WILMERHALE

MEMORANDUM

Date March 12, 2025

To Patrice Sulton, Jason Ziedenberg, and Nye Winslow, DC Justice Lab

From WilmerHale

Re **DCJL – Fifty-State Survey of Search Warrant Laws**

I. Introduction

The DC Justice Lab (DCJL) asked WilmerHale to research the laws and procedures governing the issuance and execution of search warrants across the United States and the District of Columbia. Specifically, DCJL wanted to learn (1) whether any U.S. jurisdiction imposes limitations on the issuance of residential search warrants based on drug activity, (2) whether any jurisdiction requires prosecutor approval before officers seek a residential search warrant, and (3) whether the statutory language developed in 2020 by law students raised any concerns.

To answer these questions, we read the relevant statutes and rules of criminal procedure for every state and the District of Columbia. We also conducted general searches for police procedure manuals—typically of the major cities in each state—and other relevant secondary materials. Finally, we conducted case law research into whether residential search warrants could be issued based solely on evidence of drug activity.

In addition to this memo, we have compiled a Fifty-State Table (the "Table") that documents much of this research. For each state and the District of Columbia, Column B captures the language of the statute or criminal rules that provides the grounds for issuance of a search warrant, and Columns C and D provide web links to the text of the statute and rules, respectively. Columns E and F describe any time restrictions and manner restrictions, respectively, on the execution of search warrants. Column G explains any prosecutor approval requirements. Finally, Column H includes any additional notes worth highlighting, and Columns I to L contain links to illustrative secondary sources.

This memo reports the key findings from our research. Section II discusses the typical structure of state search warrant laws and any notable drug-related or offense-related provisions found in specific statutes. It also explains the District of Columbia's law in detail. Section III discusses prosecutor approval requirements; as explained in more detail below, some states (and more often localities) do have prosecutor approval requirements, but these generally are non-statutory. Section IV discusses the time and manner restrictions, which all fifty states and the District of Columbia impose in some form. Section V presents an interesting divide in the case law as to whether search warrants may be issued based on an assumption that individuals suspected of drug activity likely keep drug-related contraband in their homes. Section VI covers two additional requirements related to search warrants we found in some jurisdictions:

risk assessments prior to execution of a search warrant and reporting requirements for no-knock warrants. Finally, Section VII provides recommendations both on the statutory language developed by law students and potential areas for future research and advocacy.

II. Drug-Specific/Offense-Specific Limitations

Most states have statutory provisions and/or rules of criminal procedure that govern criminal search warrants in general, including under what circumstances a search warrant may be issued. Generally, these provisions do not expressly mention drug offenses.

As an example, many states' search warrant laws are like those of Arizona, which provides:

> A search warrant may be issued upon any of the following grounds:
>
> 1. When the property to be seized was stolen or embezzled.
>
> 2. When the property or things to be seized were used as a means of committing a public offense.
>
> 3. When the property or things to be seized is in the possession of a person having the intent to use them as a means of committing a public offense or in possession of another to whom he may have delivered it for the purpose of concealing it or preventing it being discovered.
>
> 4. When property or things to be seized consist of any item or constitute any evidence which tends to show that a particular public offense has been committed or tends to show that a particular person has committed the public offense.
>
> 5. When the property is to be searched and inspected by an appropriate official in the interest of the public health, safety or welfare as part of an inspection program authorized by law.
>
> 6. When the person sought is the subject of an outstanding arrest warrant.[1]

Evidence of drug offenses typically falls within one of these categories.[2]

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[1] Ariz. Rev. Stat. § 13-3912.

[2] *See, e.g.*, Ind. Code Ann. § 35-33-5-1 (category for "[p]roperty, the possession of which is unlawful"); La. Code Crim. Proc. Ann. art. 161 (category for anything "intended for use or has been used as a means of committing an offense," or "[m]ay constitute evidence tending to prove the commission of an offense"); S.D. Codified Laws § 23A-35-3 (category for "[c]ontraband, the fruits of crime, or things otherwise criminally possessed").

Most jurisdictions have one law that applies to criminal search warrants, regardless of the type of offense. However, in some jurisdictions, the search warrant provisions are codified as subsections of the laws pertaining to a specific offense. *See, e.g.*, Miss. Code Ann. § 99-27-19 (search warrants for intoxicating beverage offenses); N.J. Stat. Ann. § 33:1-597 (search warrants for offenses related to intoxicating liquors). However—aside from

Only a few states' laws include a category that expressly mentions drugs or controlled substances. For example, Wisconsin's statute includes a category for "controlled substances … and controlled substance analogs … and the implements for smoking or injecting them."[3] However, those statutes containing a category for controlled substances did not contain a limitation related to the type of drug or the type of drug-related offense.

A few jurisdictions did have drug-related limitations worth highlighting. In Utah, for example, "a warrant authorizing forcible entry without prior announcement may not be issued … solely for (a) the alleged possession or use of a controlled substance; or (b) the alleged possession of drug paraphernalia."[4]

In addition, the District of Columbia also has a drug-specific limitation. The D.C. Code contains two provisions that govern issuance of criminal search warrants. Nearly all criminal search warrants are governed by a general provision, Section 23–521.[5] However, search warrants for controlled substances are governed by Section 48–921.02, which was enacted as part of the Marijuana Possession Decriminalization Amendment Act of 2014. Notably, the controlled substances provision contains a drug-related limitation, providing that "[a] search warrant shall not be issued if the sole basis for its issuance would be the possession or transfer without remuneration of marijuana weighing one ounce or less."[6] This provision was "carefully worded to ensure that people found in possession of one ounce or less of marijuana would not be subject to the sort of invasive searches that routinely accompany an arrest," given

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the District of Columbia, as discussed in this section—we did not find any statutes that governed search warrants for only drug-related offenses.

