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**ISSUING SEARCH WARRANTS BASED ON THE
INFORMATION OBTAINED FROM
POLICE SOURCES
(A comparative research of adversarial and continental
legal system)**

Abstract

In the Republic of Serbia, there have been major changes in the implementation of criminal investigations. The main goal in the legal regulation of criminal procedure in any democratic and legal state is the establishment of an optimal relationship between the two opposing tendencies in criminal proceedings.

One of them strives to its full effectiveness and efficiency, and the other seeks to prevent excessive and unnecessary restrictions of rights and freedoms of citizens. In this work, using the method of comparison and correlation, based on content of analysis of legal acts from the adversarial legal system we investigate the updating and implementation of the search of the apartment based on the information from police sources, in the light of the prosecutorial investigation and the possibility or impossibility of issuing a search warrant from the court. Research grounds for the search of the apartment on the basis of information from operational sources of the police, has not been carried on our theory so far. As a starting point we take the analysis of the formal legal and institutional framework within which the problem and the subject of research should be defined. The decision to write an article about the use of police information to obtain orders for undertaking the search of the apartment, has been imposed after the changes that have been made by the criminal procedural code in Serbia. The work on one hand explores the application of knowledge ranges from police sources in establishing substantive and legal basis for receiving the command to enter the apartment and searching, in a new constructed adversarial evidence procedure in Serbia. On the other hand, it points to the necessity of adoption of the Directive by which the

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prosecutor would prescribe what an operating source, criminal investigation and criminalistics operations are.

Keywords: *police source, cognition, search, search warrant.*

1. Opening remarks

In order to obtain a search warrant in the process of adversarial constructed process of hearing the evidence in the United States, the fourth amendment provides that trial (search) must be reasonably and specifically decreed. What does it mean? It means that for a search warrant must be a valid legal and material base and specific because as only a specific object can be searched for which a warrant from a court (judges) has been searched (obtained) precisely defined by geographic parameters, such as the city, the location and which room is being searched. Other rooms on the site belonging to the above-mentioned object, such as bedrooms, outbuildings, persons, vehicles, etc. to undergo trial (the subject of the search) requires additional search warrants.

The process of obtaining a search warrant based on information to which the police came from operative sources has several of its phases. The official police person must first prove the validity of the source from which he has obtained the information. What does it mean? It means that he has to prove that the knowledge passed formalization phase and moved up to the fact that the source is an immediate, or direct, that knowledge is not in the domain of "hearsay ". No matter that the standard for search is of lower level than the standards required for a subsequent conviction, there must be a reasonable cause of the material and legal basis of the grounds for suspicion, based on direct information (i.e. are obtained by the personal observation of a cop-observation, covert monitoring, etc.) or operating source reliability. Explanation that official must provide to the court must have the following capacities: a) to prove that the evidence that can be collected without a warrant may not be sufficient to convict a person, b) but may be sufficient to suggest that the evidence to convict a person, can be found using the warrant.

When we explore the existing legal theory and jurisprudence the necessity that the official design an official request with the court for the issuance of a search warrant, we find the statement ("warranty") that is given by the official person under oath, so the impression is that we keep in mind certain "guarantee". It is so treated in the adversarial legal theory and jurisprudence. Thus, the police officers have to make certain

the reason for the trial in the documentary sense and on the other part in the formal sense, to prove that the source has collected the knowledge in a lawful manner. To prove that the source is a “concerned citizen“ who can be qualified as a “source of informant“ and is not a part of a criminal enterprise and criminal circles. As such, the source has provided the material basis for the possible cause of trial, data by which the request for the issuance of a search warrant is supported. On the other hand, the defence in the proceedings before the Court have the duty to prove that the source has not been reliable or that is a part of a criminal milieu.

That the information that he has obtained is not legal and therefore cannot be taken as an established cause of material grounds as well as the base of suspect in the formal legal sense for the issuance of a search warrant of the apartment, and therefore requires that the evidence so obtained does not perform as evidence in the proceedings. So his intervention in court before a judge is to prove that there was no corroboration that would established the requirement for the issuance of a search warrant, thus the evidence collected in that way oppose the doctrine of the fruit of the poisonous tree so the chain of causation between the illegal action and infected evidence is decisive, not too weakened, and the evidence would not have been inevitably discovered.

