

# VIRGINIA STATE CRIME COMMISSION

## 2016 Annual Report: *Search Warrants*



# Search Warrants

## Executive Summary

During the Regular Session of the 2016 General Assembly, Delegate G. Manoli Loupassi introduced House Bill 361 (HB 361) and Senators Richard H. Black and Jill Holtzman Vogel introduced Senate Bill 247 (SB 247). Both bills were identical as introduced and sought to add the authority to issue a search warrant for “*any person to be arrested or any person who is unlawfully restrained*” to Virginia Code §§ 19.2-53, 19.2-54 and 19.2-56. Senate Bill 247 was amended in the Senate Courts of Justice Committee and later passed the Senate. Specifically, the phrase “*any person to be arrested*” was amended to “*any person to be arrested for whom a warrant or process for arrest has been issued*” and the phrase “*any person who is unlawfully restrained*” was deleted from the bill.

The bills were intended to address an ambiguity under current law in regard to whether a search warrant can be issued for a person who is on probation (or parole) and who violates the terms of his probation. More specifically, it is unclear whether a violation of the terms of probation constitutes a new “crime,” so as to authorize the issuance of a search warrant for a probationer who is believed to be in the residence of a third party. Both HB 361 and SB 247 (as amended) were left in the House Courts of Justice Committee and a letter was sent to the Crime Commission requesting a review of the subject matter.

In the absence of exigent circumstances or consent, law enforcement may not enter the home of a third party to execute an arrest warrant, even if they believe the subject of the arrest warrant will be found inside that location. The proper course of conduct is to obtain a search warrant, allowing entry into the residence to search for the person who is the subject of the arrest warrant.

In Virginia, probation officers have arrest authority, but not arrest power. A probation officer can authorize a warrantless arrest for a probationer, but the probation officer cannot physically detain the subject. A warrantless arrest for a violation of the rules of probation can be for status offenses that are punishable only because the offender is on probation.

If probable cause exists, a criminal search warrant may be issued for the search and seizure of:

- Weapons or other objects used in the commission of crime;
- Articles or things the sale or possession of which is unlawful;
- Stolen property or the fruits of any crime; and,
- Any object, thing, or person, including without limitation, documents, books, papers, records or body fluids constituting evidence of the commission of crime.

The Virginia Code does not explicitly authorize the issuance of a search warrant for a person who is wanted for arrest. Thus, an ambiguity exists under current law as to whether a search warrant can be issued for a person wanted for arrest who is believed to be located inside the residence of another individual.

Staff found that if the Virginia Code is amended as provided for in the substitute version of SB 247, the issuance of a search warrant would be explicitly authorized for all cases involving a person wanted on an arrest warrant, a *capias*, or for a warrantless arrest for a violation of the rules of probation. Staff also found that the phrase “*any person who is unlawfully restrained*” is unnecessary because existing law authorizes the issuance of a search warrant in such a circumstance.

The Crime Commission reviewed study findings at its October meeting. As a result of the study effort, the Crime Commission unanimously endorsed the following recommendation at its October and December meetings:

**Recommendation 1:** Endorse the substitute version of Senate Bill 247 which adds the phrase “*any person to be arrested for whom a warrant or process for arrest has been issued*” to Virginia Code §§ 19.2-53, 19.2-54 and 19.2-56, and deletes the phrase “*any person who is unlawfully restrained*” from the original version of the bill.

Legislation for Recommendation 1 was introduced in both chambers during the 2017 Session of the General Assembly. Delegate Charniele L. Herring introduced House Bill 2084 and Senator Richard H. Black introduced Senate Bill 1260. Both bills were passed and signed by the Governor.

## Background

During the Regular Session of the 2016 General Assembly, Delegate G. Manoli Loupassi introduced House Bill 361 (HB 361) and Senators Richard H. Black and Jill Holtzman Vogel introduced Senate Bill 247 (SB 247). Both bills were identical as introduced and sought to add the authority to issue a search warrant for “*any person to be arrested or any person who is unlawfully restrained*” to Virginia Code §§ 19.2-53, 19.2-54 and 19.2-56. Senate Bill 247 was amended in the Senate Courts of Justice Committee and later passed the Senate. Specifically, the phrase “*any person to be arrested*” was amended to “*any person to be arrested for whom a warrant or process for arrest has been issued*” and the phrase “*any person who is unlawfully restrained*” was deleted from the bill.