Additionally, whereas most jurisdictions' provisions applied to any location to be searched, Florida's search warrant statute was unique in containing a provision that specifically governs when a warrant may be issued for the search of a private dwelling. *See* Fla. Stat. § 933.18.

[3] Wis. Stat. § 968.13(1)(a); *see also, e.g.*, Cal. Penal Code § 1524(16) (category for "[w]hen the property or things to be seized are controlled substances or a device, contrivance, instrument, or paraphernalia used for unlawfully using or administering a controlled substance"); S.C. Code Ann. § 17-13-140 (category for "any narcotic drugs, barbiturates, amphetamines or other drugs restricted to sale, possession, or use on prescription only, which are manufactured, possessed, controlled, sold, prescribed, administered, dispensed or compounded in violation of any of the laws of this State or of the United States"); Tex. Code Crim. Proc. Ann. art. 18.02(7) (category for "a drug, controlled substance, immediate precursor, chemical precursor, or other controlled substance property, including an apparatus or paraphernalia kept, prepared, or manufactured in violation of the laws of this state").

[4] Utah Code Ann. § 77-23-210(8)). In Louisiana, "the odor of marijuana alone shall not provide a law enforcement officer with probable cause to conduct a search without a warrant of a person's place of residence." La. Code Crim. Proc. Ann. art. 162.4. While this provision is not about when a search warrant may issue, it is an example of a drug-related limitation to search and seizure law.

[5] *See United States v. Thomas*, 294 A.2d 164, 166-67 ((D.C. 1972) ("We think it more in harmony with the obvious intent of Congress to give special treatment to narcotics law enforcement to view such provisions as the 'special' ones (including [D.C. Code § 33–414(h) (1967), now codified at D.C. Code § 48–902.04]) not subject to qualification by the general search warrant provisions of the U.S. and D.C. Codes (Rule 41(c), Federal Rules of Criminal Procedures, and [D.C. Code § 23–522(c)(1)])); *United States v. Owens*, 788 A.2d 570, 573 & n.2 (D.C. 2002) (discussing the analogous knock-and-announce provisions of D.C. Code § 48–921.02(g), applicable to the execution of search warrants for controlled substances, and D.C. Code § 23–524(a), applicable to the execution of search warrants for, as relevant there, weapons).

[6] D.C. Code § 48–921.02(a-1).

that other parts of the act decriminalized that behavior.[7] Given this provision, and as explained further in Section VII.A below, the D.C. Code thus contains some precedent for treating drug offenses differently in the search warrant context, which lends support for DCJL's potential advocacy positions.

III. Prosecutor Approval Requirements

Some states, but more often, localities, require or recommend that a prosecutor approve a search warrant application before presentation of the application to a judge. Those provisions generally fall into one of four categories, detailed below: (A) requirements found in the state statute, (B) requirements found in non-statutory sources that apply statewide, (C) requirements found in non-statutory sources that apply to localities, and (D) recommendations for a prosecutor approval requirement.

A. States Requiring Prosecutor Approval By Statute

Only three states had prosecutor approval requirements in the statute, and these requirements applied only to no-knock warrants.

Colorado. Colorado's statute provides that a no-knock search warrant shall be issued only if the affidavit for the warrant "[h]as been reviewed and approved for legal sufficiency and signed by a district attorney."[8]

Maryland. Maryland's statute provides, "*If approved in writing by a police supervisor and the State's Attorney*, an application for a search warrant may contain a request that the search warrant be a no-knock search warrant, on the ground that there is reasonable suspicion to believe that, without the authorization the life or safety of the executing officer or another person may be endangered."[9]

New Hampshire. Under the New Hampshire statute, if an officer does not have a no-knock warrant but determines that there are exigent circumstances requiring a no-knock entry, the officer may execute the warrant without knocking but must then "immediately notify his or her chief law enforcement officer who shall provide written notice to the county attorney, attorney general, or their designee."[10] Relatedly, if there are "exceptional circumstances … where no imminent threat of physical injury is present, but an officer in good faith believes the evidence is so significant, and the risk of its destruction so pronounced, that a no-knock entry is warranted, judicial authorization for a no-knock warrant may be sought *if approval is first*

[7] Council of the District of Columbia, Report of Committee on the Judiciary and Public Safety, Report on Bill 20-409, "Marijuana Possession Decriminalization Amendment Act of 2014" at 7, 9 (Jan. 15, 2014), https://lims.dccouncil.gov/downloads/LIMS/29565/Committee_Report/B20-0409-CommitteeReport1.pdf?Id=60748.

[8] Colo. Rev. Stat. § 16-3-303(4)(c).

[9] Md. Code Ann., Crim. Proc. § 1-203(a)(3)(vi) (emphasis added).

[10] N.H. Rev. Stat. Ann. § 595-A:2(III)(b)(2).

obtained from the chief law enforcement officer or his or her designee and the county attorney, attorney general, or their designee."[11]

B. States Requiring Prosecutor Approval By Non-Statutory Sources

This section provides a sampling of statewide prosecutor approval requirements found in non-statutory sources, such as police materials, court rules, and attorney general directives. Because prosecutor approval requirements may be found in a variety of sources, neither this section nor the Table is necessarily comprehensive. Rather, this section illustrates the breadth of the potential sources for a non-statutory statewide requirement.

District of Columbia. The District of Columbia's Metropolitan Police Academy makes its curriculum publicly available. Section 10.3 walks through the policies and procedures for obtaining a search warrant.[12] Among other requirements, it provides that "affiants will complete the US Attorney's Office (USAO) warrant submission form," and "[u]pon USAO approval, the affiant will receive a signed and dated warrant for submission to the court." [13]

New Jersey. Pursuant to a 2002 Attorney General Law Enforcement Directive, "[n]o law enforcement officer or agency operating under the authority of the laws of [New Jersey] at any level of government shall apply to a New Jersey Judge for issuance of a search warrant without first obtaining express authorization from an Assistant Attorney General, Deputy Attorney General or Assistant County Prosecutor who has been designated … pursuant to [earlier provisions in the Directive]."[14]

C. Localities Requiring Prosecutor Approval

This section highlights some examples of localities that have a prosecutor approval requirement. Column G of the Table provides additional examples. Many localities' prosecutor approval requirements were found in police department documents, such as policy manuals, standard operating procedures, general orders, special orders, or general directives. Because any such requirement is unique to a specific police department, neither this section nor the Table is necessarily comprehensive.

