



ANALYZING PROBABLE CAUSE

- 1. Was PC based on a tip?
- Stop. Distinguish the federal (*Gates*) rule from the Washington (*Aguilar-Spinelli*) rule. Under *Gates*, (a) and (b) below are considered together using the standard “totality” test. A strong showing under one test can make up for a lesser showing under the other. If you are using Washington’s rule, an informant’s tip must independently meet both the standards in (a) *and* (b) — again, using totality test.
 - a. Consider the informant’s credibility (likelihood that informant is speaking truthfully; another way of putting it, “is the informant sincere?”)
- [for ANONYMOUS informants, jump to step iv — unless you can make an argument that step iii applies]
 - i. Has the informant been used before and was his/her info accurate? A track record is highly probative. Even a reputation for truthfulness is helpful.
 - ii. Evaluate whether the informant is a “bystander” (citizen) or a member of the criminal community (snitch). A citizen’s statements are much more credible.
 - iii. To what extent is the informant’s statement self-incriminating. Statements against interest are considered more credible than mere accusations.
 - iv. Consider next the accused: does s/he have a reputation or history for criminal activity? This is especially strong if its the same activity as described in the tip.
 - v. Look for corroborating evidence, but give less weight to corroboration involving innocent conduct as opposed to facts with strong criminal inferences. Give more weight to corroboration which involves future conduct, less weight to corroborating facts that were evident at the time the tip was given.

- b. Consider the informant's reliability (likelihood that informant has accurate information, i.e., informant's "basis of knowledge") (put another way, "is the informant sensible")
- i. Give more weight to an informant with first hand observations or involvement. See a(ii) and (iii) above.
- ii. Discount conclusory or vague statements, give weight to detailed facts. Does the wealth of detail suggest personal knowledge?
- iii. Look for corroboration. The same rules for weight given in a(v), above, apply here.
- c. Are there other reasons to believe that the tip is accurate?
- 2. Given the totality of the circumstances, is there a substantial chance ("fair probability") that a crime has been committed and
 - a. (in case of a search) that the place to be searched contains evidence, contraband, or instrumentalities of the crime, or
 - b. (in case of an arrest) that the person is the perpetrator of the crime?

Note: PC is always *retrospective*, unlike reasonable suspicion (RS)¹. Under RS and *Terry*, police may consider whether a crime is occurring at the moment or is "*about*" to occur.

¹ A concept allowing a lesser intrusion than arrest on a showing of less than Probable Cause. We'll study it in detail next month...

PROBABLE CAUSE AND WARRANTS

- 1. Warrant clause requires PC (plus particularity, oath, etc)
- 2. Warrants to search are not the same as warrants to arrest. For example:
 - ARREST IN PUBLIC: requires PC to arrest but — for felonies — no warrant required.
 - ARREST IN SUSPECT’S HOME: need arrest warrant (which presumes magistrate agreed there was PC to arrest) *and* the arresting officer’s reasonable belief that the suspect is home. *Payton*.

The requirement for the belief about being home is to eliminate risk that officers will obtain an arrest warrant and use it to indiscriminately search the suspect’s home. Why would the police do that? Well, sometimes an arrest warrant is easily obtained but not a search warrant... As you’ll see, a search warrant requires a logical connection between the place to be searched and the items thought to be located there... a “nexus” to the crime. If officers had PC to arrest but no nexus to home, there’d be a risk that officers would use the arrest warrant to shakedown the residence. That risk is minimized (but not eliminated) by requiring a reasonable belief that the arrestee is at home...

- ARREST IN 3P’s HOME: need PC to arrest the suspect plus a warrant to search the 3rd party’s home. ² *Steagald*.

This is because the third party has privacy rights separate from the suspect’s. The warrant to search the 3rd party protects their privacy.

Note that the warrant for the arrest itself is unnecessary because the suspect is *not* in his/her private residence. For all intents and purposes, suspects are entitled to very limited privacy interests when in a 3rd party’s home. We’ll see some extremes on this point soon.

² Keep in mind, when we say “need” a search warrant for the 3rd party’s home, we’re just saying that any evidence seized from the 3rd party’s home without a warrant would be subject to suppression. In other words, if Officer A arrests Defendant B in his Friend’s C’s home without a warrant to search C’s residence, *the arrest is still good*. It’s just that C would have a basis to suppress any evidence found during the arrest. So, if the police only want to grab someone, and they’re not interested in the 3rd party, this Steagald rule can be ignored so far as B’s prosecution goes. How? Consider: Officer A, uninterested in C, could simply enter and arrest B in C’s home. Officer A just knows that nothing he finds re: C will be admissible... of course, C might have a civil rights claim against Officer A for the intrusion... but if there’s no evidence/property seized from C, the claim may be worth next to nothing.

- What about arresting suspects at their front door? That's fine so long as you have PC and they open the door and remain on the threshold. Then, the person is functionally "in public" and can be arrested without a warrant. If the person turns and runs inside, you get "hot pursuit" (an exigent circumstance allowing a warrantless arrest inside the suspect's residence) an exception to the *Payton* rule. See *Santana*, in the notes section following *Payton*.

Did you notice that all arrests require PC? This is always true: *no exceptions*.