2. The Republic of Serbia and using the police sources for obtaining the search warrant

No matter that by the major changes in the Code of criminal procedure¹ of the Republic of Serbia has passed from the court to the prosecutorial investigation, the functioning of crime operations by applying Instruction has still remained, that are made by the competent Ministers of the Interior. Thus, formal Code has introduced a new procedure that is so constructed that the prosecutor is authorized to carry out the investigation, and that there has not been necessary changes to accompany the novelty in the content and meaning of the operating sources and criminal operations.² The judge in adversarial system as is at work in Serbia does not engage in the kind of material basis for the possible cause of a trial provided by the source, as well as the data

¹ Zakonik o krivičnom postupku, *Službeni glasnik RS [Official Gazette of the RS]*, br. 72/2011, 101/2011, 121/2012, 32/2013 45/2013, 55/2014.

² Based on the search warrants which have been issued by the court in a few previous months, the officials come across the facts that the person is abroad or dead. These facts support the view that the judge orders the search warrant without going into the merits of a material fact required by the police.

which supported all requirements for the issuance of a search warrant. The defence counsels in proceedings before the court cannot prove that the source has not been reliable, or that are from the criminal milieu, that information obtained by them are not legal and therefore cannot be taken as an established cause of the material as well as grounds to suspect the legal terms for the issuance of a search warrant of the apartment. Thus, in court before a judge defence counsel has no mechanisms that would prove that there was no corroboration that would establish the requirements for the issuance of a search warrant, that the evidence collected by the fruits of the poisonous tree doctrine was therefore the chain of causation between the illegal action and infected evidence.

In contrast to the adversarial system in countries where it has application for many decades, where a police officer is in an official obligation that in presence of the prosecutor before the preliminary procedures in case that a defence counsel put to the court: to provide knowledge about the credibility of the operating sources, presents the facts from the court documents by which a search warrant has been reasoned and required, from which source he has collected data for obtaining the request for the search warrant of the apartment before the court and by the court, in a formal Code of Serbia, such an obligation is not prescribed.

Furthermore, according to the regulations in the formal Code of the Republic of Serbia, the police officer should not have to make certain the reason for the search in the documentary sense, but on the other hand in a formal sense he has not binding requirement to prove that the operational source of knowledge collected information in a lawful manner, in which he based his reasoned proposal to the prosecutor. A police officer is under no obligation to prove that it is a source of “concerned citizen“ who can be qualified as a “source of informant“ and is not a part of a criminal enterprise and criminal circles.

The judge in adversary system such as at work in Serbia, when issuing commands to search the apartment, based on a reasoned proposal of the Prosecutor, does not engage himself in what kind of a source provided the material basis for the possible cause of the search, as well as the data which supported the request for the issuance of commands to search the apartment. Furthermore, in adversary system of investigation in Serbia, a judge does not investigate whether it is substantiated suspicion before the issuance of warrant, or a citizen s space is entered in order to look for evidence. Research suggests that entry into the apartment to find grounds for suspicion prevailing in Serbia. On the other hand, from the

results of research to which we have come, the rules of the enlightened nations suggest that it is necessary to have a reasonable doubt in order to obtain a search warrant, and that it is unacceptable that after entering the area, the search is directed to looking for the grounds for suspicion.

Furthermore, defence counsels in the proceedings before the prosecutor who is now conducting an investigation, or before the judge for preliminary proceedings should have the mechanisms to file a claim, that before the decision on determining the measure of search at the request of the prosecutor, the previously established after the citizen entered the status of the suspect, what is the source used by the prosecutor to make a reasonably based proposal for the issuance of a search of an apartment with the court?

Thus, the defence counsel should require before the preliminary procedure that the plaintiff provides evidence that the source was reliable, that the information obtained by the Prosecutor are legally collected, and thus could be used as the fundamental cause in the material sense and suspicion ground in the formal sense for the issuance of a search of the apartment, that there is no doubt in the chain of causation as a basis for obtaining commands to search the apartment.

Otherwise, if the prosecutor before the judge for preliminary proceedings could not prove that the operational source through which he came to knowledge and on which he bases a reasoned proposal for obtaining commands to search the apartment, is credible, the evidence collected in that way, on which the plaintiff based reasonable suspicion, would be in the domain of illegal actions and infected evidence.

The Constitution³ of the Republic of Serbia, adopted before the adoption of the adversarial investigation system, in ‘special rights of the defendant’ in Article 33 provides: “every person charged with a criminal offense has the right to be informed promptly, in accordance with the law and in detail in a language which he understands of the nature and cause of that for which he is charged, as well as about the evidence collected against him”.