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[11] *Id.* § 595-A:2(III)(b)(3) (emphasis added).

[12] *See* Metropolitan Police Academy, Search Warrants § 10.3.5 (Aug. 2023), https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/10.3%20Search%20Warrants%20-%20IA.pdf.

[13] *Id.*

[14] N.J. Dep't of L. & Pub. Safety, Div. of Crim. Just., Attorney General Law Enforcement Directive No. 2002-2, at 3 (Aug. 2002), https://www.nj.gov/oag/dcj/agguide/directives/dir_2002_2.pdf; *see also* Policy Statement of the Attorney General of New Jersey and the County Prosecutors Association of New Jersey Regarding Prosecutorial Review of Search Warrant Applications (Feb. 1985), https://www.nj.gov/lps/dcj/agguide/3srchwar.pdf (announcing a policy that all search warrants be reviewed by the attorney general or his designees, or the appropriate county prosecutor or his designees, prior to submission to the court).

Chicago, Illinois. As part of the Chicago Police Department's residential search warrant process, "[t]he affiant presents the [Complaint for Search Warrant] and search warrant forms to a Cook County Assistant State's Attorney for review."[15]

Albuquerque, New Mexico. The Albuquerque Police Department's Standard Operating Procedure requires that an affiant "[b]rief their supervisor about the circumstances of a warrant before presenting it to the District Attorney's (DA) Office, obtain the DA's approval, and present the warrant to the judge for approval."[16]

D. Jurisdictions Recommending But Not Requiring Prosecutor Approval

Some jurisdictions or localities recommend, but do not require, that an officer applying for a search warrant obtain prosecutor advice or approval. Column G of the Table provides additional examples. As before, this is not a comprehensive list but rather highlights several illustrative examples.

Pennsylvania. Pennsylvania Code Rule 202 provides that "[t]he district attorney of any county may require that search warrant applications filed in the county have the approval of an attorney for the Commonwealth prior to filing."[17]

Palo Alto, California. The Palo Alto Police Department Policy Manual instructs officers to "consult[] with the applicable prosecuting attorney as needed."[18]

Waltham, Massachusetts. The Waltham Police Department's General Order on Search and Seizure states that "[i]f legal assistance is required for the preparation of the search warrant affidavit, the District Attorney's Office should be contacted."[19]

IV. Time and Manner Limitations

All fifty states and the District of Columbia have some limitations regarding the time and manner of search warrant execution. Our survey looked only at the relevant state statutes or rules of criminal procedure, and this section reports only those limitations that apply statewide. However, some states rely primarily on case law to establish these types of limitations,[20] and

[15] City of Chi., Off. Inspector Gen., Final Report: Chicago Police Department's Search Warrant Process 10-11 (June 2023), https://igchicago.org/wp-content/uploads/2023/06/Final-Report-Chicago-Police-Departments-Search-Warrant-Process.pdf; *see also* Chi. Police Dep't, Special Order S04-19, Search Warrants 11 (Oct. 2021), https://www.chicagopolice.org/policy-review/search-warrants-policy-review.

[16] Albuquerque Police Dep't, Standard Operating Procedure 2-70-4(A)(1), https://public.powerdms.com/COA/tree/documents/99.

[17] 234 Pa. Code Rule 202.

[18] Palo Alto Police Dep't, Policy Manual 522 (Nov. 2024), https://www.cityofpaloalto.org/files/assets/public/v/1/police-department/public-information-portal/policy-manual-for-web-11-1-2024.pdf.

[19] Waltham Police Dep't, General Order No. GO-03, Search and Seizure 4 (Apr. 2023), https://www.city.waltham.ma.us/sites/g/files/vyhlif12301/f/uploads/ch_69_search_and_seizure.pdf.

[20] *See, e.g.*, Kentucky, Mississippi, Missouri in Columns E and F of the Table.

some localities implement further limitations through, for example, local rules or a police manual.[21] This section highlights some of the notable limitations. Columns E and F of the Table contain a more complete breakdown by state.[22]

A. Time Limitations

There are two primary types of time limitations: (1) limitations on the window of time between search warrant issuance and execution, and (2) limitations on whether search warrants can be executed at night.

Most states (forty-seven) and the District of Columbia explicitly require search warrant execution within a specific window of time after issuance. This period ranged from two days[23] to sixty days.[24] More typically, twenty-eight states and the District of Columbia allow ten days to execute a search warrant. Additionally, only four states allow this period to be extended.[25]

Most states (thirty-four) and the District of Columbia also require all search warrants to be executed during the daytime.[26] Of the thirty-four states with this limitation, twenty-five statutorily define daytime and nighttime by using hours of the day.[27] Other states define this window through case law[28] or judicial discretion.[29] Even where states limit search warrants to the daytime, twenty-nine states and the District of Columbia[30] provide for exceptions based on an additional evidentiary standard, typically reasonable cause[31] or good cause.[32] Finally, some states impose time-of-day limitations only on no-knock warrants.[33]

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[21] *See, e.g.*, San Francisco, California in Column F of the Table.

[22] Please note, if the Table says "none" for a particular type of limitation, that means we found no limitation in the state's statute(s) or rule(s). The state may, nevertheless, have limitations located in its case law, police guidance, or other sources.

[23] N.C. Gen. Stat. Ann. § 15A-248; 234 Pa. Code Rule 205.

