Probable Cause to Search: The "Nexus" Requirement

Generally speaking, to find probable cause justifying a warrant, we require a "nexus" between the place to be searched and the evidence sought.[1]

Probable cause to search a person, place, or thing cannot exist unless there is a link or connection between the evidence to be seized and the location of the search. This is known as the "nexus" requirement and it is responsible for more than its fair share of rejected search warrants and suppressed evidence. A separate requirement (but equally problematic) is that there must be proof that the evidence is currently located in the place to be searched. This is known as the "currency" requirement.[2]

Both of these requirements (we will discuss both) are easily satisfied when as often happens, an officer or a reliable informant had just seen the evidence at the location. In most cases, however, the current location of the evidence must be based on circumstantial evidence or reasonable inference. Consequently, officers will be required to explain to a judge—whether the judge is reviewing a search warrant affidavit or ruling on a motion to suppress—why it is reasonable to believe the search will be productive. As the Ninth Circuit noted in a search warrant case:

> For probable cause to exist, a magistrate need not determine that the evidence sought is *in fact* on the premises to be searched, or that the evidence is more likely than not to be found where the search takes place. The magistrate need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit.[3]

Before going further, it should be noted that because the test is whether there is a link between the evidence and the place to be searched, it is immaterial that the person who controlled the premises was not involved in the crime under investigation. This is why officers can obtain warrants to search utility companies, banks, and cellphone providers for records of their customers. It is also why officers who have probable cause to believe that the suspect was storing evidence inside the home of a friend or relative may obtain a warrant to search it, even though the friend of relative was not involved in the suspect's criminal activities.

The "Nexus" Requirement

In the context of probable cause to search, the term "nexus" simply means a "link" between the evidence and the location of the search. As the Court of Appeal explained, "In order to have a valid search, officers must have probable cause to believe that the object of the search is in the particular place to be searched."[4] In the absence of a direct link, officers may be able to satisfy this requirement by means of circumstantial evidence, meaning evidence that tends to—but does not directly—indicate where the evidence is located.

Defense attorneys have sometimes argued that officers cannot obtain a warrant to search two or more locations for the same piece of physical evidence since it cannot be located at two places at the same time. The courts have, however, consistently rejected these arguments because probable cause requires only a fair probability that the evidence is located in each location.[5] Thus, in *People v. Easley* the California Supreme Court pointed out that there is "no logical inconsistency" in an officer's conclusion that there is probable cause to believe that "evidence of a crime will be in any one of a suspect's homes or vehicles."[6]

As we will now explain, proof that a link exists may be based on circumstantial evidence or inference.

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[1] *U.S. v. Crawford* (6th Cir. 2019) 943 F.3d 297, 308.
[2] Note: A judge may, however, issue an anticipatory search warrant; i.e., a warrant that authorizes a search for evidence that is not yet at the place to be searched, but will be there when a "triggering event" occurs.
[3] *U.S. v. Peacock* (9th Cir. 1985) 761 F.2d 1313, 1315.
[4] *People v. Superior Courte (Haflich)* 1986 Cal.App.3d 759, 766. Also see *U.S v. Crews* (9th Cir. 2007) 502 F.3d 1130.
[5] See *U.S. v. Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1339; *U.S. v. Barajas* (8th Cir. 2013) 710 F.3d 1102, 1109.
[6] (1983) 34 Cal.3d 858, 870.

Circumstantial evidence

Circumstantial evidence that an item is located at a certain place will exist if officers were aware of one or more facts that tended to—but did not directly—indicate it is there. For example, in *People v. Tuadles*[7] police officers in Long Beach learned that a large amount of marijuana was being shipped via UPS to Tuadles at an address in the city. They also learned that the phone number that Tuadles had given to UPS was for a house in Cerritos. Based on this information, they obtained a warrant to search both locations.

On appeal, Tuadles claimed there was insufficient nexus but the court disagreed, pointing out that because he had listed the phone number for the house in Cerritos with UPS, this indicated it was either his second home or the home of an accomplice. The court also noted that the affiant had stated that "large scale traffickers commonly use two, three, or more residences for their activities.

In *People v. Webb*[8] the California Supreme Court ruled that officers reasonably believed that duct tape used in the commission of a murder was inside the suspect's car since he had driven it on the night he killed the victim. In *Segura v. United States*[9] the Supreme Court ruled there was sufficient circumstantial evidence that drugs would be found in the suspect's home because federal agents had "maintained surveillance" over the home for weeks, and "had observed [him] leave the apartment to make sales of cocaine."

