SEARCH WARRANTS & PHONE ORDERS

PRACTICE POINTERS

1

WHY

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, an 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

"General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted."

N.C. Const. Art. 1, Sec. 20

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"It is true, of course, that the language of Article 1, Section 20 of the Constitution of North Carolina differs markedly from the language of the Fourth Amendment to the Constitution of the United States. Nevertheless, Article 1, Section 20 of the Constitution of North Carolina prohibits unreasonable searches and seizures. *State v. Ellington*, 284 N.C. 198, 200 S.E. 2d 177 (1973)."

State v. Arrington, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984)

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WHAT IS A GENERAL WARRANT?

"A 'general warrant' has traditionally been described as one 'that gives a law-enforcement officer broad authority to search and seize unspecified places or persons; a . . . warrant that lacks a sufficiently particularized description of the . . . place to be searched.' *General Warrant*, BLACK'S LAW DICTIONARY (8th ed. 2014). General warrants also include those that are not 'supported by showings of probable cause that any particular crime ha[s] been committed.' *State v. Richards*, 294 N.C. 474, 491-92, 242 S.E.2d 844, 855 (1978) (citations omitted). In other words, general warrants are 'not limited in scope and application.' *Maryland v. King*, 569 U.S. 435, 466, 133 S. Ct. 1958, 186 L. Ed. 2d 1, 32 (2013) (Scalia, J., dissenting)"

State v. Gordon, 261 N.C. App. 247, 255, 820 S.E.2d 339, 345 (2018)

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ROAD MAP

- Constitutional and Statutory Requirements for a Search Warrant
- Orders that are Not Physically Labelled as Search Warrants
- Common Shortcomings in Search Warrants
- Anticipatory Search Warrants
- Informants
- Use of Technology in Reviewing Applicants and Granting Search Warrant

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WHAT IS A SERACH WARRANT – CONSTITUTIONAL PRESPECTIVE

"The Fourth Amendment requires that search warrants be issued only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Finding these words to be "precise and clear," this Court has interpreted them to require only three things. First, warrants must be issued by neutral, disinterested magistrates. Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction" for a particular offense. Finally, "warrants must particularly describe the 'things to be seized,'" as well as the place to be searched."

Dalia v. United States, 441 U.S. 238 (1979

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- Must be issued by neutral, disinterested magistrates.
- The applicant must demonstrate to the magistrate their probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction" for a particular offense.
- Finally, "warrants must particularly describe the 'things to be seized,'" as well as the place to be searched.

This is all that is required to satisfy the Fourth Amendment.

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". . . General writs of assistance in the Colonies is widely presumed to be one of the leading causes of the American Revolution. General warrants--which the Founding Fathers considered evil--were usually 'unparticularized warrant[s] (for example, ordering a search of 'suspected places')' or warrants which were issued without "a complaint under oath or an adequate showing of cause." In particular, the Founders' primary animadversion was the use of general writs of assistance, which 'attested to the authority of the bearer to search places in which the bearer suspected uncustomed goods were hidden,' and commanded 'that all peace officers and any other persons who were present 'be assisting' in the performance of the search.'

One of the primary reasons for founding-era hatred of general warrants and general writs of assistance was that both writs conferred upon petty officers broad and unfettered discretion to determine when it was legally proper to conduct a search. Sir Matthew Hale described such warrants as allowing the officer executing the general warrant to be the judge in his own case. In the Colonies, the disdain for general writs of assistance sparked James Otis's speech in the case of *Petition of Lechmere:* 'I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villainy on the other, as this writ of assistance is.'

(citations omitted) State v. Styles, 362 N.C. 412, 418-419, 665 S.E.2d 438, 441-442 (2008)

8

N.C. Gen. Stat. § 15A – 241, *et seq*

SEARCH WARRANTS

9

A search warrant is a court order and process directing a law-enforcement officer to search designated premises, vehicles, or persons for the purpose of seizing designated items and accounting for any items so obtained to the court which issued the warrant.

§ 15A-241. Definition of search warrant.

10

Who Can Apply For A Search Warrant?

N.C. Gen. Stat. § 15A-241 *et. Seq.* is silent on that issue.

"The issue before this Court, then, is whether the Town of Waynesville has standing to apply for a search warrant authorizing seizure of the Jeep. We find nothing in Article 11 of the Criminal Procedure Act, "Search Warrants," that would prohibit the Town from applying for a search warrant. The Criminal Procedure Act provides that only Justices, judges, clerks, and magistrates may issue search warrants, *see* N.C. Gen. Stat. § 15A-243 (1997), and that only law-enforcement officers may execute them, *see* N.C. Gen. Stat. § 15A-247 (1997), but it does not limit those persons or entities who may apply for search warrants. Any person or entity--including, as here, a town--may apply for a search warrant."

In re 1990 Red Cherokee Jeep, 131 N.C. App 108, 113, 505 S.E.2d 588, 591-92 (1998).

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Each application for a search warrant must be made in writing upon oath or affirmation. All applications must contain:

(1) The name and title of the applicant; and

(2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and

(3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and

(4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

§ 15A-244. Contents of the application for a search warrant.

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15A-243. Who may issue a search warrant.

(a) A search warrant valid throughout the State may be issued by:

(1) A Justice of the Supreme Court.

(2) A judge of the Court of Appeals.

(3) A judge of the superior court.

(b) Other search warrants may be issued by:

1) A judge of the district court as provided in G.S. 7A-291.

(2) A clerk as provided in G.S. 7A-180 and 7A-181.

(3) A magistrate as provided in G.S. 7A-273.

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§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

(a) Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official. The information must be shown by one or both of the following:

(1) Affidavit.

(2) Oral testimony under oath or affirmation before the issuing official.

(3) Repealed by Session Laws *2021-47, s. 10(c)*, effective June 18, 2021, and applicable to proceedings occurring on or after that date.

(b) If the issuing official finds that the application meets the requirements of this Article and finds there is probable cause to believe that the search will discover items specified in the application which are subject to seizure under *G.S. 15A-242*, he must issue a search warrant in accordance with the requirements of this Article. The issuing official must retain a copy of the warrant and warrant application and must promptly file them with the clerk. If he does not so find, the official must deny the application.`

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ORAL TESTIMONY MAY BE CONSIDERED

- In addition, the facts contained in the written application a judge may consider information that was given orally that was summarized or recorded. G.S. 15A-245(a) State v. Hicks 60 N.C. App. 116, 298 S.E.2d 180 (1982).
- Best practice is to file the summary or recording with the application and warrant, but it is not fatal State v. Hicks 60 N.C. App. 116, 298 S.E.2d 180 (1982).
- Oral testimony that has not been recorded or summarized cannot be considered in a motion to suppress. State v. Teasley 82 N.C. App. 150, 346 S.E.2d 227 (1986).

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"A magistrate issuing a warrant can base a finding of probable cause only on statements of fact confirmed by oath or affirmation of the party making the statement, or on information which the magistrate records or contemporaneously summarizes in the record. The necessity of a sworn statement is consistent with existing case law."

State v. Heath, 73 N.C. App. 391, 326 S.E.2d 640 (1985).

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§ 15A-246. Form and content of the search warrant.

A search warrant must contain:

(1) The name and signature of the issuing official with the time and date of issuance above his signature; and

(2) The name of a specific officer or the classification of officers to whom the warrant is addressed; and

(3) The names of the applicant and of all persons whose affidavits or testimony were given in support of the application; and

(4) A designation sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched; and

(5) A description or a designation of the items constituting the object of the search and authorized to be seized.

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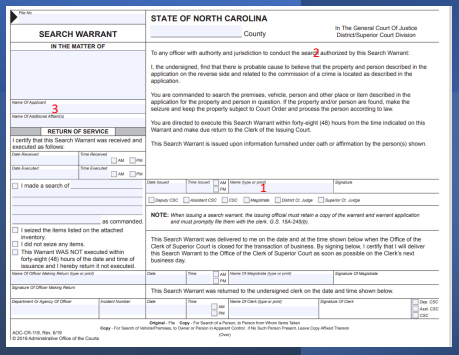
(1) The name and signature of the issuing official with the time and date of issuance above his signature; and

(2) The name of a specific officer or the classification of officers to whom the warrant is addressed; and

(3) The names of the applicant and of all persons whose affidavits or testimony were given in support of the application; and



File No.

SEARCH WARRANT

IN THE MATTER OF

Name Of Applicant 3

Name Of Additional Affiant(s)

RETURN OF SERVICE

I certify that this Search Warrant was received and executed as follows:

Date Received | Time Received ☐ AM ☐ PM

Date Executed | Time Executed ☐ AM ☐ PM

☐ I made a search of _____

_____

_____ as commanded.

☐ I seized the items listed on the attached inventory.

☐ I did not seize any items.

☐ This Warrant WAS NOT executed within forty-eight (48) hours of the date and time of issuance and I hereby return it not executed.

Name Of Officer Making Return (type or print)

Signature Of Officer Making Return

Department Or Agency Of Officer | Incident Number

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
☐ District/Superior Court Division

To any officer with authority and jurisdiction to conduct the search 2 authorized by this Search Warrant:

I, the undersigned, find that there is probable cause to believe that the property and person described in the application on the reverse side and related to the commission of a crime is located as described in the application.

You are commanded to search the premises, vehicle, person and other place or item described in the application for the property and person in question. If the property and/or person are found, make the seizure and keep the property subject to Court Order and process the person according to law.

You are directed to execute this Search Warrant within forty-eight (48) hours from the time indicated on this Warrant and make due return to the Clerk of the issuing Court.

This Search Warrant is issued upon information furnished under oath or affirmation by the person(s) shown.

Date Issued | Time Issued ☐ AM ☐ PM | Name (type or print) 1 | Signature

☐ Deputy CSC ☐ Assistant CSC ☐ CSC ☐ Magistrate ☐ District Ct. Judge ☐ Superior Ct. Judge

NOTE: *When issuing a search warrant, the issuing official must retain a copy of the warrant and warrant application and must promptly file them with the clerk. G.S. 15A-245(b).*

This Search Warrant was delivered to me on the date and at the time shown below when the Office of the Clerk of Superior Court is closed for the transaction of business. By signing below, I certify that I will deliver this Search Warrant to the Office of the Clerk of Superior Court as soon as possible on the Clerk's next business day.

Date | Time ☐ AM ☐ PM | Name Of Magistrate (type or print) | Signature Of Magistrate

This Search Warrant was returned to the undersigned clerk on the date and time shown below.

Date | Time ☐ AM ☐ PM | Name Of Clerk (type or print) | Signature Of Clerk | ☐ Dep. CSC ☐ Asst. CSC ☐ CSC

Original - File **Copy** - For Search of a Person, to Person from Whom Items Taken
Copy - For Search of Vehicle/Premises, to Owner or Person in Apparent Control. If No Such Person Present, Leave Copy Affixed Thereon
(Over)

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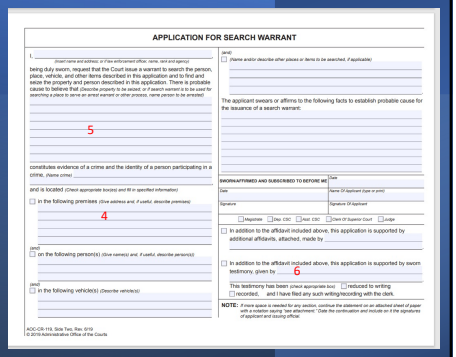
(4) A designation sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched; and

(5) A description or a designation of the items constituting the object of the search and authorized to be seized.



APPLICATION FOR SEARCH WARRANT

I, _____ (Insert name and address) or Law enforcement officer, name, rank and agency)

being duly sworn, request that the Court issue a warrant to search the person, place, vehicle, and other items described in this application and to find and seize the property and person described in this application. There is probable cause to believe that (Describe property to be seized, or if search warrant is to be used for searching a place to serve an arrest warrant or other process, name person to be arrested)

5

constitutes evidence of a crime and the identity of a person participating in a crime. (Name crime) _____

and is located (Check appropriate box(es) and fill in specified information)

☐ in the following premises (Give address and, if useful, describe premises)

4

(and)

☐ on the following person(s) (Give name(s) and, if useful, describe person(s))

(and)

☐ in the following vehicle(s) (Describe vehicle(s))

(and)

☐ (Name and/or describe other places or items to be searched, if applicable)

The applicant swears or affirms to the following facts to establish probable cause for the issuance of a search warrant:

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Date

Name Of Applicant (type or print)

Signature

Signature Of Applicant

☐ Magistrate ☐ Asst. Clerk ☐ Asst. Clerk ☐ Clerk Of Superior Court ☐ Judge

☐ In addition to the affidavit included above, this application is supported by additional affidavits, attached, made by _____

☐ In addition to the affidavit included above, this application is supported by sworn testimony, given by _____ 5

This testimony has been (check appropriate box) ☐ reduced to writing; ☐ recorded, and I have filed any such writing/recording with the clerk.

NOTE: If more space is needed for any section, continue the statement on an attached sheet of paper with a notation saying "see attachment." Date the continuation and include on it the signatures of applicant and issuing officer.

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This the _____ day of ___, 2024.

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STORED COMMUNICATIONS ACT

18 U.S.C. § 2701, *et seq.*

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(c) Records concerning electronic communication service or remote computing service.

(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice) [10 USCS §§ 801 et seq.], issued under section 846 of that title, in accordance with regulations prescribed by the President) by a court of competent jurisdiction;

(B) obtains a court order for such disclosure under subsection (d) of this section;

18 USC § 2703

22

d) Requirements for court order. A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

18 USC § 2703

23

N.C. Gen. Stat. § 15A-261 Prohibitions and Exceptions

(a) In General. — Except as provided in subsection (b) of this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order as provided in this Article

Pen register is a device that records numbers dialed by a particular phone.

Trap and trace device records incoming numbers received by a phone.

24

§ 15A-262 Application for order for pen register or trap and trace device.

(a) Application. — A law enforcement officer may make an application for an order or an extension of an order under G.S. 15A-263 authorizing or approving the installation and use of a pen register or a trap and trace device, in writing under oath or affirmation, to a superior court judge.

(b) Contents of Application. — An application under subsection (a) of this section shall include:

(1) The identity of the law enforcement officer making the application and the identity of the law enforcement agency conducting the investigation; and

(2) A certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency.

25

§ 15A-263. Issuance of order for pen register or trap and trace device.

a) In General. — Following application made under G.S. 15A-262, a superior court judge may enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device within the State if the judge finds:

(1) That there is reasonable suspicion to believe that a felony offense, or a Class A1 or Class 1 misdemeanor offense has been committed;

(2) That there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense, if that person is known and can be named or described; and

(3) That the results of procedures involving pen registers or trap and trace devices will be of material aid in determining whether the person named in the affidavit committed the offense.

