of search warrants issued each month which were executed was fairly consistent except for two months which were below the norm, as indicated by Table 17.

TABLE 17⁶⁷	
Percent of Search Warrants Issued Which were Executed: by Month	
January	81%
February	61.9%
March	84%
April	79%
May	79%
June	59%

67. The figures in Table 17 were obtained by separately examining the search warrants issued each month to see if they had been executed.

As Table 18 shows, however, the number of search warrants actually executed each month (without regard to date of issue) varied more significantly.

TABLE 18 Number of Search Warrants Executed Each Month (as a percent of total)	
January	12%
February	19%
March	21%
April	17%
May	17%
June	12%
N = 90	
Total is less than 100% due to rounding	

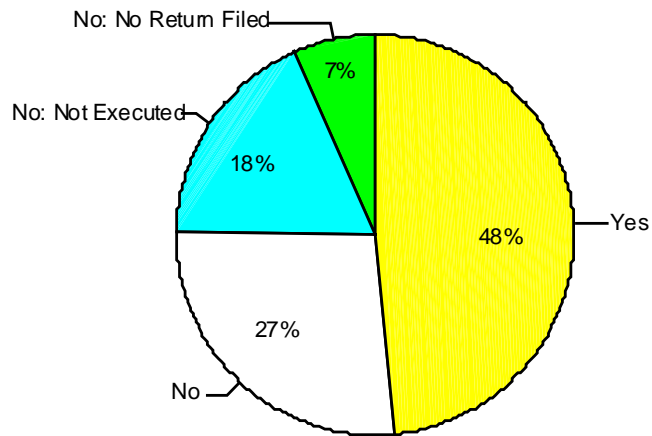
XII. RESULTS OF EXECUTED SEARCH WARRANTS

Based upon an examination of the Receipt and Inventory Form filed with the return of the executed search warrants, the results of each search were catalogued using several different measures. For each executed search it was recorded whether the primary target of the search was recovered; whether other non-primary items specified in the search warrant were seized; whether items showing dominion and control were seized; and whether other items, not specified in the search warrant, were seized.⁶⁸ Although some item was seized in the vast majority of searches, the primary target of the search was recovered in less than half (48.4%) of all search warrants issued. As Table 19 reveals, this is due in part to the fact that almost a quarter of the search warrants issued (24.6%) were never executed.

68. An object was considered a primary target if it was specified in the search warrant and was one of the motivations for getting the search warrant. A search warrant could have several primary targets. All drugs specified in a search warrant were considered primary targets. However, search warrants routinely contained a laundry list of other objects such as drug paraphernalia, packaging materials, weighing devices, etc. These items were not considered the primary target of the search and were cataloged as non-primary specified items. Search warrants also routinely authorized the seizure of items showing dominion and control over the premises and seizure of these items were recorded as a separate category.

TABLE 19⁶⁹

Was a Primary Target Recovered
(percent of all search warrants)



Looking only at executed search warrants, 65% resulted in recovery of the primary target sought.⁷⁰ Other non-primary target items specified in the search warrant (such as paraphernalia or currency) were seized in 18% of the executed search warrants.⁷¹ In 5% of the cases the only things seized were items which were not specified in the search warrant. These cases involved the seizure of either marijuana or non-contraband items. Adding such inadvertent drug discoveries together with the number of primary drug targets recovered, some drug was recovered in 73.9% of the cases where the search warrant was executed. Table 20 shows the percentage of executed

69. See *supra* note 68.

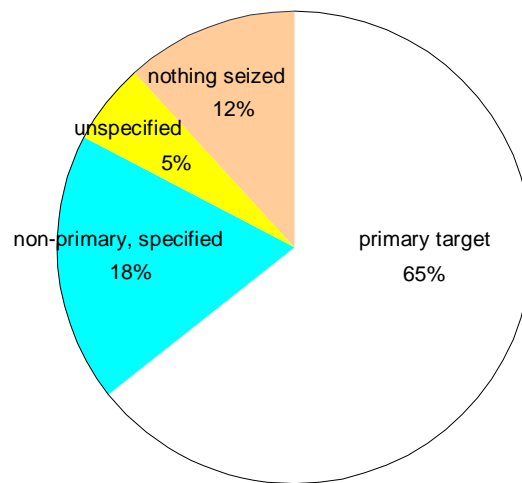
70. Executed search warrants were recorded as having recovered their primary target if any amount of the drug was recovered or even if narcotics residue was found on paraphernalia.

71. In over half (58%) of these cases marijuana or some other drug was found even though the primary target drug was not recovered.

warrants which resulted in the seizure of a primary target, only a non-primary target,⁷² only unspecified items, or no seizure at all.

TABLE 20

Results of Executed Warrants



A. TYPE OF DRUGS SEIZED

Table 21, on page 251, shows the type of drugs seized as primary targets. The most frequent drug recovered as a primary target was methamphetamine.⁷³ Marijuana and rock cocaine were the next most frequent drugs seized. Very little heroin or powder cocaine was seized. In one case, Vicodin, a prescription drug was seized. There were no seizures of LSD or PCP reported in our sample.

⁷² In this group of cases no primary target was recovered, but some item specified in the search warrant, usually drug paraphernalia, was seized.

⁷³ Methamphetamine was also one of the drugs recovered in all of the multiple drug seizures shown in Table 21.