[24] Ark. R. Crim. P. 13.2.

[25] Alaska R. Crim. P. 37(b) (30-day extension for good cause); Ariz. Rev. Stat. Ann. § 13-3918 (5-day extension); Or. Rev. Stat. § 133.565(3) (10-day extension); Tex. Code Crim. Proc. Ann. art. 18.07 (extensions only for specific types of warrants).

[26] Alabama specifically allows nighttime warrants for controlled substances while banning any other nighttime warrant unless probable cause for the night search can be shown. *See* Ala. Code § 15-5-8; AL ST RCRP Rule 3.10.

[27] Ten states adopt 6 AM-10 PM, *see, e.g.*, Vt. R. Crim. P. 41(d)(5)(A)(ii), while other states adopt other variations. *See, e.g.*, Va. Code. Ann. § 19.2-56(B) (8 AM-5 PM); Nev. Rev. Stat. § 179.045(6)(d) (7 AM-7 PM).

[28] *See Kuenzel v. State*, 577 So. 2d 474, 508-09 (Ala. Crim. App. 1990), *aff'd sub nom. Ex parte Kuenzel*, 577 So. 2d 531 (Ala. 1991) (recognizing the Code of Alabama does not define the daytime, nighttime, or a day and night and instead defining nighttime as the "factual determination of darkness")

[29] *See, e.g.*, N.J. Rules of Court 3:5-5(a); Ga. Code Ann. § 17-5-26.

[30] The District of Columbia requires probable cause, a higher evidentiary standard than good or reasonable cause. D.C. Code § 23–522(c).

[31] Ten states require reasonable cause. *See, e.g.*, Alaska R. Crim. P. 37(a)(3)(C); N.M. R. 5-211(B).

[32] Eight states require good cause. *See, e.g.*, Colo. Rev. Stat. Ann. § 16-3-305; N.J. Rules of Court 3:5-5(a).

[33] *See, e.g.*, Md. Code Ann., Crim. Proc. § 1-203.

B. Manner Limitations

There are two general types of manner limitations in state statutes and rules of criminal procedure: (1) a requirement that officers announce their authority and purpose, including provisions for when this requirement can be waived, and (2) a limitation on how much force may be used during the execution of a warrant.

First, most states (thirty-six) and the District of Columbia have explicit requirements that officers announce their authority and purpose prior to the execution of the search.[34] Of these, twenty states include provisions on when announcement may be waived, and the resulting warrant is often called a "no-knock warrant."[35] Generally, a no-knock warrant requires a showing that, if the officers were to announce themselves, doing so would either (1) pose danger to life and limb of the officer or another person, or (2) lead to the destruction of the property to be seized.[36] Some states have limited the issuance of no-knock warrants to only the former category.[37]

Second, some states have provisions about how much force may be used in the execution of a warrant. A common provision allows officers to break open any door or window to execute a search warrant if, after giving notice of authority and purpose, they are refused admittance.[38] Other states authorize all necessary and reasonable force needed to effectively execute the warrant.[39] Only three states provide for circumstances where deadly force may be used.[40]

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In the District of Columbia, there are both time and manner restrictions on search warrant execution. Warrants must be executed within ten days of issuance and during daylight hours unless probable cause can be shown that the property is likely to be either (1) removed or

[34] Even in states where this requirement is not in their statutes or rules of criminal procedure, Supreme Court case law has established officers must generally knock and announce themselves prior to entry. *See Wilson v. Arkansas,* 514 U.S. 927, 934 (1995).

[35] An additional state, Kentucky, only includes provisions on the issuance of no-knock warrants. Ky. Rev. Stat. Ann. § 455.180. Additionally, other states allow no-knock warrants through case law, and a Georgia State Senate Report surveying all fifty states (as of October 2020) could be a useful resource for future research on no-knock warrants in different states. Beth Vaughan, Georgia State Senate, No-knock Warrants – 4th Amendment Analysis for No-Knock Entry, Overview of Federal Law, and 50 State Survey (2020).

[36] *See, e.g.*, Utah Code Ann. § 77-23-210.

[37] *See, e.g.*, La. Code Crim. Proc. Ann. art. 162.3. *But see* Okla. Stat. Ann. tit. 22, § 1228 (expanding categories of no-knock warrant to include situations where notice would increase possibility of resistance or escape, inhibit effective investigation, or would be futile or useless).

[38] *See, e.g.*, N.D. Cent. Code § 29-29-08(1); Okla. Stat. Ann. tit. 22, § 1228; Ala. Code § 15-5-9.

[39] *See, e.g.*, Kan. Stat. Ann. § 22-2508; Ga. Code Ann. § 17-5-27.

[40] *See* Ark. R. Crim. P. 13.3 (self-defense, defense of others, substantial risk that persons or things to be seized will suffer, cause, or be used to cause death or serious bodily harm); Or. Rev. Stat. § 133.605 (same); N.Y. Crim. Proc. Law § 690.50 (self-defense, defense of others from deadly physical force).

destroyed if not seized quickly, or (2) that property is not likely to be found except at night.[41] Officers must also knock and announce themselves.[42]

V. Case Law

Within the case law on what evidence amounted to probable cause to seek a residential search warrant based on drug activity alone, there is an interesting divide among jurisdictions that could provide support for a limitation on residential search warrants based on drug activity alone. Although this research is not exhaustive, this divide could be an area of further research for DCJL. This section first defines probable cause before covering what various jurisdictions have found sufficient to meet that evidentiary standard for the issuance of a residential search warrant.

