CONTINUING LEGAL EDUCATION

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FUNDAMENTALS OF SEARCH AND SEIZURE LAW

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Sponsored by:
Appellate Division, First Department and the
Assigned Counsel Plan for the First Department

Fundamentals of Search and Seizure Law

I. Fourth Amendment Principles

1. Fruit of the Poisonous Tree Doctrine

a. The "fruit" can take various forms

1. Physical evidence

2. Lineup identification

3. Confessions

4. A show –up identification

5. Photographic identification

b. Exceptions

1. Inevitable Discovery Doctrine

People v. Fitzpatrick, 32 NY 2d499 (1973)

2. Attenuation Exception

People v. Martinez, 37 NY 2d 662 ( )

3. Independent Source Exception

People v. Reisman, 29NY 2d278(1971)

2. Standing

a. The defendant has the burden of establishing a reasonable expectation of privacy.

People v. Ponder, 54NY2d160(1981)

b. The defendant has the burden to establish standing to obtain a hearing, and to establish standing at the hearing itself.

1. A defendant must demonstrate both an objective and subjective component.

2. There is an exception when a defendant is charged with possession of a gun or drugs based on a statutory presumption.

People v. Millan, 69NY2d514(1987)

3. There is automatic standing in construction possession cases where a defendant is charged pursuant to a statutory presumption.

People v. Mato, 160AD2d435(1st Dept, 1990)

II. Street Encounters

1. People v. DeBour, 40NY2d 201 (1976) sets forth four levels of permissible police intrusions.

a. Right to approach a citizens-there must be an objective credible reason not necessarily indicative of criminality.

b. Common Law Right to Inquire- activated by a founded suspicion that criminal activity is afoot.

c. Right to Stop (and in some cases frisk) activated by a reasonable suspicion that a crime has been committed. The frisk can be justified by a reasonable fear that the officer is in danger of physical injury by virtue of the suspect being armed.

d. Right to arrest-based on probable cause.

III. Arrests

Arrests inside premises are subject to Payton v New York 445 US 573 (1980), requiring an arrest warrant.

a. Exceptions

1. Exigent Circumstances

2. Consent

3. Hot Pursuit

IV. Search Warrants and Exceptions to the Requirement for a Search Warrant

1. Absent a warrant, a search is per se unconstitutional

Coolidge v. New Hampshire, 403 U.S.443(1971)

2. No warrant may be issued unsupported by probable cause

3. The standard for assessing probable cause in a search warrant is Aguilar-Spinelli requiring a two-pronged test.

a. The informant was reliable

b. The informant's information was credible.

4. Exceptions to the requirement for a Warrant

   a. Consent

   b. Exigent circumstances

   c. Emergency doctrine

   d. Hot Pursuit

   e. Protective sweep

   f. Plain View

   g. Searches incident to an arrest

   h. Administrative Searches

   i. Airport and Border Searches

   j. Probationers, Parolees and Prisoners

   k. Students in School

   l. Inventory Searches

V. Automobiles

1. Automobile Stops

   a. Violations of Vehicle and Traffic Law-the standard has been articulated at both reasonable suspicion (Ingle) and probable cause (Robinson)

People v. Ingle, 36 NY 2d 413 (1975): People v. Robinson, 97NY 2d 341 (2001)

b. Criminal Activity-based upon reasonable suspicion

People v. May, 81 NY2d 725 (1992)

c. Roadblocks

People v. Scott, 63 NY2d 518(1984)

d. Consent Stops

People v. Abad, 98 NY2d 12 (2002)

e. Pretext Stops

People v. Robinson, 97 NY2d 341 (2001)

2. Searches of Automobile

a. Automobile Exception

Arizona v. Gant, 556 US 332 (2009)

b. Protective Search for Weapons during Investigative Stops

People v. Torres, 74 NY2d 224 (1989)

c. Consent Searches

People v. Whitehurst, 25 NY2d 389(1969)

d. Inventory Searches

People v. Sullivan, 29 NY 2d 69 (1971)

e. Plain View Search

People v. Spinelli, 35 NY2d 77 (1974)