TABLE 21

Type of Drugs Seized as Primary Targets

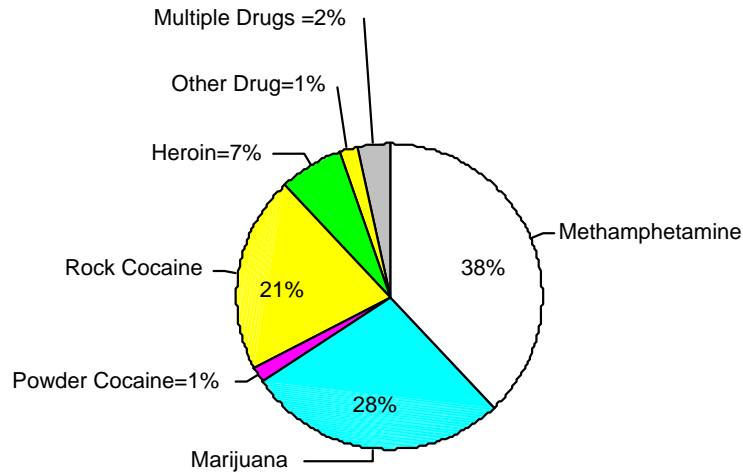


TABLE 22
Percent of Searches Successful:
By Type of Drug Sought

Marijuana	85.7%	n=7
Methamphetamine	63.2%	n=38
Heroin	44.0%	n=9
Powder Cocaine	33.0%	n=6
Rock Cocaine	27.9%	n=43
Other Drugs	25.0%	n=4

Table 22 reflects the success rate by type of drug, indicating the percentage of cases in which a recovery was made when that drug was the primary

target.⁷⁴ As can be seen, the success rate varied widely, with searches for rock cocaine being the least successful (27.9%) and searches for marijuana the most successful (85.7%).⁷⁵

B. DRUG DETECTOR DOGS

Because searches based on drug detector dogs involved multiple drugs, they were tracked separately.⁷⁶ The success rate for searches based upon canine sniffs was extremely good (91.7%).⁷⁷ All of these cases involved seizures of marijuana and in one case both marijuana and methamphetamine.⁷⁸ These cases also produced the highest recorded yields, with one case netting 53 pounds of marijuana.⁷⁹ The majority (75%) of these searches involved packages.

As previously noted, in a number of cases other drugs in addition to or instead of the primary target drug were discovered during the search. These drugs were not specified in the search warrant. Most of these seizures involved marijuana. Indeed, over half of all the marijuana seized was the result of such inadvertent discovery. When these fortuitous seizures are added together with the seizures of primary target drugs, marijuana becomes the most frequently seized drug.

Table 23, on page 253, shows the percentage of all successful searches represented by each type of drug.

74. These figures exclude cases in which multiple drugs were sought. Almost always those cases were based upon an alert by a drug detector dog. Since the dog was trained to alert to the presence of as many as five different drugs, the search warrant sought multiple drugs. Dog sniff cases are reported separately. *See supra* text accompanying notes 26 and 27.

75. The figures with respect to heroin and powder cocaine should be viewed with caution since very few search warrants actually sought these particular drugs.

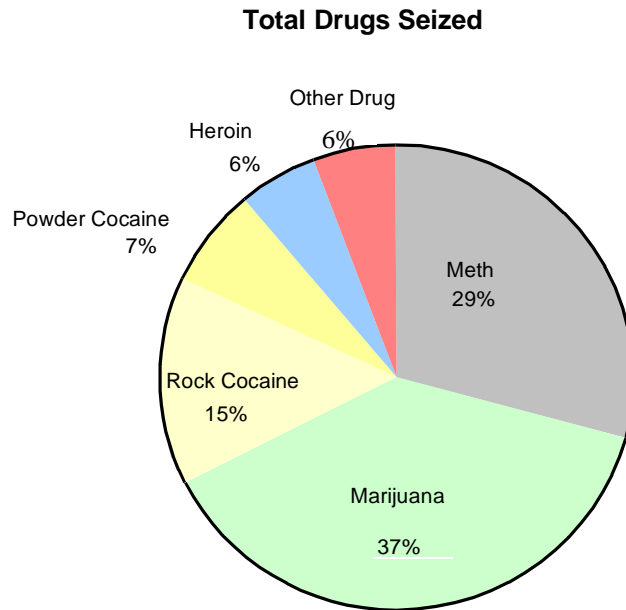
76. *See supra* note 74.

77. This figure excludes one case in which no return was filed.

78. These cases were not included in determining the success rate of searches for marijuana reported in table 22.

79. Because the quantity of drugs seized was not uniformly recorded on the Receipt and Inventory Form, we were not able to determine the total amount of each drug seized. For example a typical entry would read simply "plastic baggie w/white powder found in . . ." In two of the detector dogs cases, however, the amount of marijuana seized was specified. The second case resulted in a seizure of 13 pounds of marijuana.

TABLE 23



C. SEIZURE OF OTHER ITEMS

In over two-thirds of all executed warrants (67.4%) police seized items which had been specified in the search warrant, but which were not considered primary targets.⁸⁰ The overwhelming majority of these seizures involved drug paraphernalia (82.3%).⁸¹ Currency was also seized in well over half (62%) of all searches. Currency was often specified as an item to

80. In 18% of the executed warrants the only thing seized was such non-primary specified items. The figure in the text refers to the percentage of executed search warrants in which an item specified in the search warrant was seized other than a primary target or an item showing dominion and control.