The Code of criminal procedure of the Republic of Serbia (“Chapter I-Basic Provisions – Subject of the Code”), in Art. 2 “Definition of Terms” in paragraph 1 provides: “a suspect is a person against whom a competent public authority has undertaken a certain act stipulated under this Code in the pre-investigation proceedings due to existence of grounds of suspicion that he committed a criminal offence, and a person against whom an

³ Ustav Republike Srbije, *Sl. glasnik RS [Official Gazette of the RS]*, br. 98/2006.

investigation is being conducted; 2) a defendant is a person against whom an indictment has been filed but not yet confirmed, or against whom a motion to indict, a private prosecution or a motion to pronounce a security measure of compulsory psychiatric treatment has been submitted, and the date of the trial or hearing for pronouncing a criminal sanction has not yet been set, but also a term used as a general term for a suspect, an accused person, a defendant and a convicted person”.

Thus, according to the provisions of the Constitution and the Code of criminal procedure, the suspect should be the same as the defendant, because the Constitution does not recognize the suspect. Well, if it's really so? In systems where the adversary investigation system has been at work for decades, that is the case, so the defence counsel of the suspect before the preliminary procedure may put the request and the prosecutor is obliged to state in front of the judge the ground for engaging the operating source, who is the source as well as what his credibility is based on. If the plaintiff fails to prove the credibility of the source from which obtained the knowledge of conceiving a reasoned proposal for obtaining commands to search the apartment, the referee will immediately direct the Prosecutor to what he collected and offers as evidence in court, has no character of evidence.

Pursuant to provisions set in the Code of criminal procedure, the moment when the suspect becomes the accused is a long way because, as referred to in paragraph 1 of Article 2 of the Criminal Procedure Code, stems that suspects is not found guilty, he does not have to enter the status of the defendant, he is the person against whom they have not raised charges that are not yet confirmed. So, no matter what the suspect lawmaker in paragraph 2 of Article 2 of the Code of Criminal Procedure, provides a definition of or a term that serves as a general term for a suspect, defendant, accused and convicted. This definition is specific to the law of the Republic of Serbia (in the law of other countries it is not prescribed), because it clearly defines the status of every accused person, from a suspect to a convict and prisoners convicted and serving a sentence. Furthermore, the suspect is sufficient grounds for suspicion, while for the defendant it cannot be said, because indictment in Serbia, and from the results of research in the countries where the adversary investigation system is in practice, determines that reasonable suspicion is necessary. Thus, there are essential elements of reasonable suspicion which support the indictment (par. 331 Code of criminal procedure).

3. A search warrant on the basis of police information in adversary legal system

According to legal theory in an adversary system a search warrant is an order issued by the judge, allowing the (points) officer to search a specific place, person or thing. The judge must decide whether the order should be issued or not.⁴ That the police could use a search warrant must specifically describe: a place where it is necessary to conduct a search and describe the thing or the person being sought.⁵ On the other hand, the specificity applied in adversary system while searching the car is regulated in such a way that the inspection or search of the car is significantly different from the search of the apartment.⁶ Namely, when stopping a passenger car and driver and vehicle control, a police officer must be able to prove the existence of probable cause, and thus reasonable assurance that will prove that in the vehicle is a subject that under legal rules may not be possessed.⁷ If the driver or a passenger has been arrested, the police may search the interior of the car, but not a person.⁸

In the American legal system is particularly important institution of consent, which is not known in the continental system because it is not known in the formal criminal codes, when a police officer may search an apartment if gets the consent of the owner of the apartment or car, even if it is in such cases normally required a search warrant issued by the court.⁹ Then all the actions undertaken by the official police officer have the same legal effect as made on the basis of a warrant issued by a

⁴ J. Dressler, *Understanding Criminal Procedure*, LexisNexis, Newark 2002³.

⁵ H. A. Jackson, "Arizona v. Evans: expanding exclusionary rule exceptions and contracting Fourth Amendment protection", *Journal of Criminal Law and Criminology*, Vol. 86, 4/1996, 1218.

⁶ *Hernandez v. State*, 60 S.W.3d 106, 112-14, 115 (Tex. Crim. App. 2001),

⁷ A. Liptak, Supreme Court Edging Closer to Repeal of Evidence Ruling, N. Y. TIMES, Jan. 31, 2009, at A1 (naming Justices Roberts, Alito, Scalia and Thomas as justices willing to abolish the exclusionary rule entirely).