VI. Conduct Outside the Fourth Amendment

1. Abandoned property

2. Premises Not Protected by the Fourth Amendment

3. Searches by Private Individuals

VII. The Suppression Motion and Hearing

A. Suppression of Physical Evidence (Mapp Hearing)
Mapp v. Ohio, 367 US 643 (1961)

1. Motion to Suppress

a. Motion must be made as part of omnibus motion within 45 days of Criminal Court or Superior Court arraignment. (Court can also grant extension for" good cause").

b. Motion must state a legal basis for suppression (CPL 710.60(1). Suppression can be based upon an unlawful search and seizure under the federal or state constitutions.

c. Legal basis for suppression must be supported by sworn allegations of fact (CPL 710.60(1).

1. Factual sufficiency is evaluated under the three-pronged test of People v. Mendoza, 82 NY2d 415 (1993).

a. The defendant must allege facts rather than conclusions.

b. The defendant's allegations must be read in context with the prosecutor's theory of the case.

c. The court must consider the defendant's access to information necessary to support suppression.

2. The facts must establish both a substantive theory of suppression and the defendant's standing to challenge the unlawful conduct.

a. A defendant may rely on facts alleged by the prosecution if those facts establish a reasonable expectation of privacy.

3. A suppression court can summarily deny a motion to suppress when the defendant uses boilerplate or conclusory language (People v. Vega, 210 AD2d 41 (1st Dept. 1994).

d. Prosecution is not required to file a written answer to the motion (CPL 710.60(I); however the court can then determine the motion on the undisputed assertions of the defense.

1. If the prosecution files a written response, the failure to deny the truth of a fact alleged by the defense is deemed an admission (People v. Gruden, 42 NY2d 214 (1977). However, the People can assert that they" controvert" a particular allegation without filing a specific denial. (People v. Weaver, 49 NY2d 1012).

2. Disposition of Motion to Suppress

a. Court may summarily grant a motion to suppress (no hearing is necessary) when

1. The prosecution concedes the allegations of fact or the legal basis for suppression (CPL 710.60(2)(a).

2. The prosecution stipulates that it will not offer the physical evidence against the defendant (CPL 710.60(2)(b).

b. Court may summarily deny a motion to suppress when

1. The defense fails to allege sworn allegations of fact to support a legal basis for the motion.

2. The defense fails to allege a legal basis for the motion

c. If a court does not summarily grant or deny a suppression motion, it must conduct a hearing. (CPL 710.60(4).

3. The Hearing

a. A defendant has an absolute right of counsel at a Mapp hearing (People v. Anderson, 16 NY2d 282) (1965).

b. While a defendant can forfeit his right to attend the hearing by absconding, he does not forfeit his right to the hearing itself. (People v. Whitehead, 143 AD2d 1066 (2d Dept. 1988).

c. Hearsay is admissible at the hearing (CPL 710.60(4).

d. The defendant is entitled to Brady and Rosario material at the hearing (People v. Geaslen, 54 NY2d 510 (1981); People v.Banch, 80 NY2d 610 (1992).

e. The prosecution has the burden of going forward to establish the legality of police conduct (People v. Malinsky, 15 NY2d 86 (1965).