81. Paraphernalia was defined as anything used to process, package, weigh or ingest the drug in question and included objects of every description, ranging from plastic baggies, razor blades and scales, to bong and pipes used for smoking marijuana or crack cocaine.

be seized in the search warrant.⁸² Where a primary drug target was recovered, currency was also seized 69.5% of the time. Currency was also frequently seized when only a non-primary target such as paraphernalia was discovered.⁸³

D. EVIDENCE OF DOMINION & CONTROL

Evidence of dominion and control over the premises was another category of items to be seized which was almost always specified in the search warrant.⁸⁴ The boilerplate language used in most search warrants typically authorized seizure of “all papers, documents, and effects which tend to show possession, dominion and control over said premises, including fingerprints, handwritings, clothing and objects bearing a form of identification such as a person’s name, photograph, Social Security number or driver’s license number.” While the seizure of such items appears to be accepted practice, the fact that all narcotics search warrants specifically authorize a search for such a broad category of items has the effect of giving such search warrants virtually unlimited scope.⁸⁵ This permits a substantial invasion of privacy. It was also observed that items of “D & C” were sometimes seized even when no contraband at all was found.⁸⁶

82. The justification for seizing currency is presumably based upon the theory that there was probable cause to believe that the money was subject to forfeiture as proceeds from illegal activity.

83. Only about half of these seizures were specifically authorized by the search warrant. The remaining seizures of currency would presumably be justified under the plain view doctrine which permits seizure of contraband and other criminally connected items which lawfully come into view during a properly conducted search. *See Horton v. California*, 496 U.S. 128 (1990). *See also supra* note 82.

84. If drugs are found they must be linked to a particular defendant. Therefore bills, letters, and other papers providing personal identification which are found in the room where the contraband is located can be used as evidence to establish that person’s possession of the drugs.

85. Where the defendant is the sole owner or tenant in possession of the premises and where there has previously been a controlled buy involving the defendant, there may be little need for such evidence. The authorization to search for and seize items of dominion and control in such cases thus simply serves to authorize an arguably unnecessary fishing expedition with no meaningful control on discretion regarding the scope of the search or the amount of items which may be seized. *See Central Art Galleries v. United States*, 875 F.2d 747 (1989). For example in a number of cases, unspecified photographs were seized without any indication being given that they were a form of identification.

86. One such case arose from a traffic stop. The officer discovered a pipe used to smoke methamphetamine in a bag, after receiving consent to search the bag. The defendant was then arrested and searched and methamphetamine was found on his person along with a pager. A telephonic search warrant was then obtained for his house, but no drugs were found. The only item seized as a result of the search warrant was a piece of mail addressed to defendant. This was one of several cases in which items apparently showing only dominion and control over the premises were taken even though no contraband was seized in the place searched. It would seem that absent probable cause to believe such items had independent evidentiary significance, such seizures would be unreasonable under the Fourth Amendment since items

In a substantial majority of searches (71.7%) at least one item was seized as evidence of dominion and control. In about one third of the cases (30.4%), multiple items were seized. In 26.1% of the searches these items were described only as “D & C.” This vague description would appear to violate §1535 of the California Penal Code, which requires that the officer give a receipt “specifying . . . in detail” the property taken.⁸⁷ The most frequently taken items were financial and legal documents (26.1%), bills (17.4%), items of personal identification, such as a driver’s license or social security card (16.3%), and letters or other papers (15.2%).⁸⁸

E. SEIZURE OF WEAPONS

According to standard folklore, “In the narcotics business, ‘firearms are . . . tools of the trade.’”⁸⁹ Echoing that folklore, boilerplate language in affidavits for narcotics search warrants asserts that the officer’s “training and experience indicate that persons dealing in controlled substances trafficking frequently arm themselves with firearms”⁹⁰ However, the United States

showing dominion and control are relevant only to link one to the possession of contraband found in the premises searched.

87. CAL. PENAL CODE §1535 (West 2000).

88. The percentages reflect the percent of all searches in which such items were seized.

89. *See Ybarra v Illinois*, 444 U.S. 85, 106 (1980) (Rehnquist, J. dissenting (citing *United States v. Oates*, 560 F.2d 45, 62 (1977)).

90. The full boilerplate passage reads as follows:

Furthermore, my training and experience indicate that person dealing in controlled substance trafficking frequently arm themselves with firearms and ammunition, and will keep them available either in their premises, in their vehicles or on their person. This phenomenon is primarily due to the large amounts of cash or valuable contraband involved in trafficking, and the fact that people so involved more and more commonly resort to violence to resist robbery, settle disputes, or thwart capture by law enforcement. The presence of firearms, along with the other described property, will tend to circumstantially establish sales and provide a basis for charging a violation of Penal Code Section 12022(a).

The section of the California Penal Code referred to provides an enhanced penalty of one year when a person is “armed with a firearm in the commission or attempted commission of a felony” CAL. PENAL CODE § 12022(a) (West 2000). This section was interpreted by the California Supreme Court to apply whenever a defendant has a specified weapon “available for use.” *People v. Bland* 10 Cal. 4th 991, 997 (1995); *see also People v. Gray*, 71 Cal. Rptr. 2d 383 (1998) (holding that there was a sufficient “facilitative nexus” between a loaded revolver found near defendant’s bed and drugs stored in a detached garage 20 to 30 yards away).

However, in interpreting a similar federal enhancement provision involving the use of a firearm, (18 U.S.C. 924(c)(1)) Justice O’Connor, writing for a unanimous United States Supreme Court rejected the “facilitative nexus” approach on the ground that it created “an impossible line-drawing problem” and was not “reasonably distinguishable from [mere] possession.” *Bailey. v. United States*, 516 U.S. 137, 149 (1995). Justice O’Connor therefore held that for the enhancement provision to apply the evidence had to show “active employment” of a firearm in the commission of the substantive offense. *See id.* The Supreme Court’s interpretation of a federal statutory counterpart to CAL. PENAL CODE § 12022(a) is of

Supreme Court, in striking down a blanket “narcotics case” exception to the Fourth Amendment’s ‘knock–notice’ requirement in *Richards v. Wisconsin*,⁹¹ characterized this same assertion as a “considerable overgeneralization” which provides neither probable cause nor reasonable suspicion to believe that an officer may be endangered by weapons during a search for narcotics.⁹² Probable cause, of course, cannot be established by broad generalities, but must be based upon particularized justification.⁹³ In the absence of facts supporting the application of the generalization to the particular case, it may therefore be questionable whether the boilerplate language alone establishes probable cause to believe weapons are at the premises to be searched. No facts are normally given in the affidavit to suggest that the particular suspect is known to have a weapon, nor does the officer even assert a belief that weapons will be found.