⁸ R. E. Barnett, "Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice", *Emory Law Journal*, Vol. 32, 1983, 941-942 (calling for an alternative to the exclusionary rule); D. Dripps, "The case for the contingent exclusionary rule", *American Criminal Law Review*, Vol. 38, 2001, 5-23 (detailing the long history of criticisms of the exclusionary rule and other criminal procedure protections); Y. Kamisar, "In defense of the search and seizure exclusionary rule", *Harvard Journal of Law & Public Policy*, Vol. 26, 1/2003, 119 (citing dozens of articles); R. R. Rader, "Legislating a Remedy for the Fourth Amendment", *South Texas Law Journal*, Vol. 23, 1982, 606-07.

⁹ J. Gittins, "Excluding the Exclusionary Rule: Extending the Rationale of *Hudson v. Michigan* to Evidence Seized During Unauthorized Nighttime Searches", *BYU Law Review*, 2/2007, 451; M. J. O'Laughlin, "Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11", *UMKC Law Review*, Vol. 70, 2001, 707, 708.

court.¹⁰ Furthermore, another important legal institution when a search is carried out with the consent refers to consent given by a person who doesn't live alone in the apartment.¹¹ Thus consent extends to everything that benefits another person.¹² The exception is that then the official police officer cannot go into those rooms that are not commonly used with the person who gave the consent, such as: bedroom.¹³ In addition to the results shown here are a few situations when you do not need a search warrant, such as: a) if the officer already has the right to be on your property and see the goods, or evidence of a crime that is clearly visible, the object can be legally taken away to be used as evidence.¹⁴ For example, if the police were called and entered the house in case of a family violence, and saw the marijuana plants on the sill, the plants could be seized as evidence, b) if the arrested is at his home, police officers can search for weapons or other accomplices in order to protect their safety (institute known as "protection movement"), c) to prevent the destruction of evidence, d) extraordinary circumstances-this exception applies to emergency situations where the process of obtaining a search warrant jeopardizes public safety or could lead to the loss of evidence.¹⁵

In the UK search warrants are issued by local judges and require the official to provide evidence that can support the basis for the search warrant.¹⁶ In the vast majority of the cases in which police already had somebody in custody, the search¹⁷ of the premises can be done without a warrant in accordance with "Article 18. - The Police and evidence of a criminal offense".¹⁸ A review in accordance with "Article 18.- the Police and Criminal Law, can be implemented immediately by the police constable without requiring approval by the inspectors in accordance with Article 18 (5)".¹⁹ This subsection provides that the address of the suspect person can

¹⁰ M. S. Bransdofer, "Miranda Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine", *Indiana Law Journal*, Vol. 62, 1986.

¹¹ D. Dripps.

¹² Y. Kamisar "Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts", *Minnesota Law Review*, Vol. 43, 1958, 1145-1150.

¹³ *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 1920.

¹⁴ T. S. Schrock, R. C. Welsh "WUp from Calandra: The Exclusionary Rule as a Constitutional Requirement", *Minnesota Law Review*, Vol. 59, 1974, 308-09.

¹⁵ A. T. Webster, "Protecting Society's Rights While Preserving Fourth Amendment Protections: An Alternative to the Exclusionary Rule", *South Texas Law Journal*, Vol. 23, 1982, 693, 706 (advocating abandonment of the modern exclusionary rule).

¹⁶ See *Perry v. the United Kingdom* (dec.), no. 63737/00, 26 September 2002.

¹⁷ *United Kingdom* [GC], no. 24888/94, § 69, ECHR 1999-IX; *Ramirez Sanchez v. France* [GC], no. 59450/00, § 116, ECHR 2006-IX, and *Saadi v. Italy* [GC], no. 37201/06, § 127, ECHR 2008.

¹⁸ *Ibid.*

¹⁹ See *Perry v. the United Kingdom* (dec.), no. 63737/00, 26 September 2002.

be searched. If a person is arrested in his own home or immediately after leaving his room,²⁰ the officer can immediately search the immediate area in which the person was in accordance with “Article 32 of the same Act “.²¹

4. Limitations in search of adversary formal criminal procedure

In the United States constitutional law and criminal procedure, the term “sugar bowl “²², refers to the legal maxim in connection with one of the limitations of search and seizure imposed by the Fourth Amendment of the US Constitution.²³ This applies particularly to areas that can be searched in looking for the objects listed in items of the orders in respect of any other evidence of criminal offence that can be found.²⁴ The maxim (often cited as: “If you are looking for a stolen television set, you cannot look into the sugar bowl “)²⁵ refers to the difference between what is described in the search warrant of the apartment, persons or things that can be validly requested.²⁶

What can be conducted during the search and what cannot, we will see in the following examples: a) According to the law, only those areas that realistically could include things that are looked for, can be searched,

²⁰ P. Stewart “The road to Mapp v. Ohio and beyond: the origins, development and future of the exclusionary rule in search-and-seizure cases”, *Columbia Law Review*, Vol. 83, 1983, 1365, 1392.