26

(b) Contents of Order. — An order issued under this section:

(1) Shall specify:

a. The identity, if known, of the person to whom is leased or in whose name is listed the telephone line to which the pen register or trap and trace device is to be attached;

b. The identity, if known, of the person who is the subject of the criminal investigation;

c. The number and, if known, physical location of the telephone line to which the pen register or trap and trace device is to be attached and, in the case of a trap and trace device, the geographic limits of the trap and trace order; and

d. The offense to which the information likely to be obtained by the pen register or trap and trace device relates; and

(2) Shall direct, upon request of the applicant, the furnishing of information, facilities, or technical assistance necessary to accomplish the installation of the pen register or trap and trace device under G.S. 15A-264

27

(c) Time Period and Extension.

(1) An order issued under this section shall authorize the installation and use of a pen register or a trap and trace device for a period not to exceed 60 days.

(2) An extension of an order issued under this section may be granted, but only upon an application for an order under G.S. 15A-262 and upon the judicial finding required by subsection (a) of this section. The period of extension shall not exceed 60 days.

28

Smith v. Maryland, 442 U.S. 735 (1979)

There is no general expectation of privacy in phone numbers an individual dials, as such the installation of a pen register is not a search and no warrant is required.

29

United States v. Jones, 565 U.S. 400 (2012)

Jones involved the installation of a GPS tracking device on Jone's vehicle that was monitored for 28 days. The case was decided on the governments physical trespass of the vehicle. Five justices agreed that privacy concerns would be raised in conducting GPS tracking of Jone's cell phone. "Since GPS monitoring of a vehicle tracks 'every movement' a person makes in the vehicle . . .'longer term GPS monitoring . . . Impinges on expectations of privacy." *Id.* at 430.

The Court did indicate how long GPS tracking would need to occur to impinge of the expectations of privacy.

30

Carpenter v. United States 585 U.S. 296 (2018)

"'[H]istorical cell site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*. Unlike the bugged container in *Knotts* o the car in *Jones*, a cell phone—almost a feature of human anatomy,' tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, the compulsively carry cell phones with them all the time."

citation omitted. *Id.* at 311.

"Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one – get a warrant." *Id.* at 317.

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The Supreme Court in *Carpenter* did state

"this is certainly not to say that all orders compelling the production of documents will require a showing of probable cause. The government will be able to use subpoenas to acquire records in a majority of investigations. We hold only that a warrant is required in the rare case where the suspect has a legitimate interest in records held by a third party."

Id. at 319

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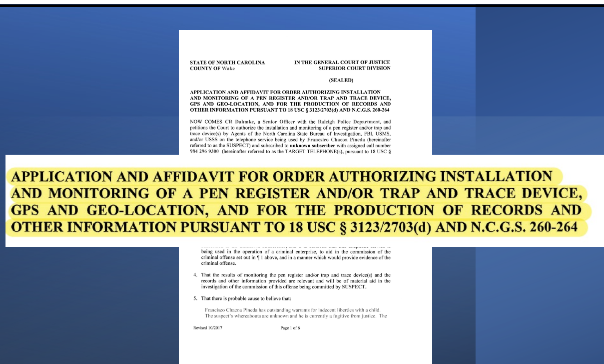
STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF Wake SUPERIOR COURT DIVISION

(SEALED)

APPLICATION AND AFFIDAVIT FOR ORDER AUTHORIZING INSTALLATION AND MONITORING OF A PEN REGISTER AND/OR TRAP AND TRACE DEVICE, GPS AND GEO-LOCATION, AND FOR THE PRODUCTION OF RECORDS AND OTHER INFORMATION PURSUANT TO 18 USC § 3123/2703(d) AND N.C.G.S. 260-264

NOW COMES CR Dahmke, a Senior Officer with the Raleigh Police Department, and petitions the Court to authorize the installation and monitoring of a pen register and/or trap and trace device(s) by Agents of the North Carolina State Bureau of Investigation, FBI, USMS, and/or USSS on the telephone service being used by Francisco Chacoa Pineda (hereinafter referred to as the SUSPECT) and subscribed to **unknown subscriber** with assigned call number 984 296 9300 (hereinafter referred to as the TARGET TELEPHONE(s), pursuant to 18 USC §

APPLICATION AND AFFIDAVIT FOR ORDER AUTHORIZING INSTALLATION AND MONITORING OF A PEN REGISTER AND/OR TRAP AND TRACE DEVICE, GPS AND GEO-LOCATION, AND FOR THE PRODUCTION OF RECORDS AND OTHER INFORMATION PURSUANT TO 18 USC § 3123/2703(d) AND N.C.G.S. 260-264

being used in the operation of a criminal enterprise, to aid in the commission of the criminal offense set out in ¶ 1 above, and in a manner which would provide evidence of the criminal offense.

4. That the results of monitoring the pen register and/or trap and trace device(s) and the records and other information provided are relevant and will be of material aid in the investigation of the commission of this offense being committed by SUSPECT.

5. That there is probable cause to believe that:

Francisco Chacoa Pineda has outstanding warrants for indecent liberties with a child. The suspect's whereabouts are unknown and he is currently a fugitive from justice. The

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1. That **any and all providers of electronic service communications pursuant to Title 18 USC 2510 (15),, and any other provider of electronic communications services as defined pursuant to N.C.G.S. § 15A-286(9) or 18 U.S.C. § 2519(15)** shall supply to the SBI or other applying officer upon request **all of the following information for the designated TARGET TELEPHONE(s)**: any and all published and non-published detailed subscriber records for the TARGET NUMBER, the last 30 days of call/text detail records with cell site information for the designated TARGET NUMBER, detailed information on purchase (purchaser, credit card number or other payment, location of purchase, etc.), the cellular / wireless device and network identifiers to include but not limited to electronic serial number (ESN), International Mobile Equipment Identity (IMEI), International Mobile Subscriber Identity (IMSI), Mobile Subscriber Identifier (MSID), Mobile Equipment Identifier (MEID), Mobile Identification Number (MIN), Mobile Dialed Number (MDN), Media Access Control (MAC) addresses and Internet Protocol (IP) Addresses and Ports, make/model of the device, telephone toll and direc connect records, data detail records, cellular tower information regarding originating, handover and terminating cell site and sector information to include towers, switches, historical and prospective Global Positioning Location (GPS) information **without geographical limits**, Verizon RTT (range to tower) data & EVDO (evolution data optimized) data, Sprint PCMD (per call measurement data), AT&T Nelos reports, T-Mobile TrueCall reports, US Cellular TrueCall reports, mediation reports, timing advance, geo-location service, triangulation, real time call detail records with coordinating real time cell site location information, historical call detail records to include cell site location information, historical text message content if available, historical IP address information, internet history, web browsing history, device or network identifiers as well as associated records maintained for telephones and/or devices "twinned" or otherwise linked to and/or paired with the target device, Home Location Register (HLR) and Visitor Location Register (VLR) records maintained pertaining to the target device, any and all Vol.TE historical records with cell site locations, any and all available Data IP Session/Packet Data/MMS records (including Sprint Vision information), historical call detail records to include cell site location information, and any other relevant information pertaining to telephone numbers associated with telephones, digital display devices, internet devices, and mobile telephones utilized by other telephone(s)/internet device(s) of whatever type, and any other relevant information pertaining to the target telephone number(s).

34

JUDGES MUST BE VIGALINT

APPLICATION FOR NEW CINGULAR WIRELESS DBA AT&T RECORDS

I, Detective Jessica Reyes-LeBlanc, being duly sworn, request that the court issue an order to produce and provide the New Cingular Wireless dba AT&T records described in this application. The records are to the custody of:

AT&T
Global Legal Demands Center
11760 U.S. Highway 1, Suite 300
North Palm Beach, FL 33408
Fax: (888) 938-4715
Email: gldc@att.com

New Cingular Wireless dba AT&T account records for 616-278-3088, between March 21, 2024 and April 21, 2024.

Mobile Records Requested:

1. All customer/subscriber information, including any listed addresses, telephone numbers, social security numbers, dates of birth, names, addresses, any other customer identifying information, mobile handset or device identifiers/serial numbers (MEID, ESN, IMSI, IMEI), activation date and deactivation date, and location device was purchased if applicable);
2. Any e-mail addresses associated with the account;
3. Call detail records, including detailed information in reference to all known outgoing and incoming calls associated with the account, dates and times calls were made, and duration of all calls made or received. This is to include any other pertinent call detail

4. **Cell site information, to include all known cell towers associated with outgoing and incoming calls (Call Detail Records). This information is to include any sector information, if known, cell site location, and any other related material that would be necessary to identify the location and sector in reference to the cell site information associated with the call detail records. In the event text messages, MMS messages, LTE and Data activity including IP session and destination addresses that were produced are also available with cell site information, this information would be included in this request.**

5. **Cell Site locations for all New Cingular Wireless dba AT&T Cell Sites, sector information, including Azimuth headings, in the regional market associated with the requested cell site information.**

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APPLICATION FOR ORDER OF DISCLOSURE OF TELECOMMUNICATIONS RECORDS

5 Call detail records, and a listing of all control channels and their corresponding cell-sites to include cell site locations

36

State v. Gore, 272 N.C. App. 98, 105, 846 S.E.2d 295, 299 (2020).

An application for cell site location information that substantially complies with N.C. Gen. Stat. § 15A-244 is sufficient to obtain an order for cell site location information. A court order for cell site location information that contains the information required by N.C. Gen. Stat. § 15A-246 is the functional equivalent of a warrant.

37

Each application for a search warrant must be made in writing upon oath or affirmation. All applications must contain:

(1) The name and title of the applicant; and

(2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and

(3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and

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§ 15A-244. Contents of the application for a search warrant.

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§ 15A-246. Form and content of the search warrant.

A search warrant must contain:

(1) The name and signature of the issuing official with the time and date of issuance above his signature; and

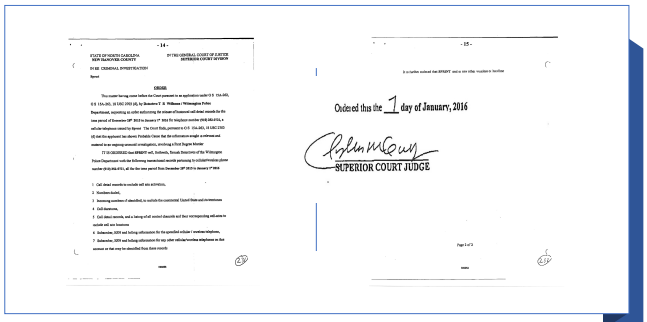
(2) The name of a specific officer or the classification of officers to whom the warrant is addressed; and

(3) The names of the applicant and of all persons whose affidavits or testimony were given in support of the application; and

(4) A designation sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched; and

(5) A description or a designation of the items constituting the object of the search and authorized to be seized.

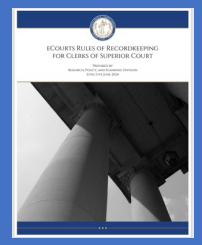
39



Ordered this the 1 day of January, 2016

SUPERIOR COURT JUDGE

40



eCOURTS RULES OF RECORDKEEPING FOR CLERKS OF SUPERIOR COURT

Rule 9.3: Processing Search Warrants, Nontestimonial Identification Orders, Administrative Inspection Warrants, and Orders for Pen Registers or Trap and Trace Devices

Upon issuance of a search warrant, nontestimonial identification order, administrative inspection warrant, or an order authorizing the installation and use of a pen register or trap and trace device under Article 12 of Chapter 15A, the judicial official shall forward the court record copy of these documents to the clerk. The clerk shall create a Search Warrant civil case in the ICMS. If there is a pending case, the clerk shall relate these cases. Search warrants are confidential until law enforcement makes a formal return of the search warrant. Orders authorizing the installation and use of a pen register or a trap and trace device are confidential until ordered unsealed by the judge.

41

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

(a) Upon timely motion, evidence must be suppressed if:

(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or

(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:

a. The importance of the particular interest violated;
b. The extent of the deviation from lawful conduct;
c. The extent to which the violation was willful;
d. The extent to which exclusion will tend to deter future violations of this Chapter.

Evidence shall not be suppressed under this subdivision if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful.

(b) The court, in making a determination whether or not evidence shall be suppressed under this section, shall make findings of fact and conclusions of law which shall be included in the record, pursuant to G.S. 15A-977(f).

42

VOID IF NOT EXECUTED WITHIN 48 hours

§ 15A-248. Time of execution of a search warrant.

A search warrant must be executed within 48 hours from the time of issuance. Any warrant not executed within that time limit is void and must be marked "not executed" and returned without unnecessary delay to the clerk of the issuing court.

43

NEUTRAL AND DETACHED MAGISTRATE

44

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson* v. *United States, supra*, at 13-14.

United States v. Ventresca, 380 U.S. 102, 106, (1965)

45

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

Investigator goes to an adult bookstore and buys two reels of film. After concluding the films violated New York Obscenity law he took them to a Town Justice who viewed the films in their ***entirety*** and thereafter executed a search warrant authorizing the search of the library.

46

"The Town Justice and the investigator enlisted three other State Police investigators, three uniformed State Police officers, and three members of the local prosecutor's office -- a total of 11 -- and the search party converged on the bookstore. The store clerk was immediately placed under arrest and advised of the search warrant. He was the only employee present; he was free to continue working in the store to the extent the search permitted, and the store remained open to the public while the party conducted its search mission which was to last nearly six hours."

"The search began in an area of the store which contained booths in which silent films were shown by coin-operated projectors. The clerk adjusted the machines so that the films could be viewed by the Town Justice without coins; it is disputed whether he volunteered or did so under compulsion of the arrest or the warrant. See *infra*, at 329. The Town Justice viewed 23 films for two to three minutes each and, satisfied there was probable cause to believe they were obscene, then ordered the films and the projectors seized."

"The Town Justice next focused on another area containing four coin-operated projectors showing both soundless and sound films. After viewing each film for two to five minutes, again without paying, he ordered them seized along with their projectors."

Id. at 322-323

47

"The search party then moved to an area in which books and magazines were on display. The magazines were encased in clear plastic or cellophane wrappers which the Town Justice had two police officers remove prior to his examination of the books. Choosing only magazines that did not contain significant amounts of written material, he spent not less than 10 seconds nor more than a minute looking through each one. When he was satisfied that probable cause existed, he immediately ordered the copy which he had reviewed, along with other copies of the same or "similar" magazines, seized. An investigator wrote down the titles of the items seized. All told, 397 magazines were taken."

"Throughout the day, two or three marked police cars were parked in front of the store and persons who entered the store were asked to show identification and their names were taken by the police. Not surprisingly, no sales were made during the period the search party was at the store, and no customers or potential customers remained in the store for any appreciable time after becoming aware of the police presence."