1. The prosecution must present credible testimony. The burden will not be met if the testimony is:

a. incredible as a matter of law;

b. has all the appearances of having been tailored to nullify constitutional objections;

c. evasive or disingenuous;

d. physically impossible;

e. contrary to experience;

f. self-contradictory.

f. Once the prosecution meets its burden, the defendant has the ultimate burden, by a fair preponderance of the evidence, to establish the illegality of the police conduct. (People v. Berrios, 28 NY2d 361 (1971).

g. There are several exceptions to the rule placing the ultimate burden on the defense. In the following situations, the People have the ultimate burden:

1. The defendant consents to a search (People v.Whitehurst,25 NY2d 389 (1969) (by clear and positive evidence).

2. The defendant abandons property (People v. Howard, 50 NY2d 583 (1980).

3. The three exceptions to the "fruit of the poisonous tree" doctrine.

a. Inevitable Discovery Doctrine (People v.Bookless, 120 AD2d 950 (4th Dept. 1986).

b. Attenuation (People v. Martinez, 37 NY2d 662 (1975).

c. Independent Source (People v. Arnau, 58 NY2d 27 (1982).

h. The defendant has the burden to establish burden to establish standing at a suppression hearing, notwithstanding that he alleged facts in his motion paper to obtain the hearing itself.

4. The Court's Ruling

a. The suppression court must state on the record its finding of fact, conclusions of law and the reasons for its determination (CPL 710.60(6).

b. The ruling must be made prior to jury selection (CPL 710.40(3)

c. Defendant has the right to a transcript of the hearing prior to the commencement of a trial provided the request is made before the hearing concludes. (People v. Sanders, 31 NY2d 463 (1973).

Sample Motions from a Panel Attorney

MOTION TO SUPPRESS PHYSICAL EVIDENCE

28. The defendant requests an Order from this Court suppressing all physical evidence, including alleged narcotics, money, cell phone, and the gun and ammunition, on the ground that their seizure occurred in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article 1 section 12 of the Constitution of the State of New York.

29. On information and belief, the source of which is the defendant, he was walking to his girlfriend's house after stopping at a cookout when an unmarked police car cut him off and police officers jumped out and confronted the defendant. The defendant had neither seen nor interacted with any of those police officers before. Despite the claims by the People, none of those officers had ever arrested the defendant before. When an officer demanded the defendant approach them, he ran. Despite the fact that the defendant had not committed any apparent crime, all officers immediately gave chase. At the time the officers gave chase, they did not have reasonable suspicion or probable cause to believe the defendant had committed, was committing, or was about to commit a crime. The defendant then immediately and spontaneously responded to this unlawful police pursuit by discarding a firearm.

30. Moreover, after the officers physically seized the defendant, they searched his person and seized his cell phone, money, and narcotics.

31. Furthermore, although the People stated at the Supreme Court arraignment that the arresting officer was aware at the time of the seizure that the defendant had a summons warrant, that is false, as the officer did not become aware of the warrants until checking at the precinct following the defendant's arrest. Indeed, the officers were not members of the warrant squad, the defendant had not been fingerprinted when issued any summonses, and the officers had never arrested or interacted with the defendant before.

32. Accordingly, the pursuit, stop and search of the defendant occurred in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article 1, section 12 of the New York state Constitution. The discarding of the gun was a direct and immediate response to the unlawful police conduct. The gun and ammunition, therefore, must be suppressed. See People v. Wilkerson, 64 N.Y.2d 749, 750 (1984); People v. Boodle, 47 N.Y.2d 398, 402 (1979); People v. Grant, 164 A.D.2d 170, 175-76 (1st Dept. 1990). The other property seized from the defendant's person must be suppressed as the fruits of the unlawful pursuit of the defendant.

33. The defendant is unable to plead any more facts with respect to the basis for his seizure, because, insofar as it may have been predicated on information within the officer's personal knowledge or on information conveyed to him, such information has not been made available to the defendant. See People v. Mendoza, 82 N.Y.2d 415, 427-429 (1993).

34. Even were the Court to determine that the defendant has alleged insufficient facts in his motion to suppress to warrant a hearing as to the constitutionality of the seizure of the defendant's property, this Court, nevertheless, has the discretion not to deny summarily the defendant's request for suppression. See C.P.L. § 710.60 (3) ("The court may summarily deny the motion . . . ") (emphasis added); Mendoza, 82 N.Y.2d at 429.