²¹ C. A. Harkins, “The Pinocchio Defense Witness Impeachment Exception to the Exclusionary Rule: Combating a Defendant’s Right to Use with Impunity the Perjurious Testimony of Defense Witnesses”, *University of Illinois Law Review*, 1990, 375, 378 (saying the Supreme Court announced the Fourth Amendment exclusionary rule in *Weeks*). D. S. Jones, „Application of the exclusionary rule to bar use of illegally seized evidence in civil school disciplinary proceedings“, *Washington University Journal of Urban and Contemporary Law*, Vol. 52, 1997, 375, 376 (claiming the Supreme Court created the exclusionary rule in *Weeks*); J. Stribopoulos, “Lessons from the pupil: A Canadian solution to the American exclusionary rule debate“, *Boston College International and Comparative Law Review*, Vol. 22, 1999, 77, 94 (claiming the Supreme Court “introduced the exclusionary rule to American law through its 1914 decision in *Weeks*”); D. R. Wright, “How to Improve Military Search and Seizure Law”, *Military Law Review*, Vol. 116, 1987, 157, 171 (stating *Weeks* “originated” the exclusionary rule).

²² M. J. Klarman, „The Racial Origins of Modern Criminal Procedure“, Vol. 99, *Michigan Law Review*, 2000, 48.

²³ R. Roots, „The Originalist Case for the Fourth Amendment Exclusionary Rule“, *Gonzaga Law Review*, Vol. 45, 2010, 20.

²⁴ Related cases: *Virginia v. Moore*, 128 S.Ct. 1598, 1603-04 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318, 332 n.6 (2001), *City of West Covina v. Perkins*, 525 U.S. 234, 247 n.2 (1999) - citing A. R. Amar, „Fourth Amendment First Principles“, *Harvard Law Review*, Vol. 107, 1994; *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1212 (10th Cir. 2003) (citing A. R. Amar, *The Constitution and Criminal Procedure: First Principles*, New Haven, 1997, 7-19 (for the proposition that “[n]ot all searches lacking warrants or consent are unconstitutional under the Fourth Amendment”).

²⁵ S. E. Pitler, „Comment, The Origin and Development of Washington’s Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy“, *Washington Law Review*, Vol. 61, 1986, 459, 466.

²⁶ L. K. Gaines, R. LeRoy Miller, *Criminal Justice in Action*, The Core. Belmont, CA, Thomson/Wadsworth, 2006⁷, chapter 6.

and as such it is the only valid proof that can be received by the court in the proceedings; b) if the search warrant states the seeking of the stolen TV and it is the motive and reason for the search, officers of the law cannot search the persons who may possess other stolen thing.²⁷ On the other hand, the police officer can search the other hiding places/areas where TV can be hidden, such as a closet, attic or a shed; c) if a search warrant requires a stolen ring as the subject, the officer can perform search the sugar bowl; d) the intention of this legal approach is to limit a search to only those areas or objects, where the hidden object from the warrant can be reasonably found.²⁸ This does not exclude evidence of other crimes in areas that the warrant reasonably allows those who search to carry out the action, or the evidence is in plain sight; e) an extension of this concept prevents the search space, things and persons that could not be the subject of the search warrant. From the analysis of such a legal approach is an evident a desire of the legislator that the maxim: “Sugar Bowl“ to be a reminder of law enforcement to carefully determine the scope of the warrant.²⁹ In the opposite treatment, if the evidence is collected, and which is outside of the scope of the warrant areas, then it is very likely that it would be excluded from the proceedings because it is an illegal search and seizure of the objects.³⁰

5. Adversary legal system and the importance of the doctrine – the poisonous tree fruits

Fruit of the poisonous tree is the metaphor in the legal system of the United States.³¹ It is used to describe the evidence that has been obtained illegally. It starts from the fact that if the infected source (“tree“) of evidence or the evidence itself, then nothing is proved- because it is infected. Such evidence is not generally admissible in court.³²

²⁷ M. S. Bransdofer, 1986.