48

"The Town Justice did not manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure. *Coolidge* v. *New Hampshire*, *supra*, at 449. We need not question the subjective belief of the Town Justice in the propriety of his actions, but the objective facts of record manifest an erosion of whatever neutral and detached posture existed at the outset. He allowed himself to become a member, if not the leader, of the search party which was essentially a police operation. Once in the store, he conducted a generalized search under authority of an invalid warrant; he was not acting as a judicial officer but as an adjunct law enforcement officer. When he ordered an item seized because he believed it was obscene, he instructed the police officers to seize all "similar" items as well, leaving determination of what was "similar" to the officer's discretion. Indeed, he yielded to the State Police even the completion of the general provision of the warrant. Though it would not have validated the warrant in any event, the Town Justice admitted at the hearing to suppress evidence that he could not verify that the inventory prepared by the police and presented to him late that evening accurately reflected what he had ordered seized."

Lo-Ji Sales v. New York, 442 U.S. 319, 326-327 (1979)

49

". . . the local justice here undertook to telescope the processes of the application for a warrant, the issuance of the warrant, and its execution. It is difficult to discern when he was acting as a "neutral and detached" judicial officer and when he was one with the police and prosecutors in the executive seizure, and indeed even whether he thought he was conducting, *ex parte*, the "prompt" postseizure hearings on obscenity called for by *Heller*, *supra*, at 492. *Heller* does not permit the kind of activities revealed by this record."

Id. at 328.

50

U.S. v. Evans 629 F.Supp 1544, 1554 (D. Conn. 1986).

"Defendant challenges the neutrality of the magistrate because he suggested that the warrant application and warrant itself include items, one or more of which had already been found in the bomb search. However, that is not evidence of such involvement in the application for the search warrant as to disqualify the magistrate on grounds that he lacked the requisite neutrality. The limited conduct attributable to the magistrate in the course of the search warrant is not comparable to that in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 60 L. Ed. 2d 920, 99 S. Ct. 2319 (1979), where the Town Justice issued and signed an open-ended search warrant, participated in the search and seizure, and allowed the warrant to be completed based on the results of the search."

51

State v. Woods, 26 N.C. App. 584, 216 S.E.2d 492 (1975)

"On the evening of 14 August 1974 Magistrate Ralph Swain, a duly appointed and qualified magistrate in Dare County, was at the Dare County Courthouse in Manteo. At that time Officer J. C. Stuart of the Kill Devil Hills Police Department brought to the courthouse one Robert Ken Hansen, whom he had arrested on a drug-related charge. While Magistrate Swain was preparing the arrest warrant against Hansen, he overheard Hansen making a statement to Officer Stuart concerning a "cache of pills, a suitcase full, thousands of dollars worth," in the possession of defendant Woods. Magistrate Swain was acquainted with Hansen and knew that on a number of occasions Hansen had been an informer to the police in connection with drug investigations in Dare County. Magistrate Swain told Officer Stuart of the reliability of Hansen as an informer, and suggested that Stuart telephone Chief Bray of the Kill Devil Hills Police Department. Stuart did so, and both Stuart and Swain talked with Chief Bray on the phone. In these conversations Chief Bray confirmed that on a previous occasion Hansen had provided accurate information which resulted in an arrest and conviction. On the basis of this information, Officer Stuart then signed the affidavit upon which the search warrant was issued by Magistrate Swain."

State v. Woods, 26 N.C. App. 584, 585-586, 216 S.E.2d 492, 493 (1975)

52

"Certainly the issuing magistrate must be "neutral and detached," *Shadwick v. City of Tampa*, 407 U.S. 345, 32 L.Ed. 2d 783, 92 S.Ct. 2119 (1972), but there has been no showing in this case that Magistrate Swain at any time failed to occupy that status. Quite to the contrary, he performed his duties throughout in a correct and admirable manner. Certainly it is entirely consistent with a properly judicial and detached neutrality for the magistrate to inform the officer of the type of information which must be supplied to support a finding of probable cause. As the magistrate in this case testified, "[a]t the time when an officer comes for a search warrant, you have to furnish him with the knowledge of what information he needs." Nor was there anything improper in this case in the magistrate, because of information which he already possessed, suggesting to the officer that he contact the police chief in order to obtain further information."

Id. at 586, 216 S.E.2d at 494

53

State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888, modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Execution Of A Search Warrant Of A Building Pursuant to a Search Warrant Authorizing Search and Seizure of Intoxicating Liquors Possessed For The Purpose Of Sale. A Law Enforcement Officer Was Murdered During The Execution Of What Turned Our to Be a No-Knock Search Warrant

54

The Affidavit Contained Sufficient Facts to State Probable Couse for A Search for Gambling Equipment But Not Intoxication Liquors for the Purpose of Sale

The magistrate read the affidavit and "scanned over the search warrant to see if all the blanks were filled," but "did not read completely the search warrant itself." The magistrate asked Treadaway if he was "going out to round up some gamblers," inquired as to the last time Treadaway had been in touch with his confidential informant, and then signed the warrant without having read it. This occurred at 1:40 a. m. on 17 October 1970 after Treadaway had been in the magistrate's office a total of "two or three minutes." The magistrate knew that Treadaway was "right much in a hurry to get the raid under way." On leaving the magistrate's office Sergeant Treadaway took the affidavit and warrant, folded together but not attached to each other, out to the car and gave them to Officer McGraw, who put them "out of sight," and that was the last time Sergeant Treadaway saw the search warrant.

Id. at S. 190 S.E.2d at 893.

55

"The record before us makes manifest that the magistrate, by simply signing without reading the paper which the police officer placed before him, utterly failed to perform the important judicial function which it was his duty to perform as a neutral and detached magistrate of making his own independent determination from the affidavit submitted to him as to whether probable cause existed for issuance of the search warrant which he signed. Had he performed his duty, it is inconceivable that the mistake would have occurred. We deal here not with mere clerical error, but with the safeguarding of fundamental constitutional rights which belong to all of us, rights which, in the first instance, it was the magistrate's high duty to defend. He failed to perform that duty. As a result, the search warrant which he signed was not merely technically defective; it was totally invalid since the finding of probable cause which he purported to make was in no way supported by the affidavit or evidence before him."

Id at 10, 190 S.E.2d at 894.

56

PROBABLE CAUSE

Probable cause means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender.

State v. Campbell, 282 N.C. 125, 191 S.E.2d 752, (1972)

57

"The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief."

State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438, (1979).

"Probable cause is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved."

State v. Allen, 282 N.C. 503, 194 S.E.2d 9, (1973), *disapproved on other grounds, Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660, (1979).

"Probable cause is concerned with probabilities, the practical considerations of everyday life upon which reasonable and prudent men act. "

State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

58

"In *Arrington*, our Supreme Court adopted the "totality of circumstances" test set out in *Illinois v. Gates*, 462 U.S. 213, *reh'g denied*, 463 U.S. 1237 (1983), for determining the constitutionality of a magistrate's finding of probable cause. Under this test, the question is whether the evidence as a whole provides a substantial basis for concluding that probable cause exists. *State v. Williams*, 319 N.C. 73, 352 S.E. 2d 428 (1987). In applying the "totality of circumstances" test, 'great deference should be paid a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review.. *Arrington*, 311 N.C. at 638, 319 S.E. 2d at 258."

State v. Graham, 90 N.C. App. 564, 567, 369 S.E.2d 615, 617-618 (1988)

59

U.S. v. Ventresca, 380 U.S. 102, 108 (1965)

These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

60

"Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. Affidavits are normally drafted by nonlawyers in the midst and haste of a criminal investigation, and technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place in this area."

State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820, 1971 cert. denied, 279 N.C. 728, 184 S.E.2d 885, (1971); State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

"Because applications are normally submitted by police officers who do not have legal training, the language is to be construed in a common-sensical, nontechnical and realistic way."

State v. Windham, 57 N.C. App. 571, 291 S.E.2d 876 (1982).

61

Tie Goes to the Warrant

"Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

Ventresca, at 109.

"Each case must be decided on its own facts and reviewing courts are to pay deference to judicial determinations of probable cause. The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

State v. Jones, 299 N.C. 298, 261 S.E.2d 860, (1980).

62

THE PROCESS OF DETERMINING WHETHER THERE IS PROBABLE CAUSE IS NOT THE EQUIVALENT OF A TRIAL ON THE MERITS

63

PROBABLE CAUSE

CONCLUSORY ALLEGATIONS

64

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson* v. *United States*, *supra*, at 13-14.

United States v. Ventresca, 380 U.S. 102, 106, (1965)

65

State v. Campbell 282 NC 135, 191 S.E.2d 752 (1972)

WHOLE MESS OF ARREST WARRANTS

66

"Peter Michael Boulus, Special Agent; N.C. State Bureau of Investigation; being duly sworn and examined under oath, says under oath that he has probable cause to believe that Kenneth Campbell; M. K. Queensberry and David Bryan has on his premises certain property, to wit: illegally possessed drugs (narcotics, stimulants, depressants), which constitutes evidence of a crime, to wit: possession of illegal drugs . . . .

The property described above is located on the premises described as follows: a one story white frame dwelling .9 miles from the Coats city limits on Hwy. 55 west toward Angier; on the right side of the hwy. directly across from Ma's Drive In also known as Bill's Drive-in. The facts which establish probable cause for the issuance of a search warrant are as follows: (See attached Affidavit) . . . .

Affidavit

Affiant is holding arrest warrants charging Kenneth Campbell with sale of Narcotics on April 16, 1971 and possession of narcotics on April 16, 1971 and April 28, 1971.

Affiant is holding arrest warrants on M. D. Queensberry for sale of narcotics on April 16, 1971, April 28, 1971 and April 29, 1971. Also affiant has four arrest warrants charging Queensberry with four counts of possession of Narcotics.

Affiant is holding arrest warrants charging David Bryan with sale and possession of narcotic drugs on April 1, 1971.

All of the above subjects live in the house across from Ma's Drive-in on Hwy. 55. They all have sold narcotics to Special Agent J. M. Burns of the SBI and are all actively involved in drug sales to Campbell College students; this is known from personal knowledge of affiant, interviews with reliable confidential informants and local police officers.

The house is owned by Macia Walker and leased to Kenneth Campbell who also pays the utility bills."

67

Upon searching the home law enforcement found 289 LSD tablets

"Tested by the constitutional principles stated above, the affidavit in this case is fatally defective. It details no underlying facts and circumstances from which the issuing officer could find that probable cause existed *to search the premises described*. The affidavit implicates those premises *solely as a conclusion of the affiant*. Nowhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling. The inference the State seeks to draw from the contents of this affidavit -- that narcotic drugs are illegally possessed on the described premises -- does not reasonably arise from the facts alleged. Therefore, nothing in the foregoing affidavit affords a reasonable basis upon which the issuing magistrate could conclude that any illegal possession or sale of narcotic drugs had occurred, or was occurring, on the premises to be searched."

State v. Campbell, 282 N.C. 125, 131, 191 S.E.2d 752, 756-757 (1972)

68

State v. Edwards, 286 N.C. 162, 209 S.E.2d 758 (1974)

"Capt Stanle [sic] Moore Lenoir County Sheriff's Dept being duly sworn and examined under oath, says under oath that he has probable cause to believe that Haywood Edwards has on his premises and in his vehicle certain property, to wit: Non Tax Paid Whiskey, The Possession of which is a crime, to wit: Violation of Liquor laws Apr, [sic] 7, 1973 RT 2 Grifton.

The property described above is located On the Premises and in a 1965 Chevrolet described as follows: A red frame farm house located 8/10 of a mile west of NC 11 on rural unpaved road 1714 and a 1965 Chevrolet station wagon Lic #EZM771. The facts which establish probable cause for the issuance of a search warrant are as follows: A confidential and reliable informant who has given reliable information says that there is non tax paid whiskey at above location at this time.

s/ Stanley Moore, D. S.

Signature of Affiant"

State v. Edwards, 286 N.C. 162, 164-165, 209 S.E.2d 758, 760 (1974)

69

We conclude that in instant case the search warrant was invalid because the affiant did not inform the magistrate of *any* underlying circumstances from which the *informant* concluded that non-tax-paid whiskey was where he said that it was. Neither does the record disclose that the magistrate was furnished any evidence of probable cause other than that contained in the affidavit. Since there was not sufficient basis for a finding of probable cause to issue the search warrant, the evidence obtained as a result of its issuance was erroneously admitted at trial.

Edwards at 170, 209 S.E.2d at 763.

70

State v. Guffey, 31 N.C. App. 515, 229 S.E.2d 837 (1976)

Defendant was charged with possession of beer for sale: The search warrant stated:

"1. Members of the Rutherford Co. Sheriff's Dept. have received complaints that Lewis Guffey is selling liquor & beer from the above residence.

"2. Members of the Rutherford Co. Sheriff's Dept. have observed users of liquor and beer and known drunks come to and leave the residence after staying only a few minutes.

"3. Lt. Laughter and Chief Deputy L. W. Nichols have observed Lewis Guffey in past buy large quantities of liquor at S. C. liquor stores.

"4. On this date, Lt. Laughter observed Lewis Guffey buy a large quantity of liquor at a S. C. liquor store and place it in the above 1959 Ford and leave in a direction of travel toward his home."

71

In reversing the trial court, the Court of Appeals held:

"The affidavit in the instant case avers complaints from anonymous informants, and it contains no information which enables the magistrate to judge either the credibility of the informants, or the correctness of their conclusions. *Aguilar v. Texas*, 378 U.S. 108 (1964); *see also, State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

While precise references to specific time and dates certainly are not required, the affidavit in question is too imprecise as to *when* observations were made by Rutherford County law officers. See, *State v. English*, *supra*. Moreover, the purchase of liquor in South Carolina is not an illegal activity, and the affidavit does not state how frequently purchases were made, or make any showing that such activity was unusual or suspicious in any way. Incidentally, we note that only one-half of a half pint of liquor was found on the premises."

Guffey at 517, 229 S.E.2d at 839.

72

State v. Lenoir, 59 N.C. App. 857, 816 S.E.2d 857 (2018)

"On July 29, 2013 I went to 652 Byers Road Lot 10 Forest City, N.C. for a knock and talk. Once at the residence I spoke with the tenant at the residence David Lenoir. Lenoir stated he and his brother Jesse Lenoir both lived there. David consented to a search of the residence and stated no one was inside the residence. In a back bedroom was Dawn Bradley sleeping and I could see a smoke pipe used for methamphetamine in plain view. The bedroom she was in belonged to Jessie [sic] Lenoir. Jessie [sic] was unable to be reached. Dawn would not admit to the smoke pipe being hers but she did stated [sic] Jessie [sic] and Rebecca Simmons stayed in that bedroom as well."