35. The defendant requests an Order requiring the People to produce at the hearing all the property, including the gun, that is the subject of the hearing.

SUPREME COURT: CRIMINAL TERM
COUNTY OF NEW YORK: PART 45

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : NOTICE OF MOTION TO CONTROVERT THE SEARCH WARRANT AND TO SUPPRESS EVIDENCE

:

[redacted], Ind. No. [redacted]-2011

Defendant. :

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TO: , Assistant District Attorney, Office of the Special Narcotics Prosecutor.

PLEASE NOTE THAT, pursuant to C.P.L.R. 2214, answering affidavits are hereby demanded to be served at least seven (7) days before the within motion has been noticed to be heard.

PLEASE TAKE NOTICE, that on the annexed affirmation of, ESQ., and on all the papers and proceedings heretofore had therein, the undersigned will move this Court, on March 15, 2012, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order:

1. SUPPRESSING ALL EVIDENCE, INCLUDING, BUT NOT LIMITED TO, NARCOTICS AND OBSERVATIONS OF THE DEFENDANT OBTAINED AS A RESULT OF A SEARCH OF 115B LEWIS STREET, YONKERS, NEW YORK, ON THE GROUND THAT THE SEARCH WARRANT AUTHORIZING THE POLICE ENTRY AND SEARCH OF THAT LOCATION WAS NOT ISSUED ON PROBABLE CAUSE.

Dated: New York, New York
March 14, 2012

, Esq.
Attorney for the Defendant

New York, N.Y. 10279

SUPREME COURT: CRIMINAL TERM
COUNTY OF NEW YORK: PART 45

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THE PEOPLE OF THE STATE OF NEW YORK :

AFFIRMATION

-against- :

: Ind. No. [redacted]-2011

[redacted],

Defendant. :

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, ESQ., an attorney duly admitted to practice law in the State of New York, affirms under penalty of perjury the following:

1. I am the attorney of record for the defendant herein. As such I am familiar with the facts of and proceedings had in this case.

2. This affirmation is made in support of the defendant's motion to controvert the search warrant and to suppress evidence.

3. Unless otherwise specified, all allegations of fact are based on inspection of the record of this case, discussions with law enforcement officials, conversations with the defendant, inspection of the search warrant issued in this case, and inspection of the affidavit submitted in support thereof.

4. On information and belief, the source of which is the defendant, in the evening of December 12, 2011, he was invited to

115B Lewis Street, Yonkers, New York, where he slept overnight.

5. On information and belief, the source of which is the defendant, when the police entered the house at 115B Lewis Street, Yonkers, New York, the defendant was in a bedroom on the top floor at that location and was dressed only in his underwear.

6. On information and belief, the source of which is the felony complaint and statements made by Assistant District Attorney in court filings and on the record in open court, the police found in a closet on the second floor landing a plastic container in which they found approximately twenty kilograms of narcotics wrapped in duct tape.

7. On information and belief, the source of which is the defendant and the felony complaint, the police entered the house without consent.

8. On information and belief, the sources of which are A.D.A. , the felony complaint, and inspection of the search warrant and the application therefor, the police entered the house pursuant to a search warrant issued on December 13, 2011.

9. Examination of the affidavit submitted in support of the application for the search warrant reveals that the affidavit did not establish probable cause to believe that the house contained evidence of narcotics activity.

10. For the reasons stated in the accompanying memorandum

of law, therefore, all evidence obtained as a result of the execution of the search warrant must be suppressed, as obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article 1, section 12 of the New York State Constitution.

Dated: New York, New York
March 14, 2012

SUPREME COURT: CRIMINAL TERM
COUNTY OF NEW YORK: PART 45

THE PEOPLE OF THE STATE OF NEW YORK :	
	MEMORANDUM OF LAW
-against- :	
:	Ind. No. [redacted]-2011
[redacted],	
Defendant. :	

The affidavit submitted in support of the search warrant application in this case was deficient on its face, as it failed to establish probable cause to believe that contraband or evidence of a crime would be found in 115B Lewis Street, Yonkers, New York. All evidence obtained as a result of the police entry into, and search of, the house, therefore, must be suppressed.