Our study found that firearms were discovered in only 14.1% of all searches. Handguns⁹⁴ were discovered in eight cases, and shotguns were discovered in four cases. This figure also includes one case in which both a stun gun and BB gun were seized.⁹⁵ Thus the generalization asserted in the boilerplate language used in narcotics affidavits appears to be incorrect 85.9% of the time. This should not be understood to imply that the execution of a search warrant for narcotics does not entail a significant risk of danger to police officers. That risk is of course always present and very real. These findings do indicate, however, that the number of times firearms are actually present in a home subject to a narcotics search warrant is substantially less than common folklore suggests and confirms the wisdom of the Supreme

course not binding on the California Supreme Court when interpreting state law. Nevertheless, the reasoning in *Bland*, decided before *Bailey*, is less than persuasive in view of the unanimous opinion by the high court. If Justice O’Connor’s view is correct that merely storing a firearm in the vicinity of controlled substances is not a proper ground for enhancing the penalty for the drug offense, then the basis for seizing a weapon during a search in which narcotics are found becomes more problematic absent probable cause to believe the weapon is unregistered or otherwise illegally possessed, as would be the case, for example, if it was known that the defendant had a prior felony conviction.

91. 520 U.S. 385 (1997). The Fourth Amendment incorporates the common law requirement that police executing a search warrant must knock on the door of a home and announce their identity and purpose before making a forcible entry. *See Wilson v. Arkansas*, 514 U.S. 927, 929 (1996).

92. *Richards*, 520 U.S. at 393. In *Richards*, the Court held that in order for an exception to apply, officers must have reasonable suspicion that knocking and announcing their presence would be dangerous, futile or would frustrate the purpose of the search. *See id.* The issue here, however, is whether the affidavit provides probable cause to believe firearms are present in the premises to be searched.

93. *See Ybarra*, 444 U.S. at 91 (holding that individualized justification was required to search a person on the premises being searched pursuant to a search warrant, stating: “Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person”).

94. This figure includes cases in which the officer only recorded the weapon as a “gun” on the Receipt and Inventory form without further identification or comment.

95. In one case a billy club was found. In several cases (7.6%) unspecified ammunition was seized although no weapon was found.

Court's decision in *Richards* not to permit a blanket exception to the knock-notice requirement in narcotics cases.

F. SEIZURE OF MISCELLANEOUS UNSPECIFIED ITEMS

In over half (53%) of all searches, a wide variety of other items not specified in the search warrant were also seized. Pagers and cellular telephones were among the most frequent items taken.⁹⁶ Other items included personal effects such as a bicycle, key ring, calculator, key for safe deposit box, VCR tapes, and a camera and film.⁹⁷

XIII. FEEDBACK AND OVERSIGHT

Under the statutory scheme, a judge in theory receives feedback on the results of a search warrant he or she has issued when the officer returns the search warrant together with an inventory of the items seized. The California Penal Code requires that the search warrant be served by the officer named in the warrant "but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."⁹⁸ Following the execution of the search warrant the officer completes a Receipt and Inventory Form detailing the property taken. The search warrant is then returned to the magistrate together with an inventory of the property taken, and the officer swears before the magistrate that the inventory is a "true and detailed account" of all property taken.⁹⁹ The majority (95%) of the search warrants were returned by the officer who executed them. Normally the issuing judge signs the attestation on the Receipt and Inventory Form. However over a third (37%) of these forms were signed by a judge other than the issuing magistrate. While it is not required by statute that the warrant be returned to the same judge who issued the warrant, to the extent

96. Search warrants also routinely authorize the officer "to intercept all incoming phone calls to said premises while the warrant is being executed." While the practice of intercepting telephone calls has been upheld when large amounts of drugs have been discovered during a search or other specific information gives probable cause to believe that incoming telephone calls will concern criminal activity involving narcotics, *See People v. Sandoval*, 65 Cal. 2d 303 (1966); *People v. Vanvalkenburgh*, 145 Cal. App. 3d 163 (1983), the idea that the right to search a premises for drugs automatically includes the right to intercept all incoming telephone calls has been rejected by at least one court. *See People v. Harwood*, 74 Cal. App. 3d 460 (1977); *see also Berger v. New York*, 388 U.S. 41 (1967).

97. While it is understandable that the police might want to collect photographic evidence of friends and acquaintances of a person who sells drugs, the legal basis for seizing cameras and film is less than clear in the absence of probable cause to believe there are events connected to drug trafficking activity captured on film. Developing the film and viewing the pictures would in any event appear to require a warrant, as would viewing any VCR tapes seized, as these were not specified items. *See Walter v. United States*, 447 U.S. 649 (1980).