73

"In the present case, Sergeant Murray's affidavit simply stated that he saw 'a smoke pipe used for methamphetamine' in a bedroom in Defendant's house. It made no mention at all of Sergeant Murray's training and experience; nor did it present any information explaining the basis for his belief that the pipe was being used to smoke methamphetamine as opposed to tobacco. In addition, the affidavit did not explain how Sergeant Murray was qualified to distinguish between a pipe being used for lawful — as opposed to unlawful — purposes. Indeed, the affidavit did not even purport to describe in any detail the appearance of the pipe or contain any indication as to whether it appeared to have recently been used. It further lacked any indication that information had been received by law enforcement officers connecting Defendant or his home to drugs.

Here, given the absence of additional information in Sergeant Murray's affidavit to support his bare assertion that the pipe was 'used for methamphetamine,' we hold that the affidavit was insufficient to establish probable cause for the issuance of the search warrant. Accordingly, the trial court erred in denying Defendant's motion to suppress."

Lenoir, at 863-64, 816 S.E.2d at 885-86.

74

Each application for a search warrant must be made in writing upon oath or affirmation. All applications must contain:

(1) The name and title of the applicant; and

(2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and

(3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and

(4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

§ 15A-244. Contents of the application for a search warrant.

75

State v. Bright, 301 N.C. 243, 271 S.E.2d 243 (1980)

"That on 4/7/79 Melissa T. Smith was kidnapped from the Major League Bowling Lanes. This incident was reported to the Gastonia City Police at approximately 8:48 p.m. Around 11 p.m. on this same night, 4/7/79, Melissa T. Smith was seen walking in the vicinity of the Major League Lanes by her parents.

Melissa was taken to the Gaston Memorial Hospital and examined. The examination revealed that Melissa T. Smith had been sexually assaulted. While at the hospital, Melissa Smith described the person that took her from the Major League Lanes as having red curly hair, white, about 6 ft. tall and slender. She described the car in which she was riding as blue with two humps on the back. She also states the car had two doors, big, and a black interior. The interior, she states was torn up. Victim also states she saw brown beer bottles in the car.

A 1967 Chevy blue/green in color was observed at 2:30 a.m. on 4/8/79 at the Cardinal Motel, Lowell, N.C. by Sgt. Carter and Officer Parham. The car is a 2 door 1967 blue/green Chevy with a long trunk which rises up on each side. On closer observation the interior of the car was observed. The car has a black interior and the front seat is torn up. The car is registered to Ricky Allen Bright according to the PIN network. Ricky Allen Bright is registered in room 42 of the Cardinal Motel in Lowell, N.C."

State v. Bright, 301 N.C. 243, 247-248, 271 S.E.2d 368, 372 (1980).

76

Based upon the information described in the application/affidavit law enforcement obtained a search warrant to search the motel room.

"The affidavit upon which the warrant to search defendant's motel room was issued contains facts from which the magistrate could form a reasonable belief that the charged crime had been committed by a slender white man about six feet tall who had red curly hair. The affidavit would also support a reasonable belief that the 1967 Chevrolet registered in defendant's name and parked in front of the Cardinal Motel in Lowell, North Carolina, was the vehicle in which the victim was assaulted. However, there was only a conclusory statement that defendant was registered in the motel. There was no information or circumstances set forth in the affidavit or which was recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official in any way indicating that the defendant was the person described in the affidavit. Therefore, it cannot be inferred from the affidavit that defendant was the person who committed the charged crime. It follows that there was nothing to support a belief that the articles sought would be in his motel room or would aid in the apprehension or conviction of the offender. We, therefore, hold that the affidavit upon which the search warrant for defendant's motel room was issued was fatally defective."

Bright, 301 N.C. at 249, 271 S.E.2d at 372-373.

77

State v. Goforth, 65 N.C. App. 302, 309 S.E.2d 488 (1983)

Search of a Residence

78

"Since this investigation was initiated Affiant has conducted surveillance on several occassions [sic] at the Executive Club, Hwy. 70, Swannanoa, N.C., a residence located at 335-A Temple Road, Black Mountain, N.C., and a residence located off Bee Tree Lake Road in Buncombe County. During this period of time Affiant has personally observed meetings take place between Harris and Goforth, Roskoff [sic] and Goforth, Goforth and Reynolds, and further that on Thursday, September 10, 1981 Affiant observed Danny Roach and "Slim" Jordan at the residence located at 335-A Temple Road, Black Mountain, North Carolina. Subsequently on 9/10/81 this affiant interviewed a confidential source previously mentioned in this affidavit as reliable. The source stated that on this date subjects Danny Roach and Jordan Robinson were traveling from Rutherford Co. to Black Mtn. to purchase marihuana. [sic] As a result Agents conducting surveillance observed the above subject (Roach and Robinson) at the residence described in this warrant operating a Ford, bearing N.C. plates. Agents observed the vehicle depart the residence and proceed east on Hwy. 70. The subjects observed Agents conducting surveillance and turned around and went back to the residence (after stopping at the ABC store). Shortly Robinson and Roach departed again operating the same vehicle and were stopped by Agents. A search of the vehicle proved neg. with the exception of a [sic] odor of marihuana [sic] present in the trunk of the vehicle. . . .

Also Robinson had approx. five to six thousand dollars in US currency on the person and the name and address of Paul Depoo. As a result of the information in this affidavit this affiant request that this warrant be issued and all papers, documents, and monies be seized and held subject to court order as evidence as a conspiracy to traffic in marihuana [sic]."

State v. Goforth, 65 N.C.App. 302, 305, 309 S.E.2d 488, 491 (1983).

79

. . . this affidavit failed to implicate the premises to be searched. In order to show probable cause, an affidavit must establish reasonable cause to believe that the proposed search for evidence of the designated offense will "reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender." *State v. Campbell*, 282 N.C. 125, 129, 191 S.E. 2d 752, 755 (1972). Probable cause cannot be shown by an affidavit which is purely conclusory and does not state underlying circumstances upon which the affiant's belief of probable cause is founded; there must be facts or circumstances in the affidavit which implicate the premises to be searched. *State v. Rook*, 304 N.C. 201, 221, 283 S.E. 2d 732, 744-745 (1981), *cert. denied*, 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed. 2d 155 (1982).

In order for an affidavit to establish probable cause sufficient to justify issuance of a search warrant, a recital of underlying facts or circumstances is essential. *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965). The only statements in the affidavit that concerned 335-A Temple Road were: (1) the conclusory statement that 335-A Temple Road was being used "for the storage of drugs and the furtherance of their illicit drug operation," and (2) the fact that two individuals that a confidential informant said were going "to Black Mtn. to purchase marihuana" [sic] later appeared at 335-A Temple Road. We hold that these statements do not recite facts or circumstances sufficient to implicate the premises at 335-A Temple Road as a place where drugs were being stored or where drug-related activities were taking place. Thus, the search warrant was invalid, and the fruits of the search were not competent evidence. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961); *State v. Campbell*, *supra*; G.S. 15A-974.

Goforth at 307-308, 309 S.E.2d at 493.

80

State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981)

"On 13 September 1977, Mary Jo Nancy Coats [sic], W/F, 14, and Barbara Davenport, W/F, 16, were ambushed in some woods near their home and Victim [sic] Coats [sic] was raped and stabbed to death, and Victim Davenport was stabbed and cut severely. A light blue van was seen parked at the crime scene. It was observed that a tire print, believed to be from the right rear wheel of the vehicle, was in the mud at the crime scene. A cast and photographs was [sic] made of this print. On 20 September 1977, Stephen Karl Silhan was arrested with a warrant charging him with the crime. At the time of his arrest, the defendant was operating a 1976 Chevrolet Van, blue in color. The affiant prays that a search warrant be issued so that the right rear tire of the van can be seized and compared by experts with the cast and photograph made at the crime scene."

State v. Silhan, 302 N.C. 223, 236, 275 S.E.2d 450, 462 (1981)

81

Defendant claimed the affidavit failed sufficiently to allege the underlying facts and circumstances upon which a finding of probable cause could be based. The Court found this to be untenable.

In the present case the affidavit states not only that defendant was operating a blue 1976 Chevrolet van at the time of his arrest but also that a van of the same color was observed at the crime scene. Thus the van was linked not only to defendant, who according to the affidavit had been arrested presumably on probable cause, but also to criminal activity which was then under investigation. These facts taken together are sufficient to enable the magistrate to make a determination that probable cause prerequisite to the issuance of the search warrant existed.

State v. Silhan, 302 N.C. 223, 237, 275 S.E.2d 450, 463 (1981)

82

State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980)

"[T]hat as a result of an investigation being conducted by the Forsyth County Sheriff's Department into a fire occurring at Clemmons Florist and Gift Shop on August 28, 1978 in Forsyth County, Clemmons, North Carolina, the said District Attorney has reason to believe that the examination of certain records in the possession of Charles Steven Sheetz and one Clemmons Florist Gift [sic] Shop and the entire business and working records of the Clemmons Florist and Gift Shop would be in the best interest of the enforcement of the law and the administration of justice in Forsyth County . . ."

Id. at 918

"The allegation that agents have conducted an investigation which has disclosed evidence of irregularities which, if supported by evidence and found to be true, would constitute serious violations of the law on the part of the defendant, without the disclosure of facts from which the magistrate could ascertain the existence of irregularities that would constitute serious violations of the law, does not meet the constitutional standard for issuance of a search warrant." *Id.* at 919

83

File No.

SEARCH WARRANT

IN THE MATTER OF

Computer Equipment Seized on August 9, 2024
Think Station PC (S/N: 8355S00X2436
P1WH09C00KL)
Toshiba External Hard drive (S/N: YZE6P043CTXR6)
Be Quiet PC (S/N: W233XT390047136)
Mac air book (S/N: FVFDVM1PQ6L4)

Name Of Applicant
HSI TFO Scott Finch

Name Of Additional Affiant(s)

RETURN OF SERVICE

I certify that this Search Warrant was received and executed as follows:

Date Received | Time Received ☐ AM ☐ PM

Date Executed | Time Executed ☐ AM ☐ PM

☐ I made a search of _____

_____

_____ as commanded.

☐ I seized the items listed on the attached inventory.
☐ I did not seize any items.
☐ This Warrant WAS NOT executed within forty-eight (48) hours of the date and time of issuance and I hereby return it not executed.

Name Of Officer Making Return (type or print)

Signature Of Officer Making Return

Department Or Agency Of Officer | Incident Number

STATE OF NORTH CAROLINA

WAKE County

In The General Court Of Justice
District/Superior Court Division

To any officer with authority and jurisdiction to conduct the search authorized by this Search Warrant:

I, the undersigned, find that there is probable cause to believe that the property and person described in the application on the reverse side and related to the commission of a crime is located as described in the application.

You are commanded to search the premises, vehicle, person and other place or item described in the application for the property and person in question. If the property and/or person are found, make the seizure and keep the property subject to Court Order and process the person according to law.

You are directed to execute this Search Warrant within forty-eight (48) hours from the time indicated on this Warrant and make due return to the Clerk of the Issuing Court.

This Search Warrant is issued upon information furnished under oath or affirmation by the person(s) shown.

Date Issued | Time Issued ☐ AM ☐ PM | Name (type or print) | Signature

☐ Deputy CSC ☐ Assistant CSC ☐ CSC ☐ Magistrate ☐ District Ct. Judge ☒ Superior Ct. Judge

NOTE: *When issuing a search warrant, the issuing official must retain a copy of the warrant and warrant application and must promptly file them with the clerk. G.S. 15A-245(b).*

This Search Warrant was delivered to me on the date and at the time shown below when the Office of the Clerk of Superior Court is closed for the transaction of business. By signing below, I certify that I will deliver this Search Warrant to the Office of the Clerk of Superior Court as soon as possible on the Clerk's next business day.

Date | Time ☐ AM ☐ PM | Name Of Magistrate (type or print) | Signature Of Magistrate

This Search Warrant was returned to the undersigned clerk on the date and time shown below.

Date | Time ☐ AM ☐ PM | Name Of Clerk (type or print) | Signature Of Clerk | ☐ Dep. CSC ☐ Asst. CSC ☐ CSC

Original - File Copy - For Search of a Person, to Person from Whom Items Taken
Copy - For Search of Vehicle/Premises, to Owner or Person in Apparent Control; if No Such Person Present, Leave Copy Affixed Thereon

AOC-CR-119, Rev. 6/19

(Over)

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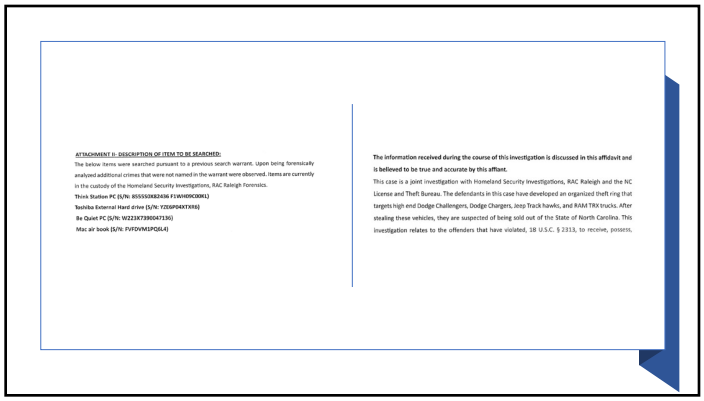
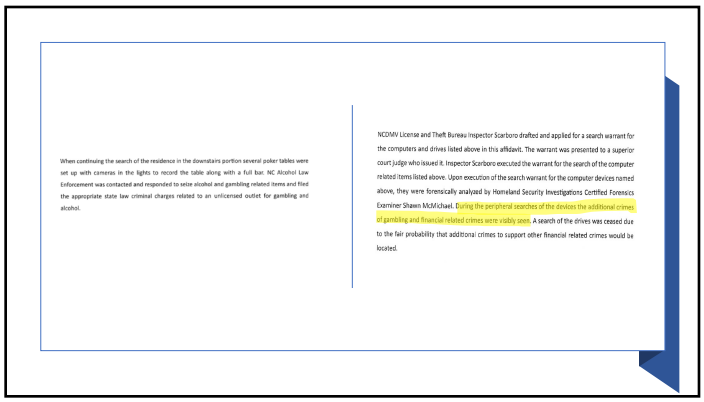


85



86

PROBABLE CAUSE

STALENESS

87

"Before a search warrant may be issued, proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time. 68 Am. Jur. 2d *Searches and Seizures* § 70 (1973). The general rule is that no more than a 'reasonable' time may have elapsed. The test for 'staleness' of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. *Sgro v. United States*, 287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138 (1932); *State v. King*, 44 N.C. App. 31, 259 S.E. 2d 919 (1979). Common sense must be used in determining the degree of evaporation of probable cause. *State v. Louchheim*, 296 N.C. 314, 250 S.E. 2d 630 (1979), *cert. denied*, 444 U.S. 836 (1980). 'The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock . . . .' *Andresen v. Maryland*, 24 Md. App. 128, 172, 331 A. 2d 78, 106, *cert. denied*, 274 Md. 725 (1975), *aff'd*, 427 U.S. 463, 49 L.Ed. 2d 627, 96 S.Ct. 2737 (1976)."