To begin, as an overnight guest in the house searched, the defendant has standing to contest the lawfulness of the search of that house. Minnesota v. Olson, 495 U.S. 91, 93, 100 (1990); People v. Scott, 6 A.D.3d 465, 466 (2d Dept. 2004). Because the police entry into, and search of, the house resulted from the execution of a wrongfully issued search warrant, the entry and search were unlawful under the Fourth and fourteenth Amendments to the United States Constitution and under Article 1, section 12 of the New York State Constitution.

As noted by the Court of Appeals, "[i]n reviewing the validity of a search warrant to determine whether it was supported by probable cause or whether it contained a sufficiently particular description of its target, the critical facts and circumstances for the reviewing court are

those which were made known to the issuing Magistrate at the time the warrant application was determined." People v. Nieves, 36 N.Y.2d 396, 402 (1975). Thus, "[t]he paramount concern is whether, at its inception, the warrant, including the showing on which it was based, satisfies the fundamental constitutional requirements . . . and fulfills the great promise of the Fourth Amendment that the right of the people to be secure in their persons shall not be violated." Nieves, 36 N.Y.2d at 406 (internal citation omitted). A search warrant applicant must provide "information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place." People v. Bigelow, 66 N.Y.2d 417, 423 (1985). On the other hand, "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (quoting Jones v. United States, 362 U.S. 257, 271 [1960]). A review of the affidavit submitted in support of the search warrant in this case reveals that the issuing judge had no such substantial basis.

The search warrant application begins with the rather conclusory statement that "[f]or the past few weeks . . . [law enforcement agencies] have been investigating an individual who resides at the TARGET PREMISES believed to be involved in narcotics trafficking." Aff. of Sr. Inv. Joseph Hall at ¶ 6(a). Critically, however, the affidavit fails to identify either the source of this allegation of narcotics trafficking or the source's basis of knowledge. This claim, therefore, fails the Aguilar-Spinelli test. See People v. Griminger, 71 N.Y.2d 635, 637 (1988) (holding that, as a matter of State law, the Aguilar-Spinelli test "should be employed in determining the sufficiency of an affidavit submitted in support of a search warrant application"); People v. Hetrick, 80 N.Y.2d 344, 348 (1992). Indeed, the affidavit even fails to identify the "resident"

under investigation in any way, shape, or form. Accordingly, this is precisely the type of conclusory allegation that contributes nothing to the determination of probable cause. See Gates, 462 U.S. at 239 (citing examples of insufficient statements by affiants in support of search warrants).

Moreover, although the affiant claims that the "[i]nvestigation has included visual surveillance of the TARGET PREMISES," he fails to inform the issuing judge of the results, if any, of such surveillance, except for observations at some unspecified time on December 13, 2011. See Aff. of Sr. Inv. Hall at ¶¶ 6(a), (b). It is claimed that on that day, an investigator observed "a black SUV with Taxi and Limousine Commission license plate T517130C" enter the driveway of the TARGET PREMISES. See Aff. of Sr. Inv. Hall at ¶ 6(b). The driver of the vehicle allegedly was seen exiting the vehicle and entering the TARGET PREMISES and then returning the vehicle shortly thereafter. See id. Importantly, the affidavit contains no claim that the vehicle is owned or registered to the "resident" of the TARGET PREMISES. In fact, not only does the affidavit contain no claim that the driver of the vehicle is the "resident" who is under investigation, but it fails entirely to identify or even describe the driver in any way. Perhaps most important, however, is the absence of any claim that the driver of the vehicle is carrying anything at all either when he enters the house or when he returns to his vehicle.