²⁸ P. Tinsley *et al.*, „In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach“, *Southern University Law Review*, Vol. 32, 2004, 63, 64.

²⁹ *Lawson v. Buzines*, 3 Del. (3 Harr.) 416, 416 (1842); *Boggs v. Vandyke*, 3 Del. (3 Harr.) 288, 288 (1840); *Hall v. Hall*, 6 G. & J. 386, 409 (Md. 1834) (holding that “[t]he constable in execution of a warrant to arrest a party, breaks another’s house at his peril”).

³⁰ T. Y. Davies, „Recovering the Original Fourth Amendment“, *Michigan Law Review*, Vol. 98, 1999, 547, 663-66.

³¹ K. T. Lash, “James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment”, *George Washington Law Review*, Vol. 74, 2/2006, 165, 192-194 (describing the Supreme Court’s occasional treatment of the Ninth and Tenth Amendments as “mere truisms,” i.e., statements of the existing relationships among the states, the people, and the national government, without any distinct authority to limit government).

³² Justice Hugo Black, widely known as the arch-textualist of his era, expressed the opinion this way: “[T]he federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.” *Wolf*, 338 U.S. at 39-40 (Black, J., concurring).

The doctrine is an extension of the exemption rule, which, in accordance with some exceptions, prevents evidence obtained in contravention of the Fourth Amendment³³ to be admitted in criminal proceedings.³⁴ As a rule of exemption, the doctrine of the “fruit of the poisonous tree” aims to distract the police from the use of illegal means to obtain evidence, because there is no benefit.³⁵ Such evidence is not generally admissible in court.³⁶ If a police officer conducted an unconstitutional search of the house because he has got the key of the locker and the evidence of the crime came from it than the evidence would likely be excluded.

This legal doctrine has four exceptions. The evidence is admissible if: a) it is detected in the partial search as a result of an independent source; b) would have been inevitably discovered despite the infected source; c) the chain of causation between the illegal action and infected evidence is too weakened;³⁷ and d) a search warrant is valid based on probable cause,³⁸ but it has been lost by the government agents in good faith³⁹ (this is called the exception of goodwill).⁴⁰

³³ W. C. Heffernan, “On Justifying Fourth Amendment Exclusion”, *Wisconsin Law Review*, 1989, 1193, 1224 (concluding that the exclusionary rule is implicitly required by the text and history of the Fourth Amendment).

³⁴ B. J. Killian, „United States v. Crews: Fruit of the Poisonous Tree—A New Wrinkle?“, *Idaho Law Review*, Vol. 18, 1982, 18: 151.

³⁵ F. Schauer, „On the Supposed Jury-Dependence of Evidence Law“, *University of Pennsylvania Law Review*, Vol. 155, 1/2006, 165, 168.

³⁶ B. P. Wilson, „The Fourth Amendment as More Than a Form of Words: The View from the Founding” in: *The Bill of Rights: Original Meaning and Current Understanding* (ed. Eugene W. Hickock, Jr.), 1991, 151, 154.

³⁷ M. J. O’Laughlin, „Comment, Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11“, *University of Missouri-Kansas City Law Review*; Vol. 70, 2011, 707, 708.

³⁸ A. R. Amar, 757, 764. *Virginia v. Moore*, 128 S.Ct. 1598, 1603-04, 2008.

³⁹ R. Roots (2010) lists the most important court cases: *Findlay v. Pruitt*, 9 Port. 195, 200 (Ala. 1839) (upholding liability of arrestor for trespass and assault for arrest with insufficient cause); *Braveboy v. Cockfield*, 27 S.C.L. (2 McMul.) 270, 273 (S.C. 1841) (holding that words on the arrest warrant were insufficient to justify an arrest, thus placing liability on constable); *Colvert v. Moore*, 17 S.C.L. (1 Bail.) 549, 549 (S.C. 1830) (action against arrestor for assault and false imprisonment); *Garvin v. Blocker*, 4 S.C.L. (2 Brev.) 157, 158 (S.C. 1807) (successful suit against constable and justice of the peace). During the early 1800s, there was virtual strict liability for every search and seizure violation. See: *Randall v. Henry*, 5 Stew. & P. 367 (Ala. 1834) (suggesting that someone—the magistrate, the complainant or the arrestor—was liable for every false arrest); *Reed v. Legg*, 2 Del. (2 Harr.) 173, 176 (1837) (holding that complainants are liable for procuring a search warrant that turns up nothing, even if an executing officer is protected by the warrant); *Simpson v. Smith*, 2 Del. Cas. 285 (1817) (holding person who swore out search warrant application liable, regardless of the existence of probable cause and the procedural propriety of his claims, when the arrestee was found innocent); *State v. McDonald*, 14 N.C. (3 Dev.) 468, 471-72 (1832) (officer and other defendants liable for searching a house upon inaccurate search warrant).