State v. Lindsey, 58 N.C. App. 564, 565-566, 293 S.E.2d 833, 834 (1982)

88

"It is beyond dispute that probable cause must exist at the time the warrant issues. "[I]t 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." *Sgro v. United States*, 287 U.S. 206, 210, 77 L.Ed. 260, 263, 53 S.Ct. 138, 140 (1932)."

State v. Louchheim, 296 NC 314, 322, 250 S.E.2d 630, 635 (1979)

89

"Common sense is the ultimate criterion in determining the degree of evaporation of probable cause. *United States v. Brinklow*, 560 F. 2d 1003 (10th Cir. 1977), *cert. denied*, 434 U.S. 1047 (197); *State v. Louchheim, supra.* 'The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock . . . .' *Andresen v. State*, 24 Md. App. 128, 331 A. 2d 78, *cert. denied*, 274 Md. 725 (1975), *aff'd*, 427 U.S. 463 (1976). 'The significance of the length of time between the point probable cause arose and when the warrant issued depends largely upon the property's nature, and should be contemplated in view of the practical consideration of everyday life.' *United States v. Brinklow*, supra (citations omitted)."

State v. Jones, 299 N.C. 298, 305, 261 S.E.2d 860, 865, (1980)

90

State v. Louchheim, 296 NC 314, 322, 250 S.E.2d 630, 635 (1979)

"The confidential source of information disclosed that CCI maintained two different sets of invoices detailing the production costs purported to be incurred as a result of the State advertising contract. . . . The informant further related that records concerning the actual and true production costs incurred by Ad-Com International, Inc., were in the possession of Jerome M. Louchheim at the Raleigh offices of Louchheim, Eng and People, Inc. (Formerly CCI). . . . The informant further related based on personal knowledge and observation of the said records and invoices, that said records and invoices were never removed from the offices of Louchheim, Eng and People, Inc. and Jerome H. Louchheim, but were kept in those offices in compliance with the State advertising contract previously entered into with the State of North Carolina. The informant's last personal knowledge of and observation of the said records and invoices was during the month of March of 1975, at which time the said records and invoices were located under lock in the Raleigh offices of Louchheim, Eng and People, Inc. and Jerome H. Louchheim."

Disregarding the allegedly false information, the affidavit also stated that Judith Justice confirms the existence of two sets of Ad Com invoices based on her own observation during her employment at CCI.

The documents that were the subject of the affidavit had last been seen in the corporate office some 14 months earlier

91

"Although it was fourteen months since either one had personally observed the invoices, that fact is not conclusive.

The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc." *Andresen v. Maryland*, 24 Md. App. 128, 172, 331 A. 2d 78, 106 (1975), *cert. denied*, 274 Md. 725 (1975), *aff'd*, 427 U.S. 463, 49 L.Ed. 2d 627, 96 S.Ct. 2737 (1976). *See also United States v. Steeves*, 525 F. 2d 33 (8th Cir. 1975)."

Louchheim at 323, 250 S.E.2d at 636.

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"In this case, the alleged crime is a complex one taking place over a number of years. The place to be searched is an ongoing business. The affidavit further alleged that the invoices "were never removed from [defendant's] offices . . . but were kept in those offices in compliance with the State advertising contract."

Most important, the items to be seized included "corporate minutes, bank statements and checks, sales invoices and journals, ledgers, correspondence, contracts, . . . and other books and documents kept in the course of business by Louchheim, Eng and People and Capital Communications, Incorporated, of N.C. during all periods which said corporations were under contract to perform any advertising services [for] the State of North Carolina." Thus, the supposedly incompatible invoices that had been seen fourteen months earlier were not the only items to be seized during the search. All these materials could constitute evidence of defendant's alleged crime of obtaining property from the State by false pretense pursuant to the advertising contract.

We think there was a "substantial basis" for the magistrate to conclude that these business records were "probably" located at defendant's business offices on 25 May 1976 when the search warrant issued. "No more is required." *Rugendorf v. United States*, 376 U.S. 528, 533, 11 L.Ed. 2d 887, 891, 84 S.Ct. 825, 828 (1964). *See also Andresen v. Maryland*, 427 U.S. 463, 49 L.Ed. 2d 627, 96 S.Ct. 2737 (1976)."

State v. Louchheim, 296 N.C. 314, 323-324, 250 S.E.2d 630, 636 (1979)

93

"The search warrant was issued on 7 January 1980 upon the affidavit of S.B.I. Officer Ned Whitmire. Whitmire stated that a confidential informant told Whitmire that he knew defendant to habitually keep drugs on his person, had seen drugs at defendant's home, and had seen defendant give drugs to his own children. This information was received over a year prior to issuance of the warrant. However, the information relied upon to establish probable cause came not only from the foregoing informant, but also from Ed Woods, an undercover agent of the Polk County Sheriff's Department. Approximately three weeks prior to issuance of the warrant, defendant and another man sold Woods over ten pounds of marijuana and 377 doses of phenobarbital. A month prior to this, defendant had attempted to sell two pounds of marijuana to Woods. Woods had also purchased drugs in defendant's presence at a service station run by defendant. The agent had seen defendant at a friend's apartment on several occasions when drugs were being sold."

As a general rule, an interval of two or more months between the alleged criminal activity and the affidavit has been held to be such an unreasonably long delay as to vitiate the search warrant. Annot., 100 A.L.R. 2d 525 (1965).

State v. Lindsay, 58 N.C. App. 564, 293 S.E.2d 833 (1982)

94

Although the affidavit on which the search warrant was based also presented more recent information concerning defendant's drug activities, the year-old information was the only evidence of residential possession by defendant. The more recent information provided by undercover Agent Woods concerned defendant's operation of a service station where drug activities occurred and his presence at a friend's apartment where drugs were sold. The fact that defendant had this more recent involvement with drugs establishes no reasonable inference that he continued to possess drugs in his home at the time the search warrant was issued. The affidavit merely implicates a probability of the continued presence of drugs in defendant's home. Nowhere in the recent information from Agent Woods is there any statement that drugs were possessed or sold in or about the dwelling to be searched.

State v. Lindsey, 58 N.C. App. 564, 567, 293 S.E.2d 833, 835 (1982)

95

State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980)

"In applying for the search warrant SBI Agent Snead swore, in his affidavit to establish probable cause for issuance, that the body of Glenn Gibson had been found in a ditch near milepost 187 beside I-95 in Dillon County, South Carolina; that defendant James Thomas Jones and David Carl Odom had been arrested for the murder of Mr. Gibson; that David Carl Odom had given oral and written statements detailing participation in the murder by him and defendant; that Odom had accompanied officers to the crime scene on the banks of the Cape Fear River where the murder weapon had been recovered with other items; that Odom had shown officers the area behind the victim's residence where the body was kept for a week before it was taken to South Carolina; that Odom had stated that the hatchet used in the killing along with the pipe, already recovered, was the property of defendant and that defendant kept the hatchet and welder's gloves either in the garage workshop or in the house of his parents located at Route 1, Box 301, Shannon, North Carolina, telephone 875-2510. It further appears that Odom and defendant had jointly participated in the murder of Glenn Gibson and had moved the body twice. Odom knew where defendant's parents lived and knew there was a workshop behind their house which was used by defendant."

State v. Jones, 299 N.C. 298, 304, 261 S.E.2d 860, 864 (1980)

96

Defendant contends that the information contained in the affidavit furnished the magistrate suffers from staleness. He argues that five months elapsed between the time Odom last saw defendant's hatchet and welder's gloves and the date Odom told officers of the whereabouts of the hatchet. The passage of such time, it is urged, dissipates probable cause to believe that the materials sought were still located at the place to be searched.

The items sought by the search warrant -- a hatchet and welder's gloves -- were not particularly incriminating in themselves and were of enduring utility to defendant. Moreover, the affidavit indicates that defendant normally kept such items either in his parents' home, or in a garage workshop behind his parents' home. A practical assessment of this information would lead a reasonably prudent magistrate to conclude that the hatchet and welder's gloves were "probably" located in the home or on the premises of defendant's parents.

State v. Jones, 299 N.C. 298, 305, 261 S.E.2d 860, 865 (1980)

97

State v. Witherspoon, 110 N.C. App. 413, 429 S.E.2d 783 (1993)

Marijuana Grower

98

"We . . . have received information from Officer D. M. Sikes who has received information from a concerned citizen that Charles Nathan Witherspoon, Jr. is growing marijuana at 3602 Carlyle Drive. This citizen has been inside this address within the last 30 days and have observed approximately one hundred marijuana plants growing under the crawl-space of this house at 3602 Carlyle Drive using a light system with automatic timers. This concerned citizen advised they [sic] have known Charles Nathan Witherspoon, Jr. for more than 30 days and during this time period has spoken with Charles Nathan Witherspoon, Jr. on numerous occasions about his growing these marijuana plants. This concerned citizen has used marijuana and has observed it growing in the past. This concerned citizen lives and works in the Charlotte area and has nothing to gain by giving this information. Officer D. M. Sikes has known this concerned citizen for more than one year and knows them [sic] to be truthful. This concerned citizen wishes to remain confidential and is in fear of reprisals and bodily harm.

The concerned citizen also stated that Charles Nathan Witherspoon, Jr., has been arrested for DWI, drives a light blue Ford LTD and parks it at his residence at 3602 Carlyle Drive. Through independent investigation, a criminal history shows a prior arrest for DWI. The affiants have observed a light blue Ford LTD, North Carolina registration CSA-8167 parked in the driveway of 3602 Carlyle Drive. The vehicle is registered to BMW Realty. Prior arrest shows this is Charles Nathan Witherspoon, Jr.'s place of employment. Duke Power records show that Charles Nathan Witherspoon, Jr. has been paying the power bill for 3602 Carlyle Drive continuously for the last 6 months.

Based on these affiants[']' training and experience as Charlotte Police Officers and Vice Investigators, the information given by the concerned citizen shows a continuous growing and cultivation process of marijuana plants. This is consistent with these affiants[']' experience involving growing and cultivation of marijuana plants . . . ."

99

[t]he test for "staleness" of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. *Sgro v. United States*, 287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138 (1932); *State v. King*, 44 N.C. App. 31, 259 S.E.2d 919 (1979). Common sense must be used in determining the degree of evaporation of probable cause. *State v. Louchheim*, 296 N.C. 314, 250 S.E.2d 630 (1979), *cert. denied*, 444 U.S. 836 (1980). "The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock . . . ." *Andresen v. Maryland*, 24 Md. App. 128, 172, 331 A.2d 78, 106, *cert. denied* , 274 Md. 725 (1975), aff'd, 427 U.S. 463, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976).

State v. Witherspoon, 110 N.C. App. 413, 419, 429 S.E.2d 783, 786, (1993).

100

If the marijuana was being grown for defendant's personal consumption, it is unlikely that he would consume such a large quantity within 30 days. If the marijuana was being grown in defendant's home for purposes of sale, then the informant's statements indicate that defendant was engaged in the ongoing criminal activity of selling marijuana.

The presence of a lighting system and timers, objects requiring installation and not subject to ready mobility, the magistrate could reasonably infer that the evidence would likely remain in defendant's home 30 days later.

One may properly infer that equipment acquired to accomplish the crime and records of the criminal activity will be kept for some period of time. When the evidence sought is of an ongoing criminal business of a necessarily long-term nature, such as marijuana growing, rather than that of a completed act, greater lapses of time are permitted if the evidence in the affidavit shows the probable existence of the activity at an earlier time.

The informant's observation (within 30 days) of the *cultivation* of marijuana plants, the growth cycle of which lasts approximately 3 to 4 months according to the testimony presented at the suppression hearing.

101

State v. Lindsay, 58 N.C. App 564, 293 S.E.2d 833 (1982)

Search of the Defendant's Home for Drugs

102

"The search warrant was issued on 7 January 1980 upon the affidavit of S.B.I. Officer Ned Whitmire. Whitmire stated that a confidential informant told Whitmire that he knew defendant to habitually keep drugs on his person, had seen drugs at defendant's home, and had seen defendant give drugs to his own children. This information was received over a year prior to issuance of the warrant. However, the information relied upon to establish probable cause came not only from the foregoing informant, but also from Ed Woods, an undercover agent of the Polk County Sheriff's Department. Approximately three weeks prior to issuance of the warrant, defendant and another man sold Woods over ten pounds of marijuana and 377 doses of phenobarbital. A month prior to this, defendant had attempted to sell two pounds of marijuana to Woods. Woods had also purchased drugs in defendant's presence at a service station run by defendant. The agent had seen defendant at a friend's apartment on several occasions when drugs were being sold."

State v. Lindsey, 58 N.C. App. 564, 565, 293 S.E.2d 833, 834 (1982)

103

As a general rule, an interval of two or more months between the alleged criminal activity and the affidavit has been held to be such an unreasonably long delay as to vitiate the search warrant. Annot., 100 A.L.R. 2d 525 (1965).

The reasoning of the *Louchheim* and *Jones* decisions is inapplicable, however, to the facts of the case before us. Unlike the foregoing cases, the subject of this search warrant was not an item expected to be kept for extended periods of time or designed for long-term use. Rather, the item sought to be seized was marijuana, a substance which can be easily concealed and moved about and which is likely to be disposed of or used. We therefore find that the year-old information was too stale to establish probable cause to search defendant's residence.

Although the affidavit on which the search warrant was based also presented more recent information concerning defendant's drug activities, the year-old information was the only evidence of residential possession by defendant. The more recent information provided by undercover Agent Woods concerned defendant's operation of a service station where drug activities occurred and his presence at a friend's apartment where drugs were sold. The fact that defendant had this more recent involvement with drugs establishes no reasonable inference that he continued to possess drugs in his home at the time the search warrant was issued. The affidavit merely implicates a probability of the continued presence of drugs in defendant's home. Nowhere in the recent information from Agent Woods is there any statement that drugs were possessed or sold in or about the dwelling to be searched.

Lindsey, at 567, 293 S.E.2d at 835

104

State v. Pickard, 178 N.C. App. 330, 631 S.E.2d 203 (2006)

Search warrant obtained on Sept 1 2003, to search Defendant's residence for any computers, computer equipment and accessories, any cassette videos or DVDs, video cameras, digital cameras, film cameras and accessories, and photographs or printed materials which could be consistent with the exploitation of a minor.