In *U.S. v. Curry*[10] the court ruled that officers had probable cause to search a storage locker that had been rented by a bank robbery suspect because, shortly after the robbery, he had taken a bag from the locker and put it into a dumpster and the bag was "covered in a red dye consistent with the dye in the bank's dye packs."

Finally, in *People v. Farley*[11] the California Supreme Court ruled it was reasonable to believe that evidence pertaining to the murder of seven people at a laboratory in Sunnyvale would be found in a storage locker the suspect had rented three days before the killings. Said the court, "In light of the circumstance that any items stored in the locker were placed there sometime during the three days preceding the shootings," it was reasonable to believe that incriminating evidence would be found there.

Reasonable inference

In the absence of direct or circumstantial proof as to the whereabouts of the evidence, officers may rely on reasonable inference. As the Ninth Circuit explained in *U.S. v. Gann,* "The required nexus between the items to be seized and the place to be searched rests not only on direct observation, but on the type of crime, the nature of missing items, the extent of the suspects' opportunity for concealment, and normal inferences as to where a criminal would be likely to hide [the evidence."[12]

THE SUSPECT'S HOME: Because a person's home is a relatively safe and convenient place to store things, it is almost always reasonable to believe that that's where the evidence is located.[13] "Simple common sense," said the Seventh Circuit, "supports the inference that one likely place to find evidence of a crime is the suspect's home, at least absent any information indicating to the contrary."[14]

For example, in ruling that it was reasonable for officers to infer that certain types of evidence would be found in the perpetrator's home, the courts have noted the following:

Drugs and sales paraphernalia: "In the case of drug dealers, evidence is likely to be found where the dealers live."[15] "Numerous cases have upheld search warrants on the theory that one who sells narcotics may have more at his residence or place

[7] (1992) 7 Cal.App.4th 1777.
[8] (1993) 6 Cal.4th 494.
[9] (1984) 468 U.S. 810-11.
[10] *U.S. v. Curry* (7th Cir. 2008) 538 F.3d 719, 729-30.
[11] (2009) 46 Cal.4th 1053, 1100.
[12] *U.S. v. Gann* (9th Cir. 1984) 732 F.2d 714, 722.
[13] See *People v. Dumas* (1973) 9 Cal.3d 871, 885.
[14] *U.S. v. Aljabari* (7th Cir. 2010) 626 F.3d 942, 945. Also see: *People v. Koch* (1989) 209 Cal.App.3d 770, 779.
[15] *U.S. v. Job* (9th Cir. 2017) 851 F.3d 889, 901.

or operations."[16] "For the vast majority of drug dealers, the most convenient location to secure items is the home. After all, drug dealers don't tend to work out of office buildings."[17]

Loot and stolen property: "It was likely that [bank robbers] would conceal the cash in the apartment rather than in some less secure and accessible place."[18] "Cash is the type of loot that criminals seek to hide in secure places like their homes."[19] "[W]e cannot disregard the likelihood that a person who holds stolen property he wishes to sell will attempt to conceal it in a place under his control that is nearby and apparently secure."[20]

Weapons used in a crime: "It is no great leap to infer that the most likely place to keep a firearm is in one's home."[21] "It was not unreasonable for the police to suspect that evidence of the murder might be found in petitioner's motel room."[22] It was reasonable to infer that "the murder weapon and/or ammunition would be located in the apartment where [the suspect] lived, or in his mother's house."[23]

Clothing worn by perpetrator: "After all, what more likely place to find a suspect's clothes than his own home."[24]

Arson instrumentalities: It was reasonable to search the home of an arson suspect for "gas cans, flammable liquids, lighters, burnt clothing, surgical masks, dark clothing, and shoes."[25]

BUSINESS RECORDS: Because people (including criminals) often keep business records in their homes, it is a logical place to look.[26]

THE SUSPECT'S VEHICLES: Like homes, vehicles belonging to the suspect may also be a logical place to store evidence because vehicles are convenient and fairly secure. As the D.C. Circuit observed, "Everyone knows that drivers who lawfully purchase items at stores often place their purchases in the trunks of their cars. Nothing in common experience suggests that criminals act any differently."[27] For example, in ruling that the suspect's car was a logical place to find stolen bonds, the California Supreme Court said, "When the officers were unable to discover the bonds in defendant's apartment, his automobile, parked outside on the street, quite naturally became an object of strong suspicion."[28]