As introduced, both HB 361 and SB 247 added the authority to issue a search warrant for “*any person to be arrested or any person who is unlawfully restrained*” to the Virginia

criminal search warrant statutes.<sup>1</sup> This language was nearly identical to the terminology used in the Federal Rules of Criminal Procedure.<sup>2</sup>

The bills were intended to address an ambiguity under current law in regard to whether a search warrant can be issued for a person who is on probation (or parole) and who violates the terms of his probation. More specifically, it is unclear whether a violation of the terms of probation constitutes a new “crime,” so as to authorize the issuance of a search warrant for a probationer who is believed to be in the residence of a third party. Both HB 361 and SB 247 (as amended) were left in the House Courts of Justice Committee and a letter was sent to the Crime Commission requesting a review of the subject matter. The issue presented is best illustrated by the following scenario:

*Imagine that a defendant steals a computer and takes it back to his home. Police could clearly obtain a search warrant under Va. Code § 19.2-53 to search his home for the computer. Now, assume that police have charged him with grand larceny for stealing the computer and he hides in his neighbor’s home. Under the Steagald decision,<sup>3</sup> police must obtain a search warrant to enter his neighbor’s home to arrest him on the felony warrant. Virginia Code § 19.2-53 does not explicitly authorize the issuance of a search warrant for the defendant in this circumstance. However, magistrates in Virginia are issuing search warrants in these instances on the theory that the defendant’s physical body itself constitutes “evidence of the commission of [a] crime”<sup>4</sup> because he was present for and allegedly committed the offense.*

*Now, fast forward in time and imagine that the defendant was convicted of grand larceny and is on supervised probation. His probation officer receives information that he is using drugs and calls him to the probation office for a drug screen. The defendant refuses to take the drug screen and walks out of the office. His probation officer authorizes a warrantless arrest for his refusal to take the drug screen in violation of the rules of probation. Once again, the defendant hides in his neighbor’s home and police attempt to obtain a search warrant to enter his neighbor’s home and arrest him for this violation of probation. Whether a magistrate can issue a search warrant in this scenario is unclear under existing law.*

*Virginia Code § 19.2-53 does not explicitly authorize a search warrant for a person in this circumstance. The defendant’s physical body may no longer constitute “evidence of the commission of [a] crime”<sup>5</sup> because he has been convicted of the underlying grand larceny offense. Furthermore, refusing the drug test is not a new “crime” under the Virginia Code. The refusal of the drug test is a status offense that is punishable only because*

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<sup>1</sup> The bill proposed amendments to Va. Code §§ 19.2-53, 19.2-54 and 19.2-56.

<sup>2</sup> Fed. R. Crim. P. 41(c)(4).

<sup>3</sup> Steagald v. United States, 451 U.S. 204 (1981).

<sup>4</sup> See Va. Code § 19.2-53(A)(4) (2016).

<sup>5</sup> *Id.*

*the defendant is on probation. Such a refusal could constitute a violation of a court order, but some judges are uncomfortable with magistrates deciding what actions constitute a violation of the court's order.*

As demonstrated by the given scenario, existing Virginia law is unclear as to whether a search warrant can be issued for an individual who is subject to arrest for a violation of probation and who is believed to be hiding in the residence of a third party. Staff undertook a thorough legal analysis to clarify the issue presented by the bills.

## Legal Analysis

### U.S. Supreme Court Decisions

In Payton v. New York, the U.S. Supreme Court held that in the absence of exigent circumstances, the Fourth Amendment prohibits law enforcement from making a warrantless entry into a person's home for the purpose of executing a routine felony arrest.<sup>6</sup> In order to enter a person's residence to execute a routine felony arrest, law enforcement must first obtain an arrest warrant for that person. The Payton decision did not address entering the residence of a third party to execute an arrest of an individual.

In Steagald v. United States, the U.S. Supreme Court held that in the absence of exigent circumstances or consent, law enforcement may not enter the home of a third party to execute an arrest warrant, even if they believe the subject of the arrest warrant will be found there.<sup>7</sup> Warrantless entry into the residence is a violation of the homeowner's Fourth Amendment rights. The proper course of conduct is to obtain a search warrant authorizing entry into the third party's residence to search for the person who is the subject of the arrest warrant.