⁴⁰ D. E. Steinberg, „The Original Understanding of Unreasonable Searches and Seizures“, *Florida Law Review*, Vol. 56, 2004, 1052, 1072 (“Prior to *Boyd v. United States*, constitutional search and seizure provisions probably were discussed in fewer than fifty opinions.”).

6. Concluding remarks

The results of these investigations indicate the findings, which can be summarized as follows: no matter what major changes in the criminal-procedural code of the Republic of Serbia passed from trial to the prosecutorial investigation, crime operations using the instructions and directions taken by the competent ministers interior remain still in function. Thus, formal Code introduced a new procedure that is so constructed that the prosecutor is authorized to conduct an investigation, and that there were no necessary changes to accompany the novelty in the content and meaning of the operating sources and criminal operations because the prosecutor did not bring the directive about the operational source, working with the source, mode of implementation of the operations to collect information from the source.

In contrast to the adversarial system in countries where it has been applied for many decades, where a police officer is in an official obligation that in the presence of the prosecutor before the judge for preliminary procedure if the request has been put by the defence of the suspect: to provide the knowledge about the credibility of the operating sources, to present the facts from the court documents by which the issuance of a search warrant has been reasoned and asked, from which source the data has been collected and by which the request for order to search the apartment has been based before the court and by the court, in a formal Code of Serbia, such an obligation is not prescribed. Furthermore, according to the provisions in the formal Code of the Republic of Serbia, the police officer would not have to make certain the reason for the trial in the documentary sense, but on the other hand in a formal sense there is no binding requirement to prove that the operational source has collected the knowledge in a lawful manner in which his reasoned proposal to the prosecutor has been based. A police officer is under no obligation to prove that it is a source of “concerned citizen“ who can be qualified as a “source of informant“ and is not part of a criminal enterprise and criminal circles.

The judge in adversary system such as in Serbia, when issuing commands to search the apartment, based on a reasoned proposal of the prosecutor, does not engage himself in what kind of a source provided the material basis for the possible cause of the search, as well as the data by which the request for the issuance of commands to search the apartment has been supported. Furthermore, in adversary system in Serbia a judge does not engage himself in the fact whether the suspicion has been sustained

before the issuance of commands, or a space of the citizen is entered to look for suspicion. Research suggests that entry into the apartment to find grounds for suspicion is prevailing in Serbia. On the other hand, from the results of research to which we have come, the rules of enlightened nation suggest that it is necessary to have a reasonable doubt in order to obtain a search warrant, and that it is unacceptable that after entering the area the search is directed to seeking the grounds of suspicion.

Furthermore, defence counsels in the proceedings before the prosecutor who is now conducting an investigation, or before the judge for preliminary proceeding should have the mechanisms to file a claim, that before the decision on determining the measure of search at the request of the prosecutor, the previously established after the citizen entered the status of the suspect, what is the source used by the prosecutor to make a reasonably based proposal for the issuance of a search of an apartment with the court?

Thus, the defence counsel should require before the preliminary procedure that the plaintiff provides evidence that the source was reliable, that the information obtained by the Prosecutor are legally collected, and thus could be used as the fundamental cause in the material sense and suspicion ground in the formal sense for the issuance of a search of the apartment, that there is no doubt in the chain of causation as a basis for obtaining commands to search the apartment. Otherwise, if the prosecutor before the judge for preliminary proceedings could not prove that the operational source through which he came to knowledge and on which he bases a reasoned proposal for obtaining commands to search the apartment, is credible, the evidence collected in that way, on which the plaintiff based reasonable suspicion, would be in the domain of illegal actions and infected evidence. The Constitution of the Republic of Serbia, adopted before the adoption of the adversial investigation system, in 'special rights of the defendant' in Article 33 provides: 'every person charged with a criminal offense has the right to be informed promptly, in accordance with the law and in detail in a language which he understands of the nature and cause of that for which he is charged, as well as about the evidence collected against him.

