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## Protection **NOT** Afforded by Arrest Warrant

### COUNTY LAW UPDATE

by Mike Rainwater on 01/29/2001 (updated 01/22/04)

**A warrant does not protect officer from a claim of "false arrest" or "illegal search" if, on an objective basis, the application for a warrant is so lacking in indicia of probable cause that no reasonably competent officer would have concluded that a warrant should issue (but if officers of reasonable competence should disagree on this issue, immunity should be recognized).** *Malley v. Briggs*, 475 U.S. 335, 89 L.Ed.2d 271, 106 S.Ct. 1092 (1986).

**Deference to Warrants:** Searching a place or arresting an individual based upon a warrant issued by a neutral magistrate is reasonable *per se* because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'" *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and the Supreme Court has thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination. *Spinelli v. United States*, 393 U.S., at 419; *see also Illinois v. Gates*, 462 U.S., at 236; *United States v. Ventresca, supra*, 380 U.S., at 108-109. "In a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U.S. 102, 106 (1965); *see also Aguilar v. Texas*, 378 U.S., at 111.

**Deceit in Procurement:** "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing" (emphasis in original). *Franks v. Delaware*, 438 U.S. 154, 164-165 (1978) (quoting *United States v. Halsey*, 257 F.Supp. 1002, 1005 (S.D.N.Y.1966)). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. *Id.* The application for a warrant should, however, be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true. *Id.* A warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. *See Nathanson v. United States*, 290 U.S. 41, 47 (1933) *Giordenello v. United States*, 357 U.S. 480, 485-486 (1958); *Aguilar v. Texas*, 378 U.S. 108, 114-115 (1964). If an informant's tip is the source of information, the affidavit must recite "some of the underlying circumstances from which the informant concluded" that relevant evidence might be discovered, and "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was 'credible' or his information 'reliable.'" *Id.* (citations omitted).

**Qualified Immunity for Execution of Facially Valid Warrant:** Public "officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982). This qualified immunity "gives ample room for mistaken judgments but does not protect the plainly incompetent or those who knowingly violate the law." *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995) (quoting *Malley v. Briggs*, 745 U.S. 335, 341 (1986)). It is well established that when an officer acts within the scope of a facially valid warrant, he or she has "acted in good faith in conducting the search" and is, as a matter of law, entitled to the full protection afforded by qualified immunity. *See United States v. Leon*, 468 U.S. 897, 922 (1984).