### Warrantless Arrests in Virginia

Under Virginia law, if a probation officer desires to have a probationer arrested for violating the terms of his probation, he can either: 1) request that a judge issue a *capias* for violation of a court order, or 2) authorize a warrantless arrest of the probationer.<sup>8</sup> In Virginia, a probation officer can authorize a warrantless arrest for a probationer, but the probation officer cannot physically detain the probationer. These warrantless arrest documents issued by the probation officer are commonly referred to as a "PB 15." The probation officer issues the PB 15 documents and then provides the documents to law enforcement to execute the arrest of the probationer.

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<sup>6</sup> 445 U.S. 573 (1980).

<sup>7</sup> 451 U.S. 204 (1981).

<sup>8</sup> Va. Code §§ 53.1-149 and 53.1-162 (2016).

A warrantless arrest on a PB 15 is for a violation of the rules of probation. The violation can be for a status offense, which is an action that is not a “crime” in and of itself, but which is punishable because the offender is on probation, such as:

- Failure to report an arrest;
- Failure to maintain or report changes in employment;
- Failure to report to probation as instructed;
- Failure to allow probation to visit home or work place;
- Failure to follow instructions;
- Use of alcohol or controlled substances;
- Possession or transport of a firearm; or,
- Change of residence or leaving the Commonwealth without permission.<sup>9</sup>

While HB 361 and SB 247 were introduced to address search warrants in relation to warrantless arrests for probation violations, the more commonly recognized statute regarding warrantless arrests is Va. Code § 19.2-81. Under this Code section, law enforcement officers in Virginia may arrest without a warrant for any crime committed in their presence, any felony not committed in their presence when based on reasonable grounds or probable cause, and certain misdemeanors not committed in their presence.<sup>10</sup> Unlike the status offenses for which a warrantless arrest for a probation violation may be issued, warrantless arrests under Va. Code § 19.2-81 all involve activities that are defined criminal violations.

### **Search Warrants in Virginia**

If probable cause exists, a criminal search warrant may be issued pursuant to Va. Code § 19.2-53 for the search of and seizure therefrom of the following things as specified in the warrant:

- Weapons or other objects used in the commission of crime;
- Articles or things the sale or possession of which is unlawful;
- Stolen property or the fruits of any crime; and,
- Any object, thing, or person, including without limitation, documents, books, papers, records or body fluids constituting evidence of the commission of crime.

When applying for a search warrant, Va. Code § 19.2-54 requires the filing of “an affidavit of some person reasonably describing the place, thing, or person to be searched, the things or persons to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which such warrant is to be made and that the object, thing, or person searched for constitutes evidence of the commission of such offense.”

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<sup>9</sup> See Sentencing Revocation Report (2016). *Virginia Criminal Sentencing Commission*. Retrieved from: [http://www.vsc.virginia.gov/worksheets\\_2014/SRR\\_worksheet.pdf](http://www.vsc.virginia.gov/worksheets_2014/SRR_worksheet.pdf)

<sup>10</sup> Misdemeanors not committed in the officer’s presence include driving under the influence, shoplifting, carrying a weapon on school property, assault and battery, brandishing a firearm, or destruction of commercial property. See also Va. Code § 19.2-81.3 (2016) for misdemeanor domestic assault and battery and protective order violations.

While the Virginia Code does not explicitly authorize a search warrant for “a person to be arrested,” Virginia magistrates have been encouraged to issue search warrants for a premise when there is probable cause to believe that “a person to be arrested” is within that location.<sup>11</sup> A search warrant may be issued in this circumstance under the theory that the defendant’s physical body itself constitutes “*evidence of the commission of [a] crime*”<sup>12</sup> because he was present for and allegedly committed the offense. In the case of a probation violation, no “*crime*” may have been committed because the violation may have been for a status offense. Hence, if no “*crime*” was committed, then the theory that the defendant’s physical body itself constitutes “*evidence of the commission of [a] crime*”<sup>13</sup> is not applicable to violations of probation which are status offenses.