According to the affidavit, an investigator observed the vehicle drive away and "engage[] in a quick drive around the neighborhood and returned after a few minutes to the residence." Id. Although the investigator opines that "the driver of the vehicle engaged in what appeared to be counter-surveillance in order to ascertain if law enforcement was watching him," id., without a more specific description of the driver's route or the length of time it took him to drive it, this

self serving opinion is worthless, particularly considering that the driver's conduct, as described in the affidavit, is "capable of innocent interpretation." People v. Bigelow, 66 N.Y.2d 417, 424 (1985). For example, the driver's conduct is entirely consistent with having forgotten something in the house or having received a call on a cell phone to return to the house for some innocent reason. Indeed, the investigator's self serving guess is belied by his observations upon the vehicle's return to the house: although the driver again enters the house for a short time before returning to his vehicle and driving away, see Aff. of Sr. Inv. Hall at ¶ 6(b), again there is no claim that he is carrying anything at all to or from the house.

According to the affidavit, the investigators followed the vehicle to Post Avenue, between 10th Avenue and 207th Street in Manhattan, where he observed Kelvin Santos enter the vehicle empty handed. See Aff. of Sr. Inv. Hall at ¶ 6(c). The investigator claims that the vehicle then made a u-turn and stop at 207th Street and Vermilyea Avenue. Id. Despite the fact that Mr. Santos actually exited the vehicle at that location, which is at least two blocks from where Santos entered the vehicle, the investigator again offers a self-serving opinion that "this was yet another attempt at counter-surveillance by the driver of the vehicle." See id. Indeed, there is no factual description that would lead one to believe that the driver engaged in counter-surveillance; rather, the only factual allegation is that the driver picked up Mr. Santos at one location and dropped him off a few blocks away.

Finally, when Santos exits the vehicle at 207th Street and Vermilyea, he is carrying a duffel bag that is later determined to contain six kilograms of cocaine. See Aff. of Sr. Inv. Hall at ¶ 6(d). Based on these observations, the investigator concluded that the driver of the vehicle, who is never identified in the affidavit, delivered the drugs to Santos. See id. Although that may

be a logical conclusion to reach based on his observations, it utterly fails to establish any nexus between the drugs found in the duffel bag carried by Santos in Manhattan and the house located at 115B Lewis Street in Yonkers, there being no claim in the affidavit that the driver carried the bag as he left the house, despite his being observed by the investigator to have exited the house twice.

In fact, the investigator's observations seem to establish that the still unidentified driver of the vehicle already had the duffel bag in his vehicle when he arrived at the house on December 13, 2011, and that he never brought it, or any other contraband, into the house, despite entering the house twice. And, as already noted, the affidavit never even claims that the driver of the vehicle was the resident of the TARGET PREMISES, or that he was anything more than a brief visitor on that one day. Thus, this case is easily distinguished from People v. Pinchback, 82 N.Y.2d 857, 858 (1993). Accordingly, the affidavit provides no more probable cause for the TARGET PREMISES than it would for any store or gas station the driver happened to stop at on his way to picking up Santos.

Nor is this a case where the affiant claims to have been provided information by an informant who had personal knowledge of the contents of the house or who had demonstrated his reliability or knowledge by correctly predicting the driver's conduct. See Bigelow, 66 N.Y.2d at 424. The affidavit failed to establish probable cause as required under the New York State Constitution as well as under the more forgiving totality-of-the-circumstances standard under the Fourth and Fourteenth Amendments to the Federal Constitution.

The issuing judge, consequently, lacked a substantial basis for concluding that there existed probable cause to believe that contraband or evidence of a crime would be found in 115B

Lewis Street, Yonkers, New York. The police entry into, and search of, that house, therefore, were unlawful, despite the alleged "good faith" of the officers, and all evidence resulting from the execution of the search warrant must be suppressed. See Bigelow, 66 N.Y.2d at 427.

DATED: NEW YORK, NEW YORK
March 14, 2012

Respectfully submitted,

_____

Attorney for [redacted]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 23

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

[redacted],

Defendant.