98. CAL. PENAL CODE § 1530 (West 2000).

99. CAL. PENAL CODE § 1537 (West 2000). The warrant, however, may be made returnable before either the issuing magistrate or his or her court. *See CAL. PENAL CODE § 1534(c)* (West 2000).

this practice becomes prevalent it deprives judges of feedback on the outcome of search warrants they issue. As a former California Attorney General has pointed out: "Return of the warrant and inventory required by Penal Code section 1537 allows the magistrate to compare the seized articles with the warrant he has issued and to return property that is 'not the same as that described in the warrant' under Penal Code section 1540."¹⁰⁰

Although a citizen has a statutory remedy for obtaining the return of property wrongfully seized, the U.S. Supreme Court recently held that notice of the existence of such procedures is not required.¹⁰¹ Therefore in those cases where no charges are brought, judicial review of the Receipt and Inventory Form may be the only protection realistically available to insure that the items seized were within the proper scope of the warrant issued.

XIV. IMPACT OF DELAY IN EXECUTING THE SEARCH WARRANT

Perhaps the most surprising finding arising out of our study was the discovery that a significant number of search warrants were not executed until almost a week or more had passed after their issuance. Table 24 indicates how many days after issuance the search warrants in our sample were executed. Less than a third (31.1%) were executed on the same day the search warrant was issued. More than four out of ten (43.3%) were executed five days or more after being issued. Over one quarter (27.8%) were executed seven days or more after issuance. We found one search warrant which was executed after the ten day statutory time period had expired.¹⁰²

As Table 25 reveals, we found that there was a significant relationship between the success rate and the time the search warrant was executed.¹⁰³ Where the search warrant was executed on the same day it was issued the success rate in recovering the primary target sought was 85.7%. By contrast, when the warrant was executed on the ninth day the success rate was only 33.3%. We found that five days marked the most significant dividing line between success and failure. If the search warrant was executed less than five days after issuance, there was still an 80.4% success rate. However, if

100. Evelle J. Younger, *Search and Seizure: A Statement of The Current Principles and Their Application*, Office of the Attorney General, State of California, 53 (1972). Penal Code section 1540 provides that "If it appears that the property taken is not the same as that described in the warrant . . . the magistrate must cause it to be restored to the person from whom it was taken. CAL. PENAL CODE § 1540 (West 2000).

101. *City of West Covina v. Perkins*, 525 U.S. 234 (1999). See CAL. PENAL CODE (WEST 2000) §§ 1536 and 1540 which have been held to establish adequate post-deprivation remedies. See *Perkins v City of West Covina*, 113 F.3d.1004, 1011 (9th Cir. 1997). See also CAL. PENAL CODE §1538.5 which establishes the procedure under which a criminal defendant may, by written motion, seek the return of property taken.

102. After the expiration of ten days the search warrant is void. See CAL. PENAL CODE § 1534 (West 2000). In following up this case we discovered that no motion to suppress was filed. Both defendants were illegal immigrants who pled guilty.

103. Chi-square (df 1) = 9.931, p<.002; n = 58.

execution was delayed five days or more, the rate of success dropped dramatically. More than half (56.4%) of the search warrants executed five days or more after being issued failed to recover their primary target.

TABLE 24

HOW MANY DAYS AFTER ISSUANCE WAS SEARCH WARRANT EXECUTED?

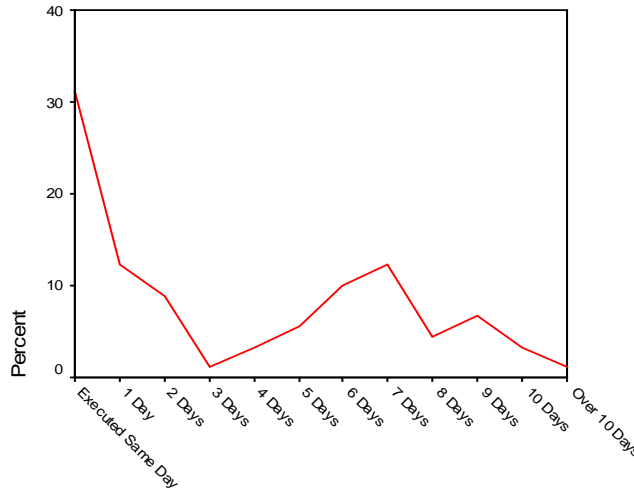
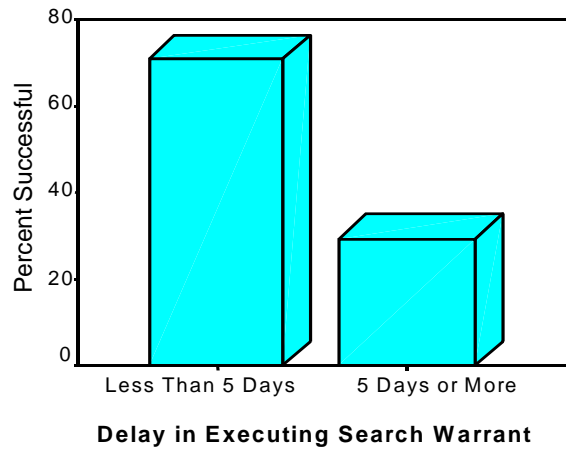


TABLE 25

IMPACT OF DELAY ON SUCCESS RATE

PERCENT SUCCESSFUL

Chi-square= 9.931, p<.002



The effect of delay remained significant in cases involving a CI. Where the search warrant was executed in less than five days, there was a successful recovery in 82.4% of the cases involving a CI, while over half (53.1%) of the CI search warrants executed 5 days or more after being issued failed to recover their primary target.¹⁰⁴ The same relationship held in cases involving a controlled buy. Again 78.6% of those (controlled buy) search warrants which were promptly executed were successful while over half (51.6%) of those delayed five days or more were unsuccessful.¹⁰⁵