105

7 year old child - Defendant (1) had rubbed his penis on top of his underwear on approximately six or seven occasions. (2) would place him on the bed and lay him on his back and rub his genital area; (3) Defendant had done the same thing to his friend, a six-year-old male, approximately four times.

6 year old child - had been in Defendant's home on several occasions and that Defendant had touched him. The six-year-old male remembered that Defendant would lie in bed with him and other children, all in their underwear, and watch television.

3 year old child - Defendant had taken lots pictures of her "in a costume that he had at his house." and he had lots of pictures and videos and kept them under his bed "so no one can see them."

15 year old – Defendant penetrated her vagina several occasions; videotaped and photographed her nude and sent images to people over the internet. Incidents took place two years prior. Defendant had videos, photographs, and internet pictures of naked children in multiple places on property. Cameras on computers in bedroom and living room. She stopped going to Defendant's home in January 2003.

Eight-year-old male - Defendant rubbing his hand between child's belly button and his private area. Defendant's camera was on a stand and when he took pictures they would appear on the computer screen.

The information provided by the fifteen-year-old female was eighteen to nineteen months old and other depictions of sexual conduct with minors did not have specific time references.

106

When evidence of previous criminal activity is advanced to support a finding of probable cause, a further examination must be made to determine if the evidence of the prior activity is stale. *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 358 (1990). "[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. The continuity of the offense may be the most important factor in determining whether the probable cause is valid or stale." *Id.* (internal citations omitted).

North Carolina courts have repeatedly held that "young children cannot be expected to be exact regarding times and dates[.]" *State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984). Thus, although the fifteen-year-old and the other minors did not provide specific dates, their allegations of inappropriate sexual touching by Defendant allowed the magistrate to reasonably infer that Defendant's criminal activity was protracted and continuing in nature. *See McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358.

Furthermore, common sense is the ultimate criterion in determining the degree of evaporation of probable cause. *State v. Jones*, 299 N.C. 298, 305, 261 S.E.2d 860, 865 (1980). "The significance of the length of time between the point probable cause arose and when the warrant issued depends largely upon the property's nature, and should be contemplated in view of the practical consideration of everyday life." *Id.* (citation omitted). Other variables to consider when determining staleness are the items to be seized and the character of the crime. *State v. Witherspoon*, 110 N.C. App. 413, 419, 429 S.E.2d 783, 786 (1993).

State v. Pickard, 178 N.C. App. 330, 335-336, 631 S.E.2d 203, 207-208 (2006)

107

The items sought by the search warrant - computers, computer equipment and accessories, cassette videos or DVDs, video cameras, digital cameras, film cameras and accessories-were not particularly incriminating in themselves and were of enduring utility to Defendant. *See Jones*, 299 N.C. at 305, 261 S.E.2d at 865 (five months elapsed between the time the witness saw the defendant's hatchet and gloves and when he told police; however, since the items were not incriminating in themselves and had utility to the defendant a reasonably prudent magistrate could have concluded that the items were still in the defendant's home). The warrant also sought photographs or printed materials which could be consistent with the exploitation of a minor. Photographs are made for the purpose of preserving an image and to be kept. *See People v. Russo*, 439 Mich. 584, 601, 487 N.W.2d 698, 705 (1992) ("[P]hotographs guarantee that there will always be an image of the child at the age of sexual preference because the photograph preserves the child's youth forever."). There would be no reason to conclude that Defendant would have felt a necessity to dispose of such items. Indeed, a practical assessment of this information would lead a reasonably prudent magistrate to conclude that the computers, cameras, accessories, and photographs were probably located in Defendant's home. *See, e.g. State v. Kirsch*, 139 N.H. 647, 662 A.2d 937 (1995) (probable cause not stale where the defendant's most recent criminal activity and contact with the victims occurred six years prior to issuance of the warrant where the search warrant sought pornographic movies and nude photographs of the minor victims).

108

State v. Daye, 253 N.C. App.408, 798 S.E.2d 817 (2017)(unpublished)

Search of Defendant's Residence for Drugs

112

"During the past two months Statesville Police Narcotic Investigators have been investigating suspicious activity at [the residence]. Investigators have observed high vehicle traffic coming to and from the residence. You affiant [Investigator Killian] known this type of behavior is consistent with the sale of illegal narcotics.

Your affiant [Investigator Killian] received information about marijuana being at [the residence]. This information has been provided by a confidential, reliable informant, for purposes of this search warrant affidavit, known as "Keith". "Keith" has worked for the Statesville Narcotics Division for approximately 2 years. During the past 2 years, "Keith" has helped investigators with over 53 drug related cases. At the conclusion of these investigations, suspects were charged with Possession with intent to sell/deliver a controlled substance. "Keith" has assisted Investigators with numerous controlled purchases in which search warrants were obtained and executed at the conclusion of the investigation. Marijuana was seized as a result of the search warrants. "Keith" is reliable and has proven so through assisting investigators in seizing illegal narcotics in the Statesville area, specifically marijuana. On several different occasions "Keith" has observed marijuana coming from [the residence].

In the past your affiant [Investigator Killian] received information from confidential, reliable informant about [Defendant] selling marijuana at different locations in the Statesville area. The informant knows [Defendant] resides at [the residence].

Your affiant [Investigator Killian] entered [the residence] into Cjleads, which is an investigative tool utilized by law enforcement. The address shows [Defendant] utilizing this address as a current place of residency. . . .

Your affiant [Investigator Killian] utilized Cjleads to look up [Defendant]. [Defendant] has a past violent criminal and drug history."

State v. Jabari Raheim Daye, 253 N.C. App. 408, 798 S.E.2d 817 (2017)

113

When evaluating whether information proffered in support of a search warrant established probable cause, this Court has cautioned that the information may not be "stale:" The concern regarding the possible "staleness" of information in an affidavit accompanying a search warrant application arises from the requirement that proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time. The general rule is that no more than a reasonable time may have elapsed. The test for staleness of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. Common sense must be used in determining the degree of evaporation of probable cause. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock.

Brown, 248 N.C. App. at 76, 787 S.E.2d at 85 (quoting *State v. Lindsey*, **58 N.C. App. 564, 565-66**, 293 S.E.2d 833, 834 (1982)).

114

"In the present case, as in *Brown* and *Newcomb*, we are unable to determine whether the information provided by either confidential informant described in the affidavit was stale. In the affidavit, Investigator Killian stated that "[o]n several different occasions" a confidential informant identified as "Keith" "observed marijuana coming from [the residence]." Similarly, Investigator Killian stated in the affidavit that "in the past" he had "received information from a confidential, reliable informant about [Defendant] selling marijuana at different locations in the Statesville area" and that the "informant knows [Defendant] resides at [the residence]." In both instances, the affidavit does not state when the confidential informants observed the activity described in the affidavit; rather, the affidavit only revealed that the activity was observed "[o]n several different occasions" and "[i]n the past," respectively. The affidavit gave no details from which one could conclude that the informants' knowledge was current. We are therefore unable to determine whether the information originating from either confidential informant was collected within a "reasonable time" from the issuance of the search warrant so as to "justify a finding of probable cause." *Brown*, 248 N.C. App. at 76, 787 S.E.2d at 85 (citation omitted)." State v. Jabari Rahein, Dave, 2017 N.C. App. LEXIS 327, *13-14, 253 N.C. App. 408, 798 S.E.2d 817

115

VOID IF NOT EXECUTED WITHIN 48 hours

§ 15A-248. Time of execution of a search warrant.

A search warrant must be executed within 48 hours from the time of issuance. Any warrant not executed within that time limit is void and must be marked "not executed" and returned without unnecessary delay to the clerk of the issuing court.

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N.C. Gen. Stat. Ch. 15A, Subch. II, Art. 11

Official Commentary

Section 15A-248 provides that search warrants must be executed within 48 hours after issuance and that warrants not executed within this time must be returned to the issuing court. Formerly, North Carolina law provided no time limit for the execution of search warrants and did not require that unexecuted warrants be returned to the court. The Commission was informed that as a result of the absence of such provisions, there were a number of "stale" but facially valid warrants "floating around." If a search warrant is not promptly executed, there is a serious question whether the probable cause that existed at the time of issuance is still present. If a search warrant is not executed within 48 hours as this section provides, it does not mean that the search may not take place; the only effect of the provision is that the invalid warrant must be returned. A new warrant may then be obtained if the grounds for it can be demonstrated.

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Anticipatory Search Warrants

118

"Anticipatory search warrants are "issued in advance of the receipt of particular property at the premises designated in the warrant[.]" Issuance of an anticipatory warrant is "based on a showing of future probable cause to believe that an item will be at a specific location at a particular time in the near future."

State v. Phillips, 160 N.C. App. 549, 551, 586 S.E.2d 540, 542 (2003)

119

State v. Smith, 124 N.C. App. 565, 478 S.E.2d 237 (1996)

Anticipatory Search Warrant for Drugs to Be Delivered to a House

120

In Smith, law enforcement set up a sale of cocaine to a known drug dealer in a "supply and buy transaction." In other words, the informant was going to sell drugs to the target. After arranging a meet up at the Defendant's location for him to purchase from the informant, law enforcement obtained a search warrant that stated in part

"*On February 15, 1993, I received information from a confidential informant who, within the past seventy-two hours had observed a quantity of cocaine located in the residence of BOBBY "BOB" LEE SMITH* located on Old Lystra Road, Orange County, North Carolina. . . . Based on my training, experience and evidence gathered through this investigation, I have the opinion that this informant's information is correct and accurate."

The State and Defendant agreed that this was an anticipatory search warrant. However, "the affidavit was written in the present or past tense, and in no way expresses that it is "contingent," or in "anticipation" of future events" such as delivery of the cocaine to the residence at the location described in the warrant.

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"Although anticipatory warrants are constitutionally permissible under both the North Carolina and federal constitutions, the instant warrant is fatally defective under N.C. Const. art. I, § 20. Nothing in either the constitution or the statutes of this state precludes the issuance of an anticipatory search warrant -- so long as there is probable cause to believe that contraband presently in transit will be at the place to be searched at the time of the execution of the warrant. However, this type of warrant presents an acute possibility of abuse because it is conditioned on the occurrence of a future event, and thus potentially opens the door for the exercise of discretion by those executing the warrant. *See Ricciardelli*, 998 F.2d at 12. The magistrate who issues an anticipatory search warrant must take particular care to eliminate the opportunity for government agents to exercise unfettered discretion in the execution of the warrant.

State v. Smith, 124 N.C. App. 565, 577-578, 478 S.E.2d 237, 244-245 (1996).

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Such vigilance is achieved by observing the following three requirements: (1) The anticipatory warrant must set out, on its face, explicit, clear, and narrowly drawn triggering events which must occur before execution may take place; (2) Those triggering events, from which probable cause arises, must be (a) ascertainable, and (b) preordained, meaning that the property is on a sure and irreversible course to its destination; and finally, (3) No search may occur unless and until the property does, in fact, arrive at that destination. These conditions ensure that the required nexus between the criminal act, the evidence to be seized, and the identity of the place to be searched is achieved. Only where the magistrate has crafted the anticipatory search warrant with "explicit, clear, and narrowly drawn conditions governing its execution" are the constitutionally protected privacy interests safeguarded. *Id.* at 12.

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The instant warrant falls woefully short of the above standards in nearly every material way. The most glaring deficiency of this warrant is the absolute lack of language denoting it as "anticipatory." Without going outside the four corners of the warrant (which, as we have stated, we cannot), there is no way a reviewing court could determine that this was anything more than a run-of-the-mill warrant. The State seems to concede this point, by directing us to Detective T.A. Coleman's suppression hearing testimony, where the detective stated that the "search warrant was an anticipatory warrant based upon an expected delivery of one kilogram of cocaine to the residence of the defendant on February 15th." One wonders why this _ statement cannot be found in the affidavits. The 15 February date in the affidavit has significance, the State argues, because the warrant was actually authorized on the evening of 14 February. In fact, the State's entire case appears to revolve around this clerical bulwark.

The instant warrant, on its face, shows that it is unconditional -- as it overlooks (*inter alia*) the "need for establishing a nexus between the triggering event and the place to be searched." *Id.* at 13; and *see United States v. Goff*, 681 F.2d 1238, 1240 (9th Cir. 1982) (finding the requirement for a nexus met where defendant boarded an airplane and agents then procured a warrant to search him at the flight's *terminus).*

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State v. Phillips

Anticipatory Search Warrant Done Right

125

When a parcel from California exhibited several characteristics indicating the possible presence of drugs, Detective Anders set the parcel aside for inspection by a K-9 unit. When the K-9 unit indicated the presence of narcotics in the package, a search warrant was obtained and executed. Detective Anders discovered the package contained approximately 1,000 grams of crack cocaine.

Detective Anders obtained a second search warrant for the address to which the package was to be delivered based on the discovery of the narcotics and arranged a controlled delivery of the re-sealed package. The package itself was addressed to Sonya Moore at 1412 Hamlet Place, Greensboro, North Carolina. The pertinent part of the search warrant stated:

On this date, this applicant and other officers will attempt to make a controlled delivery of the Federal Express Package addressed to Sonya Moore, 1412 Hamlet Pl., Greensboro, N.C. If this Federal Express Package is delivered to said residence within the forty eight hours of the Issuance of this Warrant, this search warrant will be executed shortly therafter (sic).

The controlled delivery took place that same day shortly before 11 o'clock in the morning. Since there was no answer and the label indicated a signature release, allowing the package to be left at the destination if no one was home to sign for its receipt, the officer attempting the delivery left the package on the porch. A few minutes later, defendant opened the front door from the inside of the house and retrieved the package. Approximately twenty minutes later, Detective Anders executed the search warrant and forced entry into defendant's residence when no one answered the door. Detective Anders found defendant in the bathroom, using his body to prevent entry and flushing crack cocaine down the commode.

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"On this date, this applicant and other officers will attempt to make a controlled delivery of the Federal Express Package addressed to Sonya Moore, 1412 Hamlet Pl., Greensboro, N.C. If this Federal Express Package is delivered to said residence within the forty eight hours of the Issuance of this Warrant, this search warrant will be executed shortly therafter (sic)."