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AFFIRMATION IN SUPPORT OF MOTION TO SUPPRESS

IND. NO.: [redacted]-2012

, Esq., an attorney duly admitted to the Bar of the State of New York, hereby affirms the following:

1. I am counsel of record for [redacted]. As such, I am familiar with the facts and circumstances of this case.

2. This affirmation is submitted in support of the defendant's Motion to Suppress all evidence seized as a result of the unlawful search of the defendant's room within, Apartment 3F, at 1775 Davidson Avenue, Bronx, New York.

3. Defense counsel is in possession of the redacted Affidavit in Support of Search Warrant and the Search Warrant.

4. For the following reasons the evidence seized pursuant to the search warrant must be suppressed as having been seized in violation of the defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution, Article 1, section 12 of the New York State Constitution, and CPL §§ 690.30; 690.35; 690.40; 690.45.

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FAILS TO ESTABLISH PROBABLE CAUSE TO BELIEVE THAT EVIDENCE COULD BE FOUND INSIDE APARTMENT 3F

5. All evidence obtained as a result of the search of 1775 Davidson Avenue, Apartment 3F, Bronx, New York, must be suppressed because the Affidavit in Support of Search Warrant, on which the Search Warrant was based, was legally deficient, in that it failed to establish the with particularity the apartment where the evidence allegedly could be found.

6. In his affidavit in support of the search warrant application, Officer === swore that he "conducted a reconnaissance at 1775 Davidson Avenue, Apartment 3F, Bronx County, New York in order to become familiarized with the location and personally observe the entry door to target premises." Aff. of Officer === at 4, ¶ 10.

7. Officer === stated that "[t]o get to the target premises, one must go through the front door and ascend two flights up the right hand staircase. Once on the landing, the target apartment is immediately to the right." Id.

8. On information and belief, the sources of which are the defendant, an investigation report, including photographs, prepared by =====, an investigator for the Legal Aid Society, former counsel to the defendant in this matter, Apartment 3F is not where Officer == said it is.

9. According to the defendant and Investigator ===, in order to reach Apartment 3F, one must ascend the stairs on the left, not on the right.

10. Furthermore, according to the defendant, Investigator ===, and the

photographs, apartment immediately to the right at the top of the stairs is 3E, not 3F.

11. Thus, the "target apartment," as it's location was described in detail by Officer === after conducting his own reconnaissance, was Apartment 3E, not 3F.

12. Officer ==, therefore, improperly sought and obtained a search warrant for Apartment 3F.

13. Interestingly, according to Officer ===='s affidavit, his "reconnaissance" of Apartment 3F was conducted sometime in August (the exact date is redacted, for some reason, even though the CI is not alleged to have gone to the apartment that day). See Aff. of Officer == at 4, ¶ 10.

14. Earlier in the affidavit, however, Officer == stated that "[t]he confidential informant's basis of knowledge" is that the CI allegedly conducted controlled narcotics purchases from that apartment "[w]ithin the past ten days" and "[w]ithin the past five days." See Aff. of Officer == at 2-3, ¶¶ 6-8.

15. The affidavit is dated September 11, 2012. See Aff. of Officer == at 6.

16. Thus, the two controlled purchases that allegedly gave rise to the CI's "basis of knowledge" would have occurred between September 2, 2012, and September 7, 2012.

17. Thus, it is clear that Officer == did not conduct "reconnaissance" on the apartment as a result of the CI's alleged controlled purchases.

18. This must necessarily call into question the veracity of Officer == and/or the CI, as Officer == that he had conducted surveillance of the so-called target apartment

on some date in August or that there were controlled buys in September and may account for Officer ==='s inacccurate description of the location of Apartment 3F.