The impact of delay was also seen to have a similar effect on the success rate of search warrants when controlling for the issuing judge. Table 26 shows the overall success rate for search warrants approved by the six judges who most frequently issue narcotics search warrants, without regard to delay. Table 27 then shows the improved rate of success for all but two judges where the search warrant was executed less than five days after being issued. These findings reveal that the assumption that judge shopping is bad is not necessarily always correct. Of the six judges who most frequently issued narcotics search warrants, the judge who had the highest success rate was a former police officer and prosecutor. The search warrants issued by this judge were successful in recovering their primary target 80% of the time overall. The success rate was 100% where the search warrant was executed in less than five days. In fact, four of the six judges who frequently issued narcotics warrants had a high rate of success when the search warrants were executed promptly. Each of these judges was a former prosecutor.¹⁰⁶

We also made an attempt to assess the impact of delay with respect to each type of drug. The number of cases involving heroin and powder cocaine were too small to do an analysis and all of the marijuana search warrants were executed in less than five days so a comparison was not possible. A majority (68.2%) of the search warrants for methamphetamine were executed in less than five days and had a success rate of 63%. Delay in execution of the search warrant appeared to have the greatest impact on search warrants for rock cocaine. The success rate for rock cocaine searches was the lowest of all major drugs. Only about one out of four search warrants issued for rock cocaine was ultimately successful. This was due in part to the fact that over a third (37.2%) of these search warrants were never

104. Chi-square (df 1) = 5.785, $p < .016$; $n = 49$.

105. Chi-square (df 1) = 3.602, $p < .058$; $n = 45$.

106. The two judges for whom delay did not have an impact had the lowest overall success rates of the six judges. For example, 50% of the executed search warrants issued by one judge failed to recover a primary target. That ratio remained the same even when execution occurred in less than five days. However, it is difficult to assess the impact of delay in that particular case because so few search warrants by that judge were promptly executed. The overwhelming majority (85.7%) of that judge's search warrants were executed five days or more after being issued.

TABLE 26

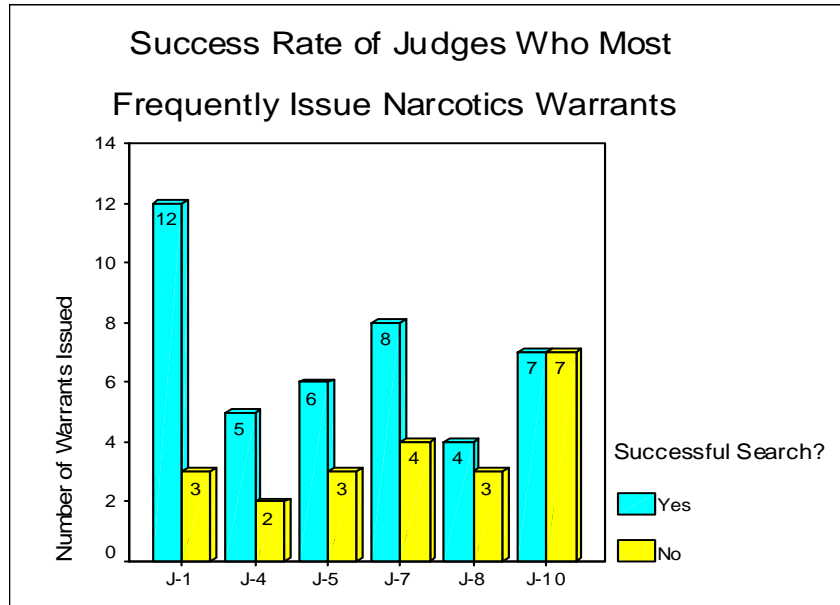
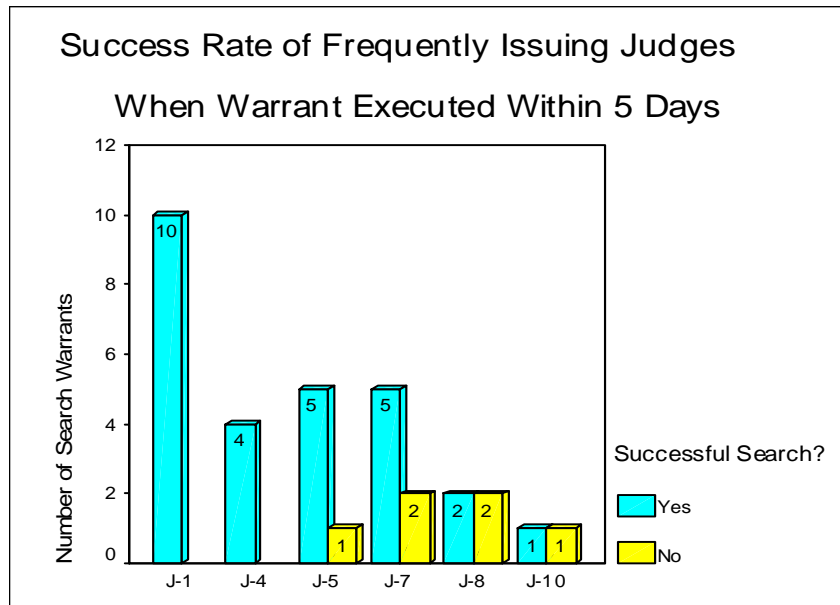