State v. Phillips, 160 N.C. App. 549, 550, 586 S.E.2d 540 (2003)

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INFORMANTS

ANONYMOUS INFORMANTS v. CONFIDENTIAL INFORMANTS

128

State v. Benters 367 N.C. 660, 766 S.E.2d 593 (2014)

"On September 29, 2011 Lt. Ferguson, hereby known as your affiant, received information from Detective J. Hastings of the Franklin County Sheriff's Office Narcotics Division about a residence in Vance County that is currently being used as an indoor marijuana growing operation. Detective Hastings has extensive training and experience with indoor marijuana growing investigations on the state and federal level. Within the past week Hastings met with a confidential and reliable source of information that told him an indoor marijuana growing operation was located at 527 Currin Road in Henderson, North Carolina. The informant said that the growing operation was housed in the main house and other buildings on the property. The informant also knew that the owner of the property was a white male by the name of Glenn Benters. Benters is not currently living at the residence, however [he] is using it to house an indoor marijuana growing operation. Benters and the Currin Road property [are] also known by your affiant from a criminal case involving a stolen flatbed trailer with a load of wood that was taken from Burlington North Carolina. Detective Hastings obtained a subpoena for current subscriber information. Kilowatt usage, account notes, and billing information for the past twenty-four months in association with the 527 Currin Road Henderson NC property from Progress Energy Legal Department. Information provided in said subpoena indicated that Glenn Benters is the current subscriber and the kilowatt usage hours are indicative of a marijuana grow operation based on the extreme high and low kilowatt usage."

State v. Benters, 367 N.C. 660, 661-662, 766 S.E.2d 593, 596 (2014)

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"Also on 9-29-2011 Detective Hastings and your affiant along with narcotics detectives from the Vance and Franklin County Sheriffs' Office as well as special agents with the North Carolina S.B.I. traveled to the residence at 527 Currin Road Henderson NC[ ]and observed from outside of the curtilage multiple items in plain view that were indicative of an indoor marijuana growing operation. The items mentioned above are as followed [sic]; potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers. Detectives did not observe any gardens or potted plants located around the residence. Detectives observed a red Dodge full size pickup truck parked by a building located on the curtilage of the residence and heard music coming from the area of the residence.

After observing the above listed circumstances, detectives attempted to conduct a knock and talk interview with anyone present at the residence. After knocking on the back door, which your affiant knows Benters commonly uses based on previous encounters, your affiant waited a few minutes for someone to come to the door. When no one came to the door, your affiant walked to a building behind the residence that music was coming from in an attempt to find someone. Upon reaching the rear door of the building, your affiant instantly noticed the strong odor of marijuana emanating from the building. Your affiant walked over to a set of double doors on the other side of the building and observed two locked double doors that had been covered from the inside of the building with thick mil black plastic commonly used in marijuana grows to hide light emanated by halogen light typically used in indoor marijuana growing operations. Thick mil plastic was also present on windows inside the residence as well."

Benters, at 662-663, 766 S.E.2d at 596-597 (2014).

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"Because the affidavit is based in part upon information received by Detective Hastings from a source unknown to Lieutenant Ferguson, we must determine the reliability of the information by assessing whether the information came from an informant who was merely anonymous or one who could be classified as confidential and reliable. *State v. Hughes*, 353 N.C. 200, 203, 539 S.E.2d 625, 628 (2000). This Court has explained that statements against an informant's penal interests and statements given by an informant with a history of providing reliable information to law enforcement carry greater weight for purposes of establishing reliability. *Id.* at 204, 539 S.E.2d at 628-29; *Riggs*, 328 N.C. at 219, 400 S.E.2d at 433 (discussing informant reliability based on an informant's "track record"); *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 330 (1989) (acknowledging the credibility of statements against penal interest (citation omitted)); *Arrington*, 311 N.C. at 641, 319 S.E.2d at 259 (discussing the credibility of statements against penal interest); *see Hughes*, 353 N.C. at 204, 539 S.E.2d at 628 (suggesting that "other indication[s] of reliability" may suffice even in the absence of statements against penal interest or an informant's history of giving reliable information)."

Benters, 367 N.C. at 665-666, 766 S.E.2d at 598.

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"When sufficient indicia of reliability are wanting, however, we evaluate the information based on the anonymous tip standard. *Hughes*, 353 N.C. at 205, 539 S.E.2d at 629. An anonymous tip, standing alone, is rarely sufficient, but "the tip combined with corroboration by the police could show indicia of reliability that would be sufficient to [pass constitutional muster]." *Id.* (citing *Alabama v. White*, 496 U.S. 325, 329, 110 S. Ct. 2412, 2416, 110 L. Ed. 2d 301, 308 (1990)). Thus, "a tip that is somewhat lacking in reliability may still provide a basis for [probable cause] if it is buttressed by sufficient police corroboration." 353 N.C. at 207, 539 S.E.2d at 630 (citation omitted). Under this flexible inquiry, when a tip is less reliable, law enforcement officers carry a greater burden to corroborate the information. *Id.* at 205, 539 S.E.2d at 629. As compared with the less demanding reasonable suspicion standard, probable cause requires both a greater quantity and higher quality of information. *White*, 496 U.S. at 329-30, 110 S. Ct. at 2416, 110 L. Ed. 2d at 308-09."

Benters, at 666, 766 S.E.2d at 598-599 (2014).

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"Taking the relevant factors together in view of the totality of the circumstances, we conclude that the officers' verification of mundane information, Detective Hastings's statements regarding defendant's utility records, and the officers' observations of defendant's gardening supplies are not sufficiently corroborative of the anonymous tip or otherwise sufficient to establish probable cause, notwithstanding the officers' professional training and experience. Furthermore, the material allegations set forth in the affidavit are uniformly conclusory and fail to provide a substantial basis from which the magistrate could determine that probable cause existed. *Gates*, 462 U.S. at 238-39, 103 S. Ct. at 2332-33, 76 L. Ed. 2d at 548-49; *Arrington*, 311 N.C. at 638, 319 S.E.2d at 257-58; *Campbell*, 282 N.C. at 130-31, 191 S.E.2d at 756. Accordingly, although "great deference should be paid a magistrate's determination of probable cause," *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365 (citation and quotation marks omitted), we hold the affidavit at issue is insufficient to establish probable cause."

Benters, at 673, 766 S.E.2d at 603.

133

State v. Moye, 12 N.C. App. 178, 182 S.E.2d 814 (1971)

The facts which establish probably (sic) cause for the issuance of a search warrant are as follows: Information furnished by a reliable and confidential informant who states that he has personal knowledge of marihuana being on the above premises at Tempie Moye, 427 Sampson St. Kinston, N. C. This informer has given information in July 1970 and a search was made and narcotic drugs were found and a subject charged with the crime of possession of narcotics. This have (sic) given information on other types of crimes in the years of 1969 and 1970 and his information was found to be true and correct and resulted in convictions of subjects being involved."

State v. Moye, 12 N.C. App. 178, 180, 182 S.E.2d 814, 816, (1971).

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We hold that the search warrant, including the attached affidavit, is in substantial compliance with the provisions of Article 4, Chapter 15 of the General Statutes of North Carolina, which was rewritten in 1969 to be effective upon its ratification on 19 June 1969. See *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). We think *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S.Ct. 1509 (1964), and the other cases cited by defendant are distinguishable.

State v. Moye, 12 N.C. App. 178, 180-181, 182 S.E.2d 814, 816, (1971).

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Mere Conclusion or Statement?

The affidavit in question is based on information given the affiant by an informer and substantiated by the affiant and other members of the Wayne County Sheriff's Department. The affiant stated that an informant had personal knowledge of the delivery of narcotic drugs and marijuana to the residence of defendant at 4:30 p.m. on 24 January 1971. Affiant stated that the Sheriff's Department had observed an unusual amount of traffic in and out of defendant's residence during the preceding year and other reports had been received that defendant was dealing in drugs. This affidavit is specific and detailed. It sets forth substantial underlying facts establishing probable cause for a search. The affidavit must also set forth circumstances from which the officer concluded that his informant was reliable. The affiant stated that the confidential informant, "has proven reliable and credible in the past." We are of the opinion that the circumstances set forth in support of the informant's reliability are the irreducible minimum on which a warrant may be sustained. The statement that the informant has proven reliable in the past is a statement of fact and not a mere conclusion. While we do not approve of such brevity in an affidavit, it does meet the minimum standards. *See State v. Moye*, 12 N.C. App. 178, 182 S.E. 2d 814 (1971).

State v. Altman, 15 N.C. App. 257, 259, 189 S.E.2d 793, 794-795 (1972)

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State v. Whitley 58 N.C. App. 539, 293 S.E.2d 838 (1982)

"Information obtained from a reliable confidential informer whose information has proven correct in the past and has led to the recovery of stolen property before. This informant has items described on the attached lists of stolen property in the possession of Maylon Theo Whitley in the past 2 weeks. The informant states that Maylon Theo Whitley has some of this property in his possession now. In the second week of February, 1971, Maylon Theo Whitley and 2 other men did have and sell to Mr. Milton Massey of Knightdale N.C. a Sears television set bearing Serial # 528-81108. This t.v. was stolen from the residence of Mr. Raymond L. Murray on 2/8/71. The informant states that on this same week Maylon Theo Whitley had in his possession a number of guns, rolled money (silver) and other items that fit the description of the items stolen from the residence of Mr. Philip W. Blake of Rt. # 2, Knightdale N.C. on 2/10/71. Also 2 of these guns on the attached list have been recovered from Mr. Will Hudson of 2205 Evers Drive by the Wake County Sheriff's Dept. These 2 guns were left with Mr. Hudson by one of the same men that was with Maylon Whitley when the t.v. set was sold to Mr. Massey. Maylon Whitley is known to most local law enforcement agencies as a break in artist and he has a criminal record in this state. He is under various criminal indictments in three counties at this time and is presently out on bail waiting trial."

State v. Whitley, 58 N.C. App. 539, 542-543, 293 S.E.2d 838, 840 (1982).

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"If the informant had stated to the affiant that recently he *personally had seen* the stolen items in defendant's possession at his residence, the affidavit would clearly suffice. Absent a statement, however, claiming personal observation or otherwise detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor . . . or an accusation based merely on an individual's general reputation.

The affidavit here attributes three statements to the informant: (1) that defendant had in his possession, within the preceding two weeks, items described as stolen property on lists attached to the affidavit, which were compiled by victims of the thefts; (2) that defendant currently has some of these items in his possession; and (3) that during the second week in February 1971 (about one week before the 22 February 1971 affidavit and search warrant) defendant had in his possession items which fit the description of certain stolen items, specifically including guns and rolled silver money."

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Because the affidavit does not describe how the informant gathered his information, the informant's tip had to provide sufficient detail to show that the information was based on "something more substantial than a casual rumor." The affidavit indicates that the informant was able to describe particular items in sufficient detail to identify them as items described on lists of stolen property. This detailed description supports the inference that the informant personally observed the allegedly stolen items.

Since at least some of the items the informant alleged defendant possessed are not such as could reasonably be expected to be stored on defendant's person, however, the inference that the stolen goods were possessed at defendant's residence reasonably arises from the informant's allegations. Thus, the informant's tip was sufficient to supply "reasonable cause to believe that the proposed search . . . [would] reveal the presence upon the described premises of the objects sought," This assignment of error is therefore overruled.

Whitley, at 543-544, 293 S.E.2d at 838.

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Methods of Proving Reliability of Informant

- Show that the informant has previously provided information that was reliable.
  - The statement that the informant has proven reliable in the past is a statement of fact and not a mere conclusion. Has information previously been provided that has led to arrests?
  - How did the informant obtain the information
- Can information be corroborated by other sources
- Statement Against Penal Interest

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VIDEO

WEBEX, FACETIME, ZOOM

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GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2021

SESSION LAW 2021-47
SENATE BILL 255

AN ACT TO MAKE VARIOUS CHANGES AND TECHNICAL CORRECTIONS TO THE LAWS GOVERNING THE ADMINISTRATION OF JUSTICE.

The General Assembly of North Carolina enacts:

MEDICAL MALPRACTICE JURY INSTRUCTIONS AND JUDICIAL ASSIGNMENT

SECTION 1.(a) Rule 51 of G.S. 1A-1 is amended by adding a new subsection to read:

"(d) Final instructions to the jury. – In civil cases subject to G.S. 90-21.11(2), the court shall reduce the oral instructions given to the jury to writing. Upon the jury retiring for deliberation, the court is encouraged to and may provide the jury a written copy of the oral instructions for the jury to take into the jury room during deliberation."

SECTION 1.(b) G.S. 7A-47.3 is amended by adding a new subsection to read:

"(c) The senior resident superior court judge, in consultation with the parties to the case, shall designate a specific resident judge or a specific judge assigned to hold court in the district to preside over all proceedings in a case subject to G.S. 90-21.11(2)."

SECTION 1.(c) This section becomes effective October 1, 2021. Subsection (a) of this section applies to actions filed on or after that date.

ADJUST MASTER JURY POOL TO ACCOUNT FOR THE COVID-19 PANDEMIC

SECTION 2. Notwithstanding G.S. 9-2(f), the master jury list for the 2022-2023 biennium shall contain not less than one and one-quarter times and not more than three times as many names as were drawn for jury duty in all courts in the county during the 2018-2019 biennium if the jury commission determines that those numbers would be more representative of the required number of jurors than the number of names drawn during the previous biennium. Notwithstanding G.S. 9-2(f), in a county preparing an annual master jury list for 2022 as authorized by G.S. 9-2(a), the master jury list shall contain not less than one and one-quarter times and not more than three times as many names drawn during 2019 if the jury commission determines that those numbers would be more representative of the required number of jurors than the number of names drawn during the previous year. A master jury list for the 2022-2023 biennium or for the 2022 year shall not include fewer than 500 names. In counties in which a different panel of jurors is selected for each day of the week, there is no limit to the number of names that may be placed on the master jury list for the 2022-2023 biennium or 2022 year.

CLARIFY VARIOUS PROCEDURES RELATED TO THE ENFORCEMENT OF JUDGMENTS

SECTION 3.(a) G.S. 1C-1603 reads as rewritten:

"**§ 1C-1603. Procedure for setting aside exempt property.**

(a) Motion or Petition; Notice. –

…

(4) After judgment, except as provided in subdivision (3) of this subsection or when exemptions have already been designated, the clerk may not issue an

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MODIFY VARIOUS PROVISIONS ALLOWING FOR REMOTE OR DIGITAL COURT PROCEEDINGS

SECTION 10.(a) G.S. 7B-1906(h) is repealed.

SECTION 10.(b) G.S. 15A-101.1(2) reads as rewritten:

"(2) "Document" means any pleading, criminal process, subpoena, complaint, motion, application, notice, affidavit, commission, waiver, consent, dismissal, order, judgment, or other writing intended in a criminal or contempt proceeding to authorize or require an action, to record a decision or to communicate or record information. ~~The term does not include search warrants.~~ A document may be created and exist in paper form or in electronic

Senate Bill 255 Session Law 2021-47 Page 7

form or in both forms. Each document shall contain the legible, printed name of the person who signed the document."

