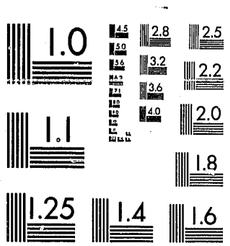

FBI LAW ENFORCEMENT BULLETIN

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The Cover: Providing assistance to both young and old, a Jacksonville police officer comes to the aid of a damsel in distress. (Photo courtesy of Frank Smith, *Florida Times-Union*, Jacksonville, Fla.)

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Documentary Search Warrants
A Problem of Particularity

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

The increase in white-collar crime in recent years has been dramatic. Experts estimate that its annual cost in this country alone exceeds $40 billion.[1] Its victims are diverse and not only include large businesses but individual consumers.

The suggestion has been made that investigation into white-collar crime has been neglected and that prosecutive accomplishments have been something less than a total success.[2] Obviously, there are many reasons for this, but one significant factor must be the difficulty of obtaining evidence of guilt. Unlike traditional personal and property crimes where the criminal instrumentalities are apparent—the "smoking gun" or crowbar left at the scene—evidence necessary to convict in a complex business scheme is not so apparent. The Government's proof often requires the reconstruction of activities conducted over several years and almost assuredly depends on the gathering of documentary evidence. This article will examine the legal problems of applying a traditional law enforcement tool, the search warrant, to the task of collecting evidence of modern, sophisticated white-collar crime.[3]

Advantages of a Search Warrant

It is now apparent that investigators may seize any evidence which they have cause to believe will be incriminating.[4] This includes documentary evidence.[5] As stated by the U.S. Supreme Court nearly 60 years ago:

> "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure. . . ."[6]

Several methods are available to officers faced with the task of developing documentary evidence. First, a request for production can be made to the custodian of the documents. The response, however, may be a refusal, especially if the custodian is a suspect. Second, a subpena duces tecum can be sought directing production of the documents. But subpenas are subject to motions to quash or make definite and certain, both time-consuming processes. The weakness of either method is obvious—a delay may occur. And once a suspect is alerted to the Government's efforts to obtain possible incriminating documents from him, he has a motive to alter or destroy the evidence. Because documents are easily destructible, the loss of evidence when either of these methods is used is quite probable. This would seem especially true when data are stored in computers.[7]

An effective solution to this problem of disappearing evidence is the search warrant. Because only Government personnel are present when warrants are issued, and because no advance notice is required prior to execution,[8] the element of surprise necessary to prevent destruction is present. Within the past 4 years, the Supreme Court has upheld the use of search warrants for seizures of documents both from the premises of defendants[9] and third parties not suspected of criminal complicity.[10]

Another advantageous feature of the search warrant should