TABLE 27



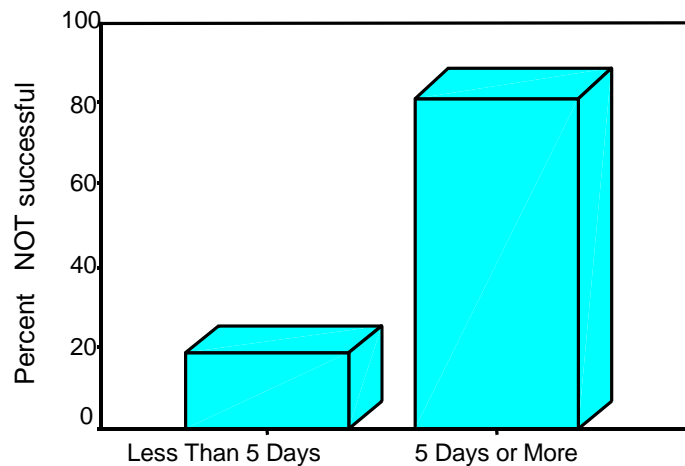
executed. However, only 40.7% of those search warrants which were executed were successful. The majority (59%) of the search warrants for rock cocaine were executed five days or more after being issued. Table 28 shows there was a significant relationship between the timing of execution and the failure rate of search warrants for rock cocaine. Less than one in five (18.8%) were successful in recovering rock cocaine if served five days or more after being issued. The failure rate was thus over 80%.

TABLE 28¹⁰⁷

EFFECT OF DELAY ON FAILURE RATE

ROCK COCAINE

Chi-square = 6.250, $p < .012$



PERCENT NOT SUCCESSFUL

107. Chi-square (df 1) = 6.250, $p < .012$; $n = 16$. This table is based upon the number of executed search warrants seeking rock cocaine which failed to find any rock cocaine. It excludes cases in which detector dogs were used since this would have skewed the data to present an even higher failure rate. See *supra* note 74.

XV. TELEPHONIC SEARCH WARRANTS

Section 1526 of the California Penal Code establishes a special procedure whereby an officer in the field can obtain verbal authorization from a judge to conduct a search. This is known as a telephonic search warrant because the judge swears the officer under oath by telephone.¹⁰⁸ The officer can make an oral statement of the grounds (probable cause) for the search¹⁰⁹ or fax or e-mail a written affidavit to the judge, along with a proposed search warrant. If approved, the search warrant is signed by the judge and faxed (or e-mailed) back to the officer who is then authorized by telephone to mark "duplicate original" on the officer's copy. It is thus possible for an officer in a squad car equipped with a lap top computer and fax-modem to obtain a search warrant while remaining in the field.

We were surprised to learn that only 11.5% of the search warrants in our sample were telephonic warrants.¹¹⁰ Apparently they are used only in the evening after regular court hours or in case of an emergency during the day. Only five telephonic warrants were issued between 9:00 a.m. and 5:00 p.m.

Half of the telephonic search warrants were sought by law enforcement agencies other than the San Diego Police Department. The majority were sought in connection with the search of a home. They were used to search for all types of drugs, the most frequent being methamphetamine. Probable cause was usually based upon observation by law enforcement either alone or in combination with information from an ordinary citizen. Only two cases involved a CI. Almost all were executed the same day they were issued.¹¹¹ Overall, telephonic warrants had a higher success rate than regular warrants. The primary target was recovered 76.9% of the time.

XVI. CRIMINAL CASES RESULTING FROM EXECUTED SEARCH WARRANTS

Discovering whether the execution of a search warrant led to a criminal prosecution is, as other researchers have noted, quite difficult.¹¹² For

108. The officer seeking a telephonic warrant contacts the Duty Lieutenant who alerts a Deputy District Attorney who is on call. The officer completes a special form describing the place to be searched and the items to be seized. This serves as the field search warrant. If the Deputy District Attorney approves, he or she then contacts the Marshall who sets up a three way conference call between the officer, the Deputy District Attorney and a Judge. After regular court hours, a judge is assigned to be on call for this duty on a rotating basis.

109. The oral statement is taped, later transcribed, approved by the judge and filed with the Clerk of the Court in the same manner as an affidavit.

110. N = 14.

111. Only one telephonic search warrant was not executed. Two were executed within one day after being issued.

112. See THE SEARCH WARRANT PROCESS, *supra* note 5, at 41. Although the search warrant number would make an easy identifier, we were advised by the Deputy District

example, the name of the person who was the target of the search warrant appeared either in the affidavit, search warrant or return in only about half of the executed search warrants in our sample. Using the criminal records database maintained by the Clerk of the Court, we were able to determine whether criminal charges had been filed against these named individuals after the date on which the search warrant was executed.¹¹³ Records discovered in this manner were then examined to determine if the criminal case was linked in time and subject matter to search warrant. This research revealed that a criminal charge was linked to an executed search warrant with respect to 45% of the named individuals who were targets of the search.¹¹⁴

XVII. DISPOSITION: MOTIONS TO SUPPRESS AND THE EXCLUSIONARY RULE

When narcotics charges were filed in connection with the execution of a search warrant a conviction was obtained 100% of the time. These search warrant convictions were also normally disposed of promptly. The average time between arraignment and disposition was fifty-one days. The median time was just thirty-four days. The reason for this quick disposition was because in 100% of these cases the conviction was obtained by a guilty plea rather than trial. Contrary to the popular mythology that the Fourth Amendment lets guilty defendants off on technicalities, we found that only three motions to exclude evidence for violations of the Fourth Amendment were filed. None was granted. Prosecutions based upon search warrants thus appear from this data to result in prompt and economical dispositions.

CONCLUSION

Our examination of the process in which narcotics search warrants were obtained in the most urban of the four judicial districts in San Diego revealed an efficient, streamlined process which, when successful in recovering narcotics, resulted in swift conviction of narcotics traffickers with a minimum expenditure of judicial resources. Despite the prevalent use of confidential informants and anonymous tips, the fact that in the overwhelming majority of these cases the tip was corroborated by

Attorney serving as Liaison to the San Diego Police Department that this number was not carried over into records kept regarding the prosecution of individuals.