19. It can not be known which apartment was truly the target apartment.

20. Moreover, according to the felony complaint, Officer ===was present when the search warrant was executed on September 19, 2012, and therefore, should have known that the apartment he entered, i.e. Apartment 3F, was not the apartment he described in his affidavit as being immediately to the right at the top of the stairs that are on the right side.

21. Rather, Apartment 3F is the second door on the right at the top of the stairs that are on the left.

22. Thus, although the search warrant on its face authorized the search of Apartment 3F, the Apartment Officer === described by its location was actually Apartment 3E. Given the conflicting information in Officer ==='s affidavit, and given that Officer == knew or should have known that the warrant was being executed in a different apartment than he described by location in his affidavit, the warrant itself was invalid and the execution of it was unlawful.

23. Accordingly, all evidence seized from Apartment 3F must be suppressed.

THE PROBABLE CAUSE ALLEGED IN THE AFFIDAVIT WAS STALE BY THE TIME THE WARRANT WAS ISSUED AND EXECUTED

24. The defendant requests and Order from this Court suppressing all evidence seized from Apartment 3F, because the affidavit submitted in support of the search-warrant

application in this case did not provide probable cause to believe that the apartment contained contraband or evidence of a crime on the date the warrant was issued, as opposed to at some much earlier time.

25. According to Officer ===’s affidavit, on two unspecified dates within five days of each other in the first week of September 2012, a confidential informant allegedly purchased narcotics from some person inside the target apartment.

26. Notably, Apartment 3F has multiple bedrooms and on the person from whom the informant allegedly purchased narcotics on the second occasion was not the same person from whom he allegedly purchased narcotics on the first occasion, at most five days earlier.

27. The search warrant was not issued, however, until September 11, 2012.

28. Furthermore, the search warrant was not executed until September 19, 2012.

29. There is no allegation in Officer ===’s affidavit that the target apartment was kept under continual, or any, surveillance following the second of the two controlled purchases, which necessarily occurred no earlier than September 2, 2012, and no later than September 7, 2012. Cf. People v. Hansen, 38 N.Y.2d 17, 20 (1975).

30. It has been recognized that although “there is no time limitation on the revelation of information that leads to the issuance of a search warrant . . . it is ‘manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.” People v. Mallory, 234 A.D.2d 913, 914 (4th Dept. 1996) (internal quotation marks omitted).

31. That is, “a search warrant application must provide the magistrate with information

sufficient to support a reasonable belief that evidence of illegal activity will be present at the specific time and place of the search." People v. Edwards, 69 N.Y.2d 814, 816 (1987).

32. Thus, in People v. Jackson, the court held that where a confidential informant told the police that he had observed the defendant in that case at least three weeks earlier "carrying a gun in his waistband and that it had been kept in the blue van truck and the white Ford, . . . such information gleaned anywhere from three weeks to more than a month before the defendant's arrest would be stale and thus could not constitute probable cause for the warrantless search of the white Ford." 64 A.D.2d 673, 675-76 (2d Dept 1978). Given the automobile exception to the warrant requirement when there exists probable cause to believe the automobile contains evidence of a crime or contraband, the fact that Jackson addressed a warrantless search is of no import. That is, the court held that, given the time lapse, probable cause simply did not exist at the time of the search. Because probable cause was lacking, no search warrant could have issued at that time either.

33. Finally, because the informant allegedly purchased narcotics from two different people in a multi-room apartment over a period of only five days or less, at least twelve days before the execution of the warrant, it can not be said that any crimes allegedly being committed inside the target apartment were ongoing crimes.

34. There was, consequently, no probable cause to believe the apartment in this case contained contraband or evidence on the date the warrant was issued or on the date it was executed. Cf. People v. Markiewicz, 246 A.D.2d 914, 915 (3rd Dept 1998).

For the foregoing reasons, all evidence seized from 1775 Davidson Avenue, Apartment 3F, Bronx, New York, pursuant to execution of the search warrant must be suppressed.

DATED: NEW YORK, NEW YORK
AUGUST 21, 2013

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