The Code of Criminal Procedure of the Republic of Serbia ('Chapter I-Basic Provisions –Subject of the Code'), in the Article 2. 'Definition of Terms' in paragraph 1 Provides that a suspect is a person against whom a public authority has undertaken an act in pre-trial proceeding or investigation is conducted on the grounds of suspicion that that he committed the criminal offense and that the a defendant is a person against

whom has been initiated a procedure using an indictment, private claim or request for compulsory psychiatric treatment of mentally ill offender. At the same time in the Code is prescribed, that the term defendant will be used as a general term for a suspect, an accused person, a defendant and a convicted person.

Thus, according to the provisions of the Constitution and the Criminal Procedure Code in the Republic of Serbia, the suspect should be the same as the defendant, because the Constitution does not recognize the suspect. Well, if it's really so? In systems where the adversary investigation system has been at work for decades, that is the case, so the defence counsel of the suspect before the preliminary procedure may put the request and the prosecutor is obliged to state in front of the judge_ the ground for engaging the operating source, who is the source as well as what his credibility is based on. If the plaintiff fails to prove the credibility of the source from which obtained the knowledge of conceiving a reasoned proposal for obtaining commands to search the apartment, the referee will immediately direct the Prosecutor to what he collected and offers as evidence in court, has no character of evidence.

Pursuant to provisions set in the Criminal Procedure Code of the Republic of Serbia, the moment when the suspect becomes the accused is a long way because, as referred to in paragraph 1 of Article 2 of the Criminal Procedure Code, stems that suspects is not found guilty, he does not have to enter the status of the defendant, he is the person against whom they have not raised charges that are not yet confirmed... So, no matter what the suspect lawmaker in paragraph 2 of Article 2 of the Code of Criminal Procedure provides a definition of ... 'or a term that serves as a general term for a suspect, defendant, accused and convicted. This definition is not immanent for formal codes in the world, because it clearly defines the status of every citizen, from a suspect to a convict and prisoners convicted and serving a sentence. Furthermore, the suspect is sufficient grounds for suspicion, while for the defendant it cannot be said, because indictment in Serbia, and from the results of research in the countries where the adversary investigation system is in practice, determines that reasonable suspicion is necessary. Thus, there are essential elements of reasonable suspicion which support the indictment in the case of a defendant in reasonable suspicion.

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**IZDAVANJE NAREDBE ZA PRETRES STANA NA
OSNOVU OBAVEŠTENJA PRIBAVLJENOG IZ
POLICIJSKOG IZVORA
(komparativno istraživanje iz adverzijalnog i kontinentalnog
pravnog sistema)**

Rezime

U Republici Srbiji, došlo je do krupnih promena u sprovođenju krivične istrage. Glavni zadatak prilikom pravnog uređenja krivičnog postupka u svakoj demokratskoj i pravnoj državi jeste uspostava optimalnog odnosa između dveju suprotstavljenih težnji u krivičnom postupku. Jedna od njih teži njegovoj delotvornosti i punoj efektivnosti, a druga nastoji onemogućiti prekomerna i nepotrebna ograničenja prava i sloboda građana. U ovom radu primenom metoda komparacije i korelacije, na osnovu analize sadržaja pravnih akata iz adverzijanog pravnog sistema istražujemo noveliranje i primenu pretresa stana na osnovu saznanja iz policijskog izvora, u svetlu tužilačke istrage i mogućnosti ili nemogućnosti izdavanja naloga za pretres od strane suda. Istraživanje osnovanosti pretresa stana na osnovu saznanja iz operativnih izvora policije, do sada u našoj teoriji nije sprovedeno. Kao polaznu tačku uzimamo analizu formalno-pravnog i institucionalnog okvira unutar koga je definisan problem i predmet istraživanja. Odluka da napišemo jedan tekst o upotrebi policijskih saznanja za dobijanje naloga radi preduzimanja pretresa stana, nametnulo se nakon promena koje su učinjene procesnim krivičnim zakonikom u Srbiji. Rad sa jedne strane istražuje domete primene saznanja iz policijskog izvora u zasnivanju materijalnog i pravnog osnova za dobijanje naredbe za ulazak u stan i vršenje pretresa, u novom konstruisanom adverzijalnom dokaznom postupku u Srbiji. Sa druge strane, ukazuje na nužnost donošenja Direktive kojom bi tužilac propisao šta je operativni izvor i kriminalistička operacija.

Ključne reči: policijski izvor, saznanje, pretres, nalog za pretres.