A. Probable Cause Overview

As discussed in Section II, search warrants require a showing of probable cause to issue.[43] Established by the Fourth Amendment to the U.S. Constitution, the probable cause standard protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by requiring law-enforcement officers make an evidentiary showing that particularly describes the place to be searched and the things to be seized.[44]

Defining what evidence suffices to establish probable cause is not straightforward. The Supreme Court has repeatedly reiterated that the probable cause standard is "a practical, nontechnical conception" that is "not readily reduced to a neat set of rules."[45] Instead, probable cause "deals with probabilities and depends on the totality of the circumstances."[46] In the context of a search warrant, probable cause exists where the officer's knowledge and reasonably trustworthy information would "cause a man of reasonable caution" to believe an offense has been or is being committed."[47] In other words, the probable cause standard is met, and a search warrant may be issued, when the facts available to an officer establish a fair probability that contraband or evidence of a crime is present in the place.[48]

Within the case law, there is a distinct divide between jurisdictions when evaluating what amounts to probable cause to search a residence based on drug activity alone. In some jurisdictions, officers may establish probable cause based on an assumption that drugs are likely to be found in the residence of a person who likely is or has engaged in drug activity. In other jurisdictions, this assumption is not permitted, instead requiring direct evidence linking drug

[41] D.C. Code § 23–522(c).
[42] D.C. Code § 23–524.
[43] *See, e.g.*, Mass. Gen. Laws Ann. ch. 276, § 1.
[44] U.S. Const. amend. IV.
[45] *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003).
[46] *Id.* at 371.
[47] *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009).
[48] *See Fla. v. Harris*, 568 U.S. 237, 243-44 (2013).

activity to the residence itself. The next two sections explore this divide further before the last section discusses the current case law in the District of Columbia Court of Appeals.

B. Jurisdictions Permitting Assumption

In some jurisdictions, officers may establish probable cause, even in the absence of direct evidence linking drug activity to a physical location, by producing evidence that (1) a person is or has likely engaged in drug activity, and (2) the place to be searched is that person's residence. For example, the Ninth Circuit upheld a residential search warrant based only on evidence establishing a fair probability the defendant was selling drugs.[49] According to the court, "[w]e require only a reasonable nexus between the activity supporting probable cause and the locations to be searched. A reasonable nexus does not require direct evidence that the items listed as objects of the search are on the premises to be searched."[50] Instead, the court allowed the assumption that, "in the case of drug dealers, evidence is likely to be found where the dealers live."[51]

Other circuit courts have established similar assumptions. The Seventh Circuit has explained that search warrants may be issued "even in the absence of direct evidence linking criminal objects to a particular site" because an "issuing court is entitled to draw reasonable inferences about where evidence is likely to be, based on the nature of the offenses."[52] Relatedly, the Third Circuit has explicitly stated that direct evidence linking criminal activity to a residence is not required.[53] So long as there is enough circumstantial evidence to indicate "a fair probability of the presence of contraband at the home," typically shown by an inference considering the (1) type of crime, (2) nature of the items sought, (3) suspect's opportunity for concealment, and (4) normal inferences about where criminals might hide stolen property, probable cause has been met.[54] The Tenth Circuit has also adopted a similar four-factor approach.[55]

Some state courts have also adopted this assumption. The Arizona Court of Appeals has upheld a finding of probable cause for a residential search warrant where the primary basis stated by officers to establish probable cause was finding drugs in the suspect's vehicle.[56] The Arizona Supreme Court went a step further, finding a nexus between an individual conducting drug transactions, their vehicle, and their home such that it would be reasonable to infer drugs would be found on their person, in their vehicle, or in their home.[57] Similarly, the Alaska Court of

[49] *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993).

[50] *Id.*

[51] *Id.* Although the Ninth Circuit has adopted this assumption, the California Court of Appeals made an explicit distinction between drug dealers and drug users, stating the assumption should primarily apply to the former. *People v. Pressey*, 102 Cal. App. 4th 1178, 1190 (2002) ("We would add that an inference of contraband in the home is more speculative in the case of drug users than drug traffickers.").

[52] *United States v. Lamon*, 930 F.2d 1183, 1188 (7th Cir. 1991).

[53] *United States v. Burton*, 288 F.3d 91, 103 (3d Cir. 2002).

[54] *Id.*

[55] *See United States v. Mora*, 989 F.3d 794, 801 (10th Cir. 2021).

[56] *State v. Garcia-Ojeda,* No. 1 CA-CR 12-0366, 2014 WL 47338, at *8 (Ariz. Ct. App. Jan. 7, 2014).

[57] *State v. Martin*, 679 P.2d 489, 496 (Ariz. 1984).

Appeals upheld a search warrant for the defendant's residence based on the assumption that "[a] person engaged in drug trafficking necessarily needs a private place in which to secret his supply and implements of his business," and the defendant's residence was the most obvious location to provide the necessary privacy to prepare packages to mail drug paraphernalia or contraband.[58]

C. Jurisdictions Requiring Direct Evidence

Other jurisdictions reject an automatic assumption based on drug activity unconnected to a residence. For example, the First Circuit stated that "[t]he inquiry is not whether 'the owner of the property is suspected of crime' but rather whether 'there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought.'"[59] In that case, the court rejected "a per se rule automatically permitting the search of the defendant's home when he is engaged in drug activity," and expressed skepticism that probable cause could be shown simply by a defendant selling drugs and the general belief that drug dealers tend to keep evidence in their homes.[60] Similarly, the Sixth Circuit requires the connection between a residence and evidence of criminal activity be "specific and concrete, not vague or generalized."[61] As the court observed, "[w]e have never held … that a suspect's status as a drug dealer, standing alone, gives rise to a fair probability that drugs will be found in his home."[62]

Many states have also adopted the direct evidence requirement. The Washington Supreme Court held that "[p]robable cause requires a nexus between criminal activity and the item to be seized *and also* a nexus between the item to be seized and the place to be searched."[63] The Arkansas Supreme Court stated that "[s]tanding alone, circumstantial evidence that the suspect may be a drug dealer is not circumstantial evidence that anything is in his home."[64] The Minnesota Supreme Court also agreed that drug activity away from one's residence does not automatically connect criminal activity to the residence.[65]

Further, some states have rejected attempts to establish probable cause based on an officer's training and experience that those involved in drug activity typically keep contraband in their homes. In *Cunningham v. Commonwealth*, the Virginia Court of Appeals rejected as "not even a minimally sufficient factual nexus" an officer's assertion that, based on his experience, the

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[58] *State v. Conway*, 711 P.2d 555, 557 (Alaska Ct. App. 1985).