113. We also checked to see if an arrest warrant had been issued for any of the named individuals with negative results.

114. This is consistent with the findings reported in *THE SEARCH WARRANT PROCESS*, *supra* note 5. As the authors there noted, however, this is necessarily an incomplete picture of the total number of criminal cases which may have resulted. In our sample, for example, the identity of individuals in control of the premises searched was unknown for almost half of the executed warrants. There also could have been charges filed against others who were present at the premises searched but who were not mentioned in the search warrant or affidavit.

conducting a controlled buy has removed many of the troublesome aspects of relying upon such sources. The findings of this study thus indicate that the judiciary has not abdicated its responsibility as guardian of the Constitutional rights of all citizens to ensure that “no Warrant shall issue but upon probable cause.” Our study has, nevertheless, generated a number of questions which require further research. Why are a significant number of search warrants never executed? Why is there significant delay in executing many search warrants? Why do so few search warrants target powder cocaine, used by Whites, while so many target rock cocaine, used by Blacks? Why are so few judges involved in the search warrant process and why do the success rates among some judges vary so widely?

One of the most puzzling questions is also why the use of statutorily authorized telephonic search warrant procedures has been so limited. We believe that the expanded use of telephonic warrants would enhance the efficiency of both the police and the judiciary. As we noted in the beginning of this article, the Supreme Court ruled in *United States v. Leon* that a magistrate’s determination of probable cause is to be given great deference by a reviewing appellate court and evidence will not be excluded even if the magistrate erred, so long as the officer reasonably relied upon the magistrate’s determination.¹¹⁵ It would therefore seem that one of the best ways to ensure that an officer has reasonably relied upon the magistrate is to make sure that the magistrate has been provided with all the facts rather than just the mind-numbing verbiage embodied in the boilerplate of the typical affidavit. From the judiciary’s perspective we believe it would also be a refreshing change for the officer to actually talk to the judge and explain his or her grounds for probable cause in plain common-sense language. Guided by a Deputy District Attorney who structures the sworn verbal statement with a check list of questions, there is little danger such oral affidavits, which are tape recorded and transcribed, will be found insufficient on any technical ground. This method would also eliminate a potential source of delay in the ultimate execution of search warrants once probable cause is obtained.

Our findings concerning the use of boilerplate also raises questions. In *Illinois v. Gates*, the U.S. Supreme Court adopted a “totality of the circumstances” test for determining probable cause, stating: “The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in the place to be searched.”¹¹⁶

Yet the increasing use of boilerplate in affidavits which we have observed actually obscures the “totality of the circumstances” by denying the magistrate any context in which to place the sanitized and prepackaged

115. 468 U.S. 897 (1984).

116. 462 U.S. 213, 238 (1984).

generic boilerplate assertions. Indeed while boilerplate obviously has its proper uses, excessive reliance upon such formalism is a relic of the old hyper-technical approach to affidavits which *Gates* intended to overthrow.

The ease with which cookie cutter affidavits are now prepared using a computer disk, and the extensive use of boilerplate throughout the affidavit, also raise some concerns for the future. We have no doubt that few law enforcement officers who submit affidavits for search warrants would knowingly make false statements of fact under oath to a judge. We also have little doubt, however, that if the search warrant process becomes a mere ritual in which pre-packaged, boilerplated affidavits are produced by merely filling in a few blanks, officers in the future may come to view the process as merely a game, in which a verbal formula becomes more important than actual fact. As one wise veteran officer observed: “When shortcuts become the norm, you start shortcutting the shortcut.”¹¹⁷

Our study showed that search warrants are rarely challenged in court by the defense. Judges also will seldom have cause to question these standard boilerplate statements. For example, when we asked one judge how it was possible to know from the boilerplate language whether a proper controlled buy had actually been conducted, the candid reply was: “You don’t. You have to trust the officer.”¹¹⁸ Certainly trust in the integrity of our law enforcement officers is necessary and is ordinarily well founded. But our system of government was founded upon the belief that checks and balances are also a necessary part of good governance. As President Ronald Reagan once said in a different context, “Trust but verify.”¹¹⁹ As we have unfortunately witnessed in the Ramparts scandal within the Los Angeles Police Department, a system which creates easy avenues for abuse and ceases to provide any meaningful check to control against that possibility, tempts the few to engage in conduct which can tarnish the reputation of the many who are unquestionably honest.¹²⁰ It is therefore important that all components of the criminal justice system- the prosecution, the defense bar and the judiciary- remain vigilant to ensure that law enforcement’s symbol of authority remains a badge of integrity.

117. Interview with veteran officer, February 17, 2000.

118. Interview with Judge #1, *supra*, note 23.

119. See Rick Horowitz, *The Latest Craze-A Russian Phrase!*, CHI. TRIB., Dec. 14, 1987, at 19.

120. According to transcripts of interviews conducted during an official investigation into allegations of misconduct, Rafee Perez, former member of the anti-gang CRASH unit in the Ramparts Division of the Los Angeles Police Department admitted that he and other officers repeatedly manufactured probable cause. See Scott Glover & Matt Lait, *Police in Secret Group Broke Law Routinely, Transcripts Say*, L.A. TIMES, Feb. 10, 2000, at A1. While the “vast majority of police officers respect the individual rights of community members they serve...Unfortunately, there are those police officers who tarnish all of our badges by their behavior.” Racial Profiling Issue; Hearing on S. 821 before the Senate Subcomm. on the Constitution, Federalism, and Property Rights, 106 Cong.(2000)(Statement of John Welter, Assistant Chief of Police, San Diego Police Department).

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