THE SUSPECT'S PERSON: Depending on the time lapse between the commission of the crime and the suspect's detention or arrest, it may be reasonable to believe that he is still carrying the fruits and instrumentalities of the crime on his person. As the Supreme Court observed in *New Jersey v. T.L.O.*, the suspect's purse was "the obvious place" to look for cigarettes.[29] Similarly, "a student who carries a gun to school will generally keep the gun in one of three places: (1) his locker, (2) a backpack or purse or (3) on his person."[30] Another gun case: "It is no great leap to infer that the most likely place to keep a firearm is in one's home."[31]

SUSPECT'S COMPUTER, CELLPHONE: When there is probable cause to search for documents or photos, it is usually reasonable to believe they are stored in the suspects computer or cell phone. As the Sixth Circuit pointed out, "Computers are similar to guns

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[16] *People v. Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 414.
[17] *U.S. v. Spencer* (D.C. Cir. 2008) 530 F.3d 1003, 100.
[18] *U.S. v. Hendrix* (7th Cir. 1985) 752 F.2d 1226, 1231. Also see *People v. Carrington* (2009) 47 Cal.4th 145.
[19] *U.S. v. Jones* (3rd Cir. 1993) 994 F.2d 1051, 1056.
[20] *People v. Dumas* (1973) 9 Cal.3d 871, 885.
[21] *People v. Lee* (2015) 242 Cal.App.4th 161, 173.
[22] *People v. Bennett* (1998) 17 Cal.4th 373, 388.
[23] *People v. McCarter* (1981) 117 Cal.App.3d 894, 901.
[24] *U.S. v. Aljabari* (7th Cir. 2010) 626 F.3d 940, 946.
[25] *U.S. v. Aljabari* (7th Cir. 2010) 626 F.3d 940, 945.
[26] See *U.S. v. Khan* (10th Cir. 2021) 989 F.3d 806; *U.S. v. Clark* (7th Cir. 2012) 668 F.3d 934, 943
[27] *U.S. v. Brown* (D.C. Cir. 2004) 374 F.3d 1326, 1329.
[28] *People v. Dumas* (1973) 9 Cal.3d 871, 885.
[29] (1985) 469 U.S. 325, 345-46.
[30] *In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1741-42.
[31] *Bastida v. Henderson* (5th Cir. 1973) 487 F.2d 860, 863.

in that they are both personal possessions often kept in their owner's residence and therefore subject to the presumption that a nexus exists between an object used in a crime and the suspect's current residence."[32] For example, in a child pornography case, the Sixth Circuit noted that "if a pornographic image has originated or emanated from a particular individual's email account, it logically follows that the image is likely to be found on that individual's computer or on storage media associated with the computer."[33]

BUSINESSES AND FRONTS: In criminal conspiracy cases, a commercial structure that is visited frequently by the suspects is a likely place to find evidence of the conspiracy; e.g., the names of co-conspirators.[34]

PROCESS OF ELIMINATION: If officers determine that the evidence they are seeking is not located in a likely place, it may be reasonable to infer that it is located in the next logical location. Thus, in *U.S. v. Vesikuru*, the Ninth Circuit said, "After learning that the package [of PCP] was neither on the porch nor in the minivan, and that it had been opened, the agents reached the logical conclusion: the package had been taken into the house."[35]

The "Currency" Requirement

Even if it is reasonable to look for evidence at a certain location, officers must prove is was reasonable to believe it is there currently. As the Fifth Circuit observed, "Although probable cause may exist at one point to believe that evidence will be found in a given place, the passage of time may render the original information insufficient to establish probable cause at the later time."[36] (If the evidence is not currently at the location, but there is probable cause to believe it will be when a "triggering" event occurs, officers may be able to obtain an anticipatory search warrant.)

In addition to the passage of time, the current whereabouts of the evidence may be based on the type of evidence sought, and the nature of the crime under investigation. As a Maryland court so aptly explained in *Andresen v. Maryland*:

> 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.[37]

Nature of the evidence

By their very nature, some types of evidence are apt to be kept at one place for days, weeks, months, and even years. In another memorable passage, the court in *Andresen* said, "The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed."