[59] *United States v. Roman*, 942 F.3d 43, 51 (1st Cir. 2019) (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978)).

[60] *Id.* at 51-52.

[61] *United States v. Brown*, 828 F.3d 375, 382 (6th Cir. 2016) (internal quotation marks omitted).

[62] *Id.* at 383; *see also United States v. Freeman*, 685 F.2d 942 (5th Cir. 1982) ("[T]he fact that there is probable cause to believe that a person has committed a crime does not automatically give the police probable cause to search his house for evidence of that crime.").

[63] *State v. Thein*, 977 P.2d 582, 585 (Wash. 1999) (emphasis added).

[64] *Yancey v. State*, 44 S.W.3d 315, 322 (Ark. 2001).

[65] *State v. Souto*, 578 N.W.2d 744, 749 (Minn. 1998) ("[Defendant's] previous use and purchase of a controlled substance at locations removed from her house certainly were evidence of a crime, but no evidence whatsoever of criminal activity linked to her home.").

defendant's home would likely contain marijuana because the officer found marijuana on the defendant.[66]

In states requiring direct evidence, a specific evidentiary nexus between drug activity and the place to be searched must be established with evidence explicitly connecting drug activity to the residence. For example, an informant telling the police he bought drugs from the defendant who was distributing drugs from his home paired with a controlled buy from the defendant's home was sufficient to establish probable cause to search the defendant's residence.[67] As another example, the Minnesota Court of Appeals found probable cause directly linked to the residence where the affidavit noted that (1) the defendant had been arrested three times for drug-related offenses and convicted of a fourth-degree controlled substance crime, and (2) three informants had stated they had seen drugs in the defendant's home.[68]

D. District of Columbia Case Law

The District of Columbia Court of Appeals has not yet explicitly adopted either approach for residential search warrants based on drug activity.[69] In the absence of a case specifically on residential search warrants, probable cause case law in other contexts provides some indication that an argument could be made that direct evidence connecting drugs or contraband to a defendant's home would be necessary to establish probable cause to search that home. For example, in *United States v. Scott*, the court decided that, after arresting the defendant for drug activity, the officers did not have probable cause to search the defendant's nearby vehicle because no evidence established the "requisite nexus between the Lexus and the drug activity."[70] The court suggested that expert police testimony that drug dealers often keep contraband in their vehicles would have weighed in favor of probable cause, but the court explicitly did not decide whether this type of testimony would be enough to establish probable cause on its own.[71] In other cases, the District of Columbia Court of Appeals has also allowed the assumption that individuals engaged in drug activity keep drugs in particular places to

[66] 49 Va. App. 605, 620 (2007); *see also People v. Eirish*, 165 P.3d 848, 854 (Colo. App. 2007) ("While an officer's 'training and experience' may be considered in determining probable cause, such training and experience cannot substitute for an evidentiary nexus, prior to the search, between the place to be searched and any criminal activity."); *Ex parte Perry*, 814 So. 2d 840, 843 (Ala. 2001) (holding conclusory statements in an officer's affidavit, standing alone, are insufficient to establish probable cause); *Sowers v. Commonwealth*, 49 Va. App. 588, 597 (2007).

[67] *See People v. McKay*, 513 P.3d 347, 351 (Colo. 2021).

[68] *State v. Hochstein*, 623 N.W.2d 617, 623 (Minn. Ct. App. 2001).

[69] However, in *United States v. Thomas*, the United States Court of Appeals for the District of Columbia Circuit held that observations of illegal activity outside of the home can provide probable cause to issue a search warrant for the home even in the absence of an allegation that any illegal activity occurred in the home itself. 989 F.2d 1252, 1254-55 (D.C. Cir. 1993).

[70] 987 A.2d 1180, 1192-93 (D.C. 2010). *See also, In re G.B.*, 139 A.3d 885, 897 (D.C. 2016) ("The first critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property for which entry is sought.")

[71] *Id.* at 1193 n.35.

factor into the probable cause analysis,[72] but this assumption has not been sufficient on its own.[73] Further, the court has also stated "an unadorned, bare bones claim of probable cause based on an applicant's training and experience" as well as "wholly conclusory statements" that the officer has cause to suspect and does believe contraband is located in a particular place do not provide a basis for a probable cause determination. Thus, the case law suggests the District of Columbia Court of Appeals requires more than just an assertion that drugs are often kept in defendants' homes to establish probable cause for a search warrant.

VI. Other Requirements

In addition to the requirements and limitations already discussed, we found two additional requirements in the statutory or rules text we thought worth highlighting: risk assessments and reporting requirements for no-knock warrants.

A. Risk Assessment

Some jurisdictions require that a risk assessment be performed prior to execution of the warrant.[74] This assessment typically has several categories, each with multiple factors for consideration. For example, there may be search warrant considerations (is it a warrant for property crime, crime against a person, or drug possession and distribution?); subject history considerations (does the subject have a history of property crimes, drug offenses, violence, or firearms use?); location considerations (is the location surveilled by the suspects or guarded by dogs, are there hazardous materials present?); and firearms considerations (is the subject known to carry firearms, is there a history of firearms at the location?). For each answer "yes," there is a numerical point value assigned. The total score of the risk assessment dictates whether the search warrant must be executed by a specialized team of officers, such as a SWAT team.[75]

These risk assessments are used to determine what type of team is necessary for the execution of a warrant, not whether a warrant should be issued. However, insofar as "search warrant

[72] *See Quintanilla v. United States*, 788 A.2d 564, 568 (D.C. 2002) ("[I]llicit drugs are generally kept in a convenient place."); *United States v. Brown*, 708 A.2d 637, 639 (D.C. 1998) ("[D]rug dealers often stash drugs or proceeds of drug sales in automobiles."); *Spinner v. United States*, 618 A.2d 176, 179 (D.C. 1992) ("The police could also reasonably conclude that the sellers would stash the proceeds of the drug sales in their cars as well as the drugs.").