SECTION 10.(c) G.S. 15A-245(a) reads as rewritten:

"(a) Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official. The information must be shown by one or ~~more~~ both of the following:

(1) ~~Affidavit; or~~Affidavit.

(2) Oral testimony under oath or affirmation before the issuing ~~official; or~~official.

~~(3) Oral testimony under oath or affirmation presented by a sworn law enforcement officer to the issuing official by means of an audio and video transmission in which both parties can see and hear each other. Prior to the use of audio and video transmission pursuant to this subdivision, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge and the chief district court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts."~~

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§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

(a) Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official. The information must be shown by one or both of the following:

(1) Affidavit.

(2) Oral testimony under oath or affirmation before the issuing official.

(3) Repealed by Session Laws 2021-47, s. 10(c), effective June 18, 2021, and applicable to proceedings occurring on or after that date.

(b) If the issuing official finds that the application meets the requirements of this Article and finds there is probable cause to believe that the search will discover items specified in the application which are subject to seizure under G.S. 15A-242, he must issue a search warrant in accordance with the requirements of this Article. The issuing official must retain a copy of the warrant and warrant application and must promptly file them with the clerk. If he does not so find, the official must deny the application.

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ALLOW COURT PROCEEDINGS BY AUDIO/VIDEO TRANSMISSION

SECTION 9.(a) Article 7 of Chapter 7A of the General Statutes is amended by adding a new section to read:

"**§ 7A-49.6. Proceedings conducted by audio and video transmission.**

(a) Except as otherwise provided in this section, judicial officials may conduct proceedings of all types using an audio and video transmission in which the parties, the presiding official, and any other participants can see and hear each other. Judicial officials conducting proceedings by audio and video transmission under this section must safeguard the constitutional rights of those persons involved in the proceeding and preserve the integrity of the judicial process.

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MODIFY VARIOUS PROVISIONS ALLOWING FOR REMOTE OR DIGITAL COURT PROCEEDINGS

SECTION 10.(a) G.S. 7B-1906(h) is repealed.

SECTION 10.(b) G.S. 15A-101.1(2) reads as rewritten:

"(2) "Document" means any pleading, criminal process, subpoena, compliant, motion, application, notice, affidavit, commission, waiver, consent, dismissal, order, judgment, or other writing intended in a criminal or contempt proceeding to authorize or require an action, to record a decision or to communicate or record information. ~~The term does not include search warrants.~~ A document may be created and exist in paper form or in electronic

form or in both forms. Each document shall contain the legible, printed name of the person who signed the document."

SECTION 10.(c) G.S. 15A-245(a) reads as rewritten:

"(a) Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official. The information must be shown by one or ~~more~~ both of the following:

(1) ~~Affidavit; or~~Affidavit.

(2) Oral testimony under oath or affirmation before the issuing ~~official; or~~official.

~~(3) Oral testimony under oath or affirmation presented by a sworn law enforcement officer to the issuing official by means of an audio and video transmission in which both parties can see and hear each other. Prior to the use of audio and video transmission pursuant to this subdivision, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge and the chief district court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts.~~"

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MODIFY VARIOUS PROVISIONS ALLOWING FOR REMOTE OR DIGITAL COURT PROCEEDINGS

SECTION 10.(a) G.S. 7B-1906(h) is repealed.

SECTION 10.(b) G.S. 15A-101.1(2) reads as rewritten:

"(2) "Document" means any pleading, criminal process, subpoena, complaint, motion, application, notice, affidavit, commission, waiver, consent, dismissal, order, judgment, or other writing intended in a criminal or contempt proceeding to authorize or require an action, to record a decision or to communicate or record information. ~~The term does not include search warrants.~~ A document may be created and exist in paper form or in electronic

Senate Bill 255 Session Law 2021-47 Page 7

form or in both forms. Each document shall contain the legible, printed name of the person who signed the document."

SECTION 10.(c) G.S. 15A-245(a) reads as rewritten:

"(a) Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official. The information must be shown by one or ~~more~~ both of the following:

(1) ~~Affidavit; or~~Affidavit.

(2) Oral testimony under oath or affirmation before the issuing ~~official; or~~official.

~~(3) Oral testimony under oath or affirmation presented by a sworn law enforcement officer to the issuing official by means of an audio and video transmission in which both parties can see and hear each other. Prior to the use of audio and video transmission pursuant to this subdivision, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge and the chief district court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts.~~"

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(10) "Signature" means any symbol, including, but not limited to, the name of an individual, which is executed by that individual, personally or through an authorized agent, with the intent to authenticate or to effect the issuance or entry of a document. A document may be signed by the use of any manual, mechanical or electronic means that causes the individual's signature to appear in or on the document. Any party challenging the validity of a signature shall have the burden of pleading, producing evidence, and proving that the signature was not the act of the person whose signature it appears to be.
N.C. Gen. Stat. § 15A-101.1

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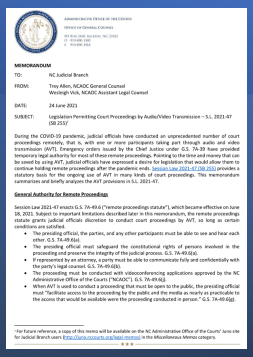

MEMORANDUM

TO: NC Judicial Branch

FROM: Troy Allen, NCAOC General Counsel
Weileigh Vick, NCAOC Assistant Legal Counsel

DATE: 24 June 2021

SUBJECT: Legislation Permitting Court Proceedings by Audio/Video Transmission – S.L. 2021-47 (SB 257)

During the COVID-19 pandemic, judicial officials have conducted an unprecedented number of court proceedings remotely, that is, with one or more participants taking part through audio and video transmission (AVT). Emergency orders issued by the Chief Justice under G.S. 7A-39 have provided temporary legal authority for most of these remote proceedings. Pointing to the time and money that can be saved by using AVT, judicial officials have expressed a desire for legislation that would allow them to continue holding remote proceedings after the pandemic ends. Session Law 2021-47 (SB 257) provides a statutory basis for the ongoing use of AVT in many kinds of court proceedings. This memorandum summarizes and briefly analyzes the AVT provisions in S.L. 2021-47.

General Authority for Remote Proceedings

Session Law 2021-47 enacts G.S. 7A-49.6 ("remote proceedings statute"), which became effective on June 18, 2021. Subject to important limitations described later in this memorandum, the remote proceedings statute grants judicial officials discretion to conduct court proceedings by AVT, so long as certain conditions are satisfied.

- The presiding official, the parties, and any other participants must be able to see and hear each other. G.S. 7A-49.6(a).
- The presiding official must safeguard the constitutional rights of persons involved in the proceeding and preserve the integrity of the judicial process. G.S. 7A-49.6(a).
- If represented by an attorney, a party must be able to communicate fully and confidentially with the party's legal counsel. G.S. 7A-49.6(b).
- The proceeding must be conducted with videoconferencing applications approved by the NC Administrative Office of the Courts ("NCAOC"). G.S. 7A-49.6(g).
- When AVT is used to conduct a proceeding that must be open to the public, the presiding official must "facilitate access to the proceeding by the public and the media as nearly as practicable to the access that would be available were the proceeding conducted in person." G.S. 7A-49.6(g).

[1] For future reference, a copy of this memo will be available on the NC Administrative Office of the Courts' Juno site for Judicial Branch users (https://juno.nccourts.org/login.nxpress) in the Miscellaneous Memos category.

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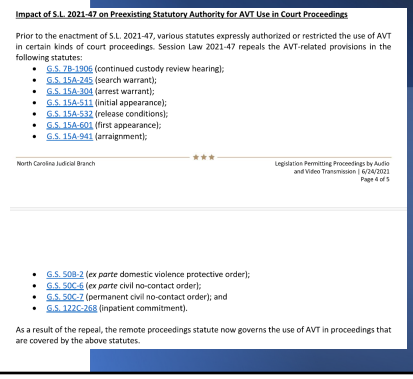

Impact of S.L. 2021-47 on Preexisting Statutory Authority for AVT Use in Court Proceedings

Prior to the enactment of S.L. 2021-47, various statutes expressly authorized or restricted the use of AVT in certain kinds of court proceedings. Session Law 2021-47 repeals the AVT-related provisions in the following statutes:

- G.S. 7B-1906 (continued custody review hearing);
- G.S. 15A-245 (search warrant);
- G.S. 15A-304 (arrest warrant);
- G.S. 15A-511 (initial appearance);
- G.S. 15A-532 (release conditions);
- G.S. 15A-601 (first appearance);
- G.S. 15A-941 (arraignment);

- G.S. 50B-2 (*ex parte* domestic violence protective order);
- G.S. 50C-6 (*ex parte* civil no-contact order);
- G.S. 50C-7 (permanent civil no-contact order); and
- G.S. 122C-268 (inpatient commitment).

As a result of the repeal, the remote proceedings statute now governs the use of AVT in proceedings that are covered by the above statutes.

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North Carolina Criminal Law Blog

With Enactment of SB 255, COVID-19 Emergency Directives Come to an End

June 21, 2021 **Shea Denning** <https://nccriminallaw.sog.unc.edu/author/sdenning/>

Earlier today, Chief Justice Paul Newby **rescinded** <https://www.nccourts.gov/assets/news-uploads/21%20June%202021%20Revocation%20of%207%20June%202021%207A-39%28b%29%282%29%20Order%20Extending%20Emergency%20Directives.pdf?I73leSzJg02Q09YoalkK66nkGD7ITojw> the two remaining COVID-19 Emergency Directives. The Chief Justice determined that the enactment of **S.L. 2021-47** <https://www.ncleg.gov/Sessions/2021/Bills/Senate/PDF/S255v7.pdf> (Senate Bill 255) on Friday rendered unnecessary Emergency Directive 3, which authorized judicial officials to conduct proceedings that include remote audio and video transmissions and Emergency Directive 5, which permitted verification of pleadings and other documents by affirmation of the subscriber.


21 JUNE 2021 REVOCATION
OF THE 7 JUNE 2021 ORDER OF THE CHIEF JUSTICE
OF THE SUPREME COURT OF NORTH CAROLINA

<https://nccriminallaw.sog.unc.edu/wp-content/uploads/2021/06/June-21-revocation-of-emergency-directives.jpg>

Search warrants. G.S. 15A-245(a) was amended in 2005 to allow officers to testify in support of search warrants by videoconference if the senior resident superior court judge and chief district court judge obtained approval of the Administrative Office of the Courts. Before the COVID-19 pandemic and its accompanying emergency directives, my impression is that this authority was seldom used. But after in-person court proceedings were interrupted last year and the authority to conduct remote proceedings was broadened by emergency directive, more judicial officials began to hear remote testimony in support of search warrant applications.

S.L. 2021-47 amends the laws governing the application for and issuance of search warrants in two important ways. First, it amends G.S. 15A-101.1(2), which had excluded search warrants from the types of documents that could exist in electronic form. This is significant because it allows a judicial official to affix an electronic signature to a search warrant, thereby removing the need for the official to physically sign a paper original. Second, the new session law removes the provisions of G.S. 15A-245(a)(3) that allowed law enforcement officers to testify by videoconference if approved. As rewritten, oral testimony under oath or affirmation in support of a search warrant (by an officer or another witness) may be received pursuant to the remote proceedings generally authorized under new G.S. 7A-49.6.

Similar amendments to G.S. 15A-304(d) permit oral testimony under oath or affirmation in support of a warrant for arrest to be received pursuant to the remote proceedings generally authorized under new G.S. 7A-49.6.

These changes also were effective Friday, June 18, 2021, for proceedings on or after that date.

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	LEO Orders					
	2019	2020	2021	2022	2023	2024
AUGUST	277	362	443	419	453	443
SEPTEMBER	328	382	366	357	385	470
OCTOBER	394	365	335	342	405	
NOVEMBER	344	320	339	318	434	
DECEMBER	258	348	293	328	409	
JANUARY		461	374	336	407	487
FEBRUARY		396	411	389	409	459
MARCH		354	433	422	408	376
APRIL		319	408	352	335	424
MAY		397	324	362	484	476
JUNE		292	367	371	406	367
JULY		380	373	373	373	481
TOTAL	1,601	4,376	4,466	4,369	4,908	3,983

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	Search Warrants					
		2020	2021	2022	2023	2024
AUGUST		99	130	261	304	353
SEPTEMBER		76	199	185	210	323
OCTOBER		81	157	228	267	
NOVEMBER		118	168	172	308	
DECEMBER		117	134	223	330	
JANUARY			158	159	222	365
FEBRUARY			174	152	222	317
MARCH			147	189	261	274
APRIL		49	100	128	223	301
MAY		44	116	195	251	318
JUNE		76	152	202	285	261
JULY		128	121	212	244	321
TOTAL		788	1,756	2,306	3,127	2,833
			6,222 total	6,675 total	8,035 total	
			~ 518.5/month	~ 556.25/month	~ 669.58/month	

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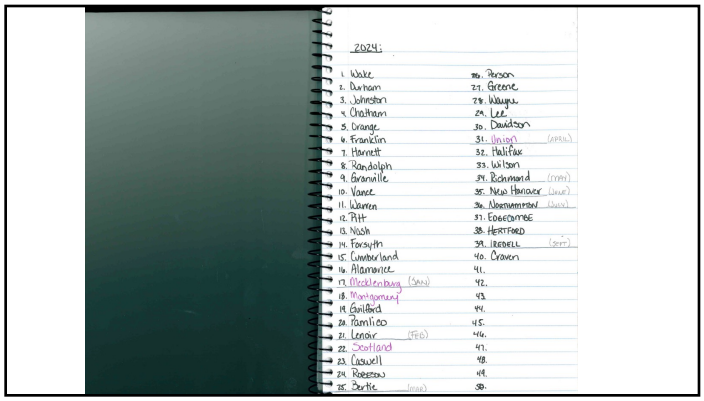
2024:
1. Wake
2. Durham
3. Johnston
4. Chatham
5. Orange
6. Franklin
7. Harnett
8. Randolph
9. Granville
10. Vance
11. Warren
12. Pitt
13. Nash
14. Forsyth
15. Cumberland
16. Alamance
17. Mecklenburg (SAN)
18. Montgomery
19. Guilford
20. Pamlico
21. Lenoir (FED)
22. Scotland
23. Caswell
24. Robeson
25. Bertie (MAR)
26. Person
27. Greene
28. Wayne
29. Lee
30. Davidson
31. Union (APRIL)
32. Halifax
33. Wilson
34. Richmond (MAY)
35. New Hanover (JUNE)
36. Northampton (JULY)
37. Edgecombe
38. HERTFORD
39. IREDELL (SEPT)
40. Craven
41.
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43.
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For a good search warrant, call Judge Shirley!
252-347-3000

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