These considerations create a lack of clarity within Virginia’s existing criminal search warrant statutes as to whether a search warrant may be issued for a person who is subject to arrest. While the original intent of HB 361 and SB 247 focused on search warrants for arrests on probation violations, the proposed amendments would provide clarity within the search warrant statutes on whether a search warrant may be issued for any person who is subject to arrest.

## Summary and Conclusion

During the Regular Session of the 2016 General Assembly, Delegate G. Manoli Loupassi introduced HB 361 and Senators Richard H. Black and Jill Holtzman Vogel introduced SB 247. Both bills were identical as introduced and sought to add the authority to issue a search warrant for “*any person to be arrested or any person who is unlawfully restrained*” to Virginia Code §§ 19.2-53, 19.2-54 and 19.2-56. Senate Bill 247 was amended in the Senate Courts of Justice Committee and later passed the Senate. Specifically, the phrase “*any person to be arrested*” was amended to “*any person to be arrested for whom a warrant or process for arrest has been issued*” and the phrase “*any person who is unlawfully restrained*” was deleted from the bill.

The bills were intended to address an ambiguity under current law in regard to whether a search warrant can be issued for a person who is on probation (or parole) and who violates the terms of his probation. More specifically, it is unclear whether a violation of the terms of probation constitutes a new “*crime*,” so as to authorize the issuance of a search warrant for a probationer who is believed to be in the residence of a third party. Both HB 361 and SB 247 (as amended) were left in the House Courts of Justice Committee and a letter was sent to the Crime Commission requesting a review of the subject matter.

If Va. Code §§ 19.2-53, 19.2-54 and 19.2-56 were amended as provided for in the original versions of HB 361 and SB 247, the issuance of a search warrant for a person would be clearly authorized for all cases when an arrest of that person was authorized.

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<sup>11</sup> See Virginia Magistrate Manual, pgs. 5-20 (2016). *Office of the Executive Secretary of the Supreme Court of Virginia*. Retrieved from: <http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll6/id/9966>

<sup>12</sup> See Va. Code § 19.2-53(A)(4) (2016).

<sup>13</sup> *Id.*

The original language applied to “*any person to be arrested.*” This terminology would encompass a search warrant for any individual to be arrested based on issued process<sup>14</sup> or any person subject to a warrantless arrest for a criminal violation.<sup>15</sup>

If Va. Code §§ 19.2-53, 19.2-54 and 19.2-56 were amended as provided for in the substitute version of SB 247, the issuance of a search warrant for a person would be clearly authorized in all cases when an arrest of that person was authorized by warrant, *capias* or PB 15. The substitute language in SB 247 applied to “*any person to be arrested for whom a warrant or process for arrest has been issued.*” This substitute version would limit the issuance of a search warrant for a person to instances when process for arrest had been issued.<sup>16</sup>

Both HB 361 and SB 247 originally included language relating to the issuance of a search warrant for “*any person who is unlawfully restrained.*” Including this phrase in the search warrant statutes is unnecessary. If a person is unlawfully restrained, he is likely the victim of an abduction. In such circumstance, a search warrant can already be issued under the existing statute to search for the person who is “evidence of the commission of [the] crime.”<sup>17</sup>

The Crime Commission reviewed study findings at its October meeting. As a result of the study effort, the Crime Commission unanimously endorsed the following recommendation at its October and December meetings:

**Recommendation 1:** Endorse the substitute version of Senate Bill 247 which adds the phrase “*any person to be arrested for whom a warrant or process for arrest has been issued*” to Virginia Code §§ 19.2-53, 19.2-54 and 19.2-56, and deletes the phrase “*any person who is unlawfully restrained*” from the original version of the bill.

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## Acknowledgements

The Virginia State Crime Commission extends its appreciation to the following agencies and organizations for their assistance and cooperation on this study:

*Virginia Department of Corrections (Probation & Parole Districts 9 and 32)*

*Virginia Department of Magistrate Services*

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<sup>14</sup> Such process for arrest may include a criminal warrant, *capias* or PB 15.

<sup>15</sup> See Va. Code § 19.2-81 (2016).

<sup>16</sup> Such process for arrest may include a criminal warrant, *capias* or PB 15.

<sup>17</sup> Va. Code § 19.2-53(A)(4) (2016).

<sup>18</sup> 2017 Va. Acts. ch. 233, 242.