[73] *Quintanilla*, 788 A.2d at 568 (finding probable cause based on this assumption, general information about the area, and confidential informant); *Brown*, 708 A.2d at 179 (finding probable cause based on this assumption and observation of defendant getting in and out of the vehicle and getting something else of vehicle trunk); *Spinner*, 618 A.2d at (finding probable cause based on this assumption as well as plain view doctrine).

[74] *See, e.g.*, Baltimore Police Dep't, Policy 1007, Search and Seizure Warrants 26 (Nov. 2021), https://www.baltimorepolice.org/transparency/bpd-policies/1007-search-and-seizure-warrants; New Orleans Police Dep't, Operations Manual, Search Warrants 11-17 (Jan. 2017), https://nola.gov/getattachment/NOPD/Policies/Chapter-1-2-4-2-Search-Warrants-EFFECTIVE-5-25-21.pdf/?lang=en-US.

[75] *See, e.g.*, Office of the Attorney General, Commonwealth of Kentucky, Report of the Search Warrant Task Force 51-53, https://www.ag.ky.gov/Documents/SWTF%20FINAL%20REPORT.pdf.

considerations"—including whether the suspected offense involves drugs—factor into the risk assessment, these assessments may be of interest to DCJL.

B. Reporting Requirements

Our research identified three states that impose additional reporting requirements for no-knock warrants.[76] In New Jersey, each county prosecutor must track and report the number of no-knock warrants applied for and approved by a court in their jurisdiction; this information must be made publicly available.[77] Similarly, in New Hampshire, chief law enforcement officers must report the use of no-knock warrants by their agency and department to the County Attorney and Attorney General, and these reports become public once the warrant is returned to the court unless otherwise ordered by the court.[78] Finally, Minnesota requires law enforcement agencies to report to the Public Safety commissioner any no-knock warrants requested, issued, and executed as well as any injuries or fatalities suffered by officers or civilians when executing these warrants.[79] This information is reported to the Minnesota Legislature and not specifically required to be made public.[80]

VII. Recommendations and Further Research

We reviewed the proposed amendments to the District of Columbia search warrant provisions that students developed in 2020, in light of our research into the structure and contents of search warrant provisions in the fifty states, and we make the following recommendations. We also provide additional recommendations or suggestions for areas of future advocacy.

A. Statutory Language

First, the proposal currently suggests deleting Section 48–921.02 and amending Section 23–521 to contain a drug-related limitation. Rather than this course of action, DCJL could consider advocating for expansion of the existing drug-related limitation in Section 48–921.02(a-1). As explained in Section II above, Section 48–921.02(a-1) sits within the substantive law on controlled substances and already places a ban on search warrants based on one ounce or less of marijuana, and Section 23–521 governs all other criminal search warrants. Thus, because of how these two provisions function, Section 48–921.02(a-1) may be a natural provision in which to codify a drug-related limitation. Additionally, this option would require less rewriting than the current proposal, insofar as it merely expands an existing limitation.

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[76] Other states may have similar reporting requirements established by something other than their statutes or rules.

[77] N.J. Dep't of L. & Pub. Safety, Div. of Crim. Just., Attorney General Law Enforcement Directive No. 2021-12, at 5 (Dec. 2021), https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2021-12_No-Knock-Warrants.pdf.

[78] N.H. Rev. Stat. Ann. § 595-A:2.

[79] Minn. Stat. § 626.14.

[80] *Id.*

Alternatively, if DCJL opted to adhere to the current proposal—i.e., deleting Section 48–921.02 and amending Section 23–521—DCJL might consider revising the proposed language for clarity. Currently, the proposed language inserts the phrase "other than a controlled substance" as a limitation into the subsections listing the categories that comprise the general grounds for issuance. The statutory language may be clearer if, instead, it more precisely distinguishes the grounds for issuance by topic. For example, the statute might allow a search warrant to issue for "stolen or embezzled property" or "firearms," but not "controlled substances."[81] This organizational structure would likely promote clarity and permit easier modification for specific types of grounds. For example, in California, certain limitations or requirements for particular grounds are easily added as subsections in the more specific statute.[82]

Second, in Section 23–522(b)(2), the suggested elevation of the evidentiary standard for the issuance of search warrants has no analog in any of the fifty states. The recommended language suggests changing the evidentiary standard for a search warrant to issue from "probable cause" to "clear and convincing evidence." However, probable cause is the standard in all fifty states and under federal law, raising some concern that this change could cause significant friction with lawmakers.

Third, in Section 23–522(c), the suggested elevation of the evidentiary standard for nighttime warrants—again from "probable cause" to "clear and convincing evidence"—is similarly largely unsupported by state analogs. As discussed in Section IV.A, most states permit nighttime warrants upon a showing of "reasonable cause" or "good cause." Because the D.C. Code currently requires a showing of "probable cause," it already has a higher standard than most. However, if raising this evidentiary standard remains a priority, it is possible Hawaii could provide some support: its case law has held that a night warrant requires "a showing of a somewhat higher standard than probable cause for its issuance."[83]

Fourth, the suggested addition of subsection (h) within Section 23–524 may be inconsistent with subsection (a) of the same section. Under subsection (a), officers conducting the search of a "dwelling house or other building or a vehicle" must execute the warrant according to the terms of 18 U.S.C. § 3109.[84] Section 3109 requires officers to give notice of their authority and purpose and, if they are refused admittance, the statute authorizes them to "break open any outer or inner door or window of a house or any part of a house, or anything therein" to execute the search warrant.[85] Notably, Section 3109 does not specify a specific amount of time officers

[81] *See, e.g.*, Cal. Penal Code § 1524 (listing twenty-one separate grounds for issuance of search warrants); Tex. Code Crim. Proc. Ann. art. 18.02 (listing fourteen separate grounds for issuance of search warrants).