LOOT FROM ROBBERY, BURGLARY: Because it is often difficult to fence or otherwise sell stolen property, it is often reasonable to believe it will be kept in one place for weeks, months, or even years. For example, the courts have ruled it was reasonable to believe that stolen artwork would be kept for two years[38]; that stolen credit cards would be retained for three weeks,[39] that stolen railroad bonds and bank checks would be kept for eight weeks,[40] and stolen artwork for two years.[41]

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[32] *Peffer v. Stephens* (6th Cir. 2018) 880 F.3d 256, 272. Also see *U.S. v. Riccardi* (8th Cir. 2005) 405 F.3d 852, 860.
[33] *U.S. v. Terry* (6th Cir. 2008) 522 F.3d 645, 648.
[34] See *People v. Farley* (2009) 46 Cal.4th 1053, 1101; *U.S. v. Harris* (10th Cir. 2013) 735 F.3d 1187.
[35] *U.S. v. Vesikuru* (9th Cir. 2002) 314 F.3d 1116, 1123.
[36] *U.S. v. Freeman* (5th Cir. 1982) 685 F.2d 942, 951. Edited. Also see *People v. Gibson* (2001) 90 Cal.App.4th 371, 380.
[37] (1975) 24 Md.App. 128, 172. Also see *U.S. v. Morales*-Aldahondo (1st Cir. 2008) 524 F.3d 115, 119.
[38] *People v. Cletcher* (1982) 132 Cal.App.3d 878, 883.
[39] *U.S. v. Gann* (9th Cir. 1984) 732 F.2d 714, 722.
[40] *People v. Dumas* (1973) 9 Cal.3d 871, 885.
[41] *People v. Cletcher* (1982) 132 Cal.App.3d 878, 883.

In contrast, the court in *U.S. v. Steeves*[42] invalidated a warrant to search the defendant's home for $16,000 taken in a bank robbery three months earlier because, essentially, the amount of money taken in most bank robberies gets spent quickly. Said the court, "there was little reason to believe that any of the bank's money or the money bag would still be in the home."

FIREARMS: Although criminals may discard the firearms they use in the commission of their crimes, it is more likely that they will retain them because of their inherent value and usefulness. As the court in *U.S. v. Neal* observed, "Information that someone is suspected of possessing firearms illegally is not stale, even several months later, because individuals who possess firearms tend to keep them for long periods of time."[43] That's also the view of the California Supreme Court:

> Particularly with regard to the staleness question, the affidavit recites that guns are valuable and difficult to obtain, particularly by ex-convicts and parolees. Suspects often retain guns along with ammunition, documents, and gun-related equipment after a crime is committed.[44]

For example, the courts have ruled it was reasonable to believe that a firearm used by a bank robber would be retained for three weeks,[45] and that a murder weapon would be kept for six weeks.[46]

CLOTHING: Like firearms, clothing worn during the commission of a crime is likely to be kept because it retains its usefulness; e.g., it was reasonable to search for the clothing worn by a bank robber three weeks after the robbery.[47]

INSTRUMENTALITIES OF CRIME: Some of the things that criminals use to commit or facilitate crimes often have enduring utility or value, such that it may be reasonable to believe they are retained for a while; e.g., handcuffs (two months);[48] "knives, rope, twine, baling wire, plastic bags, a black attaché case" that were used by a serial murderer[49]; pliers and rope that were used by a murder suspect (6-7 months);[50] a .357 magnum handgun and silencer, gas cans, burnt clothing, and other items used in the commission of arson (one month).[51]

DRUGS: If there is probable cause to believe that the suspect is a drug dealer, it is usually reasonable to believe that he will maintain a supply of drugs in the place to be searched. As the Supreme Court observed, "The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise."[52] For example, in ruling that officers had satisfied the currency requirement, the courts have said:

- "In cases involving ongoing narcotics businesses, lapses of several months—and up to two years in certain circumstances—are not sufficient to render the information in an affidavit too stale to support probable cause."[53]
- "With respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity."[54]
- "Because the underlying criminal activity was continuing in nature, probable cause did not dissipate during the ten-day period between the last identified drug-related activity and execution of the warrant."[55]

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[42] (8th Cir. 1975) 525 F.2d 33. 38.
[43] (8th Cir. 2008) 528 F.3d 1069, 1074..
[44] *People v. Bryant* (2014) 60 Cal.4th 335, 369.
[45] *U.S. v. Gann* (9th Cir. 1984) 732 F.2d 714, 722.
[46] *U.S. v. Bowers* (9th Cir. 1976) 534 F.2d 186, 192.
[47] (8th Cir. 1975) 525 F.2d 33, 38.
[48] *U.S. v. Laury* (5th Cir. 1993) 985 F.2d 1293, 1314.
[49] *People v. Cooks* (1983) 141 Cal.App.3d 224, 298.
[50] *People v. Frank* (1985) 38 Cal.3d 711, 722, 728.
[51] *U.S. v. Aljabari* (7th Cir. 2010) 626 F.3d 940, 945.
[52] *United States v. Russell* (1973) 411 U.S. 423, 432. Also see *People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1718.
[53] *U.S. v. Fernandez* (9th Cir. 2004) 388 F.3d 1199, 1254.
[54] *U.S. v. Angulo-Lopez* (9th Cir. 1986) 91 F.2d 1394, 1396.
[55] *U.S. v. Davis* (8th Cir. 2017) 867 F.3d 1021, 1028.