[82] *See, e.g.*, Cal. Penal Code § 1524(a)(21) (adding additional requirements only for search warrants being issued to search and seize ammunition).

[83] *State v. Kalai*, 56 Haw. 366, 372 (1975).

[84] *See* D.C. Code § 23–521(a).

[85] 18 U.S.C. § 3109. Section 3109 case law interprets "refused admittance" to include both affirmative and reasonably inferred refusals. *United States v. Bonner*, 874 F.2d 822, 824 (D.C. Cir. 1989) ("the phrase 'refused admittance' is not restricted to an affirmative refusal … but encompasses circumstances that constitute constructive or reasonably inferred refusal.")

must wait to infer a refusal;[86] instead, officers must wait a *reasonable* amount of time depending on the circumstances.[87]

By contrast, the proposed subsection (h) would set fifteen seconds as a specific time requirement before officers could make forced entry. While setting a specific time requirement may be permissible on its own,[88] the proposed subsection (h) may, at times, require officers to wait a full fifteen seconds when Section 3109's reasonableness standard would allow entry sooner. Certainly, proposed subsection (h)'s inclusion of an exception to the fifteen second requirement for exigent circumstances may avoid this conflict by allowing entry sooner in exigent circumstances, but it appears possible that in some instances these two provisions could come into conflict. At the very least, the proposed language in subsection (h) should appear in subsection (a) because both subsections govern the same behavior.

Fifth, proposed subsection (i) of Section 23–524 seeks to establish a use of force limitation that goes beyond any of its state analogs. As discussed in Section IV.B, statutes and rules discussing the use of force either closely adhere to the language of the federal statute,[89] or they provide for all necessary and reasonable force.[90] One of the few states that expands upon this provision to specifically ban certain types of force only discusses prohibiting certain military style devices.[91] As such, the suggested provision—which limits an officer's ability to point a firearm, use handcuffs, or search an individual—would certainly be an outlier among the states.

B. Other Recommendations

First, as a general recommendation, DCJL could consider advocating for amendments to the Metropolitan Police Department ("MPD") manual, in addition to or rather than recommending statutory changes. The two processes differ: statutory changes ultimately require legislative action and congressional approval, whereas amending police procedures may consist of advocating to the MPD. Thus, one area for further research could be to understand how MPD

[86] *See United States v. Jenkins*, 175 F.3d 1208, 1213 (10th Cir. 1999) ("a bright-line rule for determining how much time is enough is inappropriate"); *United States v. Goodson*, 165 F.3d 610, 614 (8th Cir.1999) ("[whether forced entry was justified] does not turn on any hard and fast time limit, but depends upon the circumstances confronting the officer serving the warrant").

[87] *See, e.g.*, *United States v. Banks*, 540 U.S. 31, 39 (2003) (reasonable time was fifteen to twenty seconds); *Bonner*, 874 F.2d at 826 (eleven to twelve seconds); *United States v. Phelps*, 490 F.2d 644 (9th Cir. 1974) (ten seconds).

[88] Maryland and Maine both have a specific time requirements officers must wait when executing a search warrant, but, importantly, neither state incorporates Section 3109 into their statute. Md. Code Ann., Crim. Proc. § 1-203(a)(8)(v) ("Unless executing a no-knock search warrant, a police officer shall allow a minimum of twenty seconds for the occupants of a residence to respond and open the door before the police officer attempts to enter the residence, absent exigent circumstances."); Me. Rev. Stat. Ann. tit. 15, § 57 ("Any warrant is in no-knock warrant if it is executed without waiting at least 20 seconds after the announcement of authority and purpose before making entry.").

[89] 18 U.S.C. § 3109.

[90] *See, e.g.*, Kan. Stat. Ann. § 22-2508.

[91] Md. Code Ann., Crim. Proc. § 1-203(a)(8)(v) ("[A] police officer may not use flashbang, stun, distraction, or other similar military-style devices when executing a search warrant, absent exigent circumstances.").

procedures are created and revised, to understand the feasibility of advocating for amendments to those procedures. Of course, these two different avenues for change also have different consequences—for example, whereas a violation of statute is redressable through the courts, a violation of police procedure may not come with the same remedies.

Second, DCJL could consider advocating for enactment of a prosecutor approval requirement in statute. Codifying the requirement in statute would lend it the permanence and legitimacy that comes with the imprimatur of a legislature. Additionally, as explained in Section III.B, the requirement already exists in practice. Thus, enacting it as a statute could be "low-hanging fruit" for legislators, as it would require the revision of the statutory text without imposing any new burdens or costs on the MPD. On the other hand, advocating for enactment of the prosecutor approval requirement may draw increased attention—or criticism—to the requirement, where there is no practical need to do so.

Third, as a future research project, DCJL could consider delving further into the probable cause case law discussed in Section V to identify further support for greater restrictions on residential search warrant issuance based on drug activity alone. Using that research, DCJL could collaborate with public defenders to seek favorable judicial decisions that limit the issuance of residential search warrants based on the assumption that a defendant's drug activity outside of the home means that drugs are likely to be found in that defendant's home. DCJL could also use this case law to advocate for a ban on issuing residential search warrants for drug activity alone.

VIII. Conclusion

This memo is intended to provide a high-level overview of some notable trends we observed from surveying state search warrant laws, and we hope that it proves useful to DCJL in its advocacy work. To dive further into these trends, or for additional reading and research, we recommend referencing the resources linked in the Table.