BUSINESS RECORDS: Officers may usually infer that people who run legal and illegal businesses retain the records pertaining to sales and supplies.[56] Thus, the Court of Appeal noted that such records "presumably would be retained unaltered for periods of several years."[57] Another court said, "It is eminently reasonable to expect that such [business] records would be maintained in those offices for a period of time and surely as long as three months."[58]

EVIDENCE OF IDENTITY THEFT: Like business and financial records, evidence of identity theft may be retained for a long time. For example, the court in *People v. Jones*[59] ruled that evidence of identity theft would be at the suspect's home four weeks after his last use of the victim's credit card.

CHILD PORNOGRAPHY: People who possess child pornography are notorious for considering it a valuable possession, and are therefore likely to keep it for a long time, often many years.[60] As the Tenth Circuit observed, "Possessors of child pornography are likely to hoard their materials and maintain them for significant periods of time."[61] Or, as the Sixth Circuit put it, "The same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography."[62]

Ongoing crimes: Even if the evidence did not have enduring value, it may be reasonable to believe it had not been destroyed or depleted if (1) the crime under investigation was ongoing in nature, and (2) the evidence would have been useful in carrying out the crime. As the Fifth Circuit observed, the courts "allow fairly long periods of time to elapse between information and search warrant in cases where the evidence clearly shows a longstanding, ongoing pattern of criminal activity."[63] Similarly, the Court of Appeal explained that "if circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale."[64]

It will surprise no one that the most common types of ongoing criminal activity that the courts see nowadays are drug manufacturing and sales. As the Ninth Circuit explained, "[I]n cases involving ongoing narcotics businesses, lapses of several months—and up to two years in certain circumstances—are not sufficient to render the information in an affidavit too stale to support probable cause."[65]

Similarly, in *U.S. v. Davis*[66] the court ruled that, "Because the underlying criminal activity was continuing in nature, probable cause did not dissipate during the ten-day period between the last identified drug-related activity and execution of the warrant."

In contrast, the Court of Appeal ruled that an eight-week delay between suspect's purchase of $7,000 of cocaine from a drug organization rendered the information stale because there was insufficient information to indicate the suspect was anything other than a customer.[67] Other continuing crimes include fraud,[68] production of child pornography, serial murders,[69] and stalking.[70] POV

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[56] See *U.S. v. Johnson* (D.C. Cir. 2006) 437 F.3d 69, 72; *U.S. v. Nguyen* (8th Cir. 2008) 526 F.3d 1129, 1134.
[57] *McKirdy v. Superior Court* (1982) 138 Cal.App.3d 12, 26.
[58] *Andresen v. Maryland* (1976) 427 U.S. 463, 478, fn.9.
[59] (2013) 217 Cal.App.4th 735, 791.
[60] See *U.S. v. Morgan* (8th Cir. 2016) 842 F.3d 1070, 1074; *U.S. v. Vosburgh* (3rd Cir. 2010) 602 F.3d 512, 528.
[61] *U.S. v. Potts* (10th Cir. 2009) 586 F.3d 823, 831.
[62] *U.S. v. Paull* (6th Cir. 2009) 551 F.3d 516, 522.
[63] *U.S. v. Hyde* (5th Cir. 1978) 574 F.2d 856, 865.
[64] *People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652.
[65] *U.S. v. Fernandez* (9th Cir. 2004) 388 F.3d 1199, 1254. Also see *U.S. v. Russell* (1973) 411 U.S. 423, 432.
[66] (8th Cir. 2017) 867 F.3d 1021, 1028.
[67] *People v. Hirata* (2009) 175 Cal.App.4th 1499, 1504. Also see People v. Hulland (2003) 110 Cal.App.4th 1646, 1653
[68] See *People v. Hepner* (1994) 21 Cal.App.4th 761, 782-83; *U.S. v. Snow* (10th Cir. 1990) 919 F.2d 1458, 1460.
[69] See *People v. Cooks* (1983) 141 Cal.App.3d 224, 298; *People v. Miller* (1978) 85 Cal.App.3d 194, 204.
[70] See *Wood v. Emmerson* (2007) 155 Cal.App.4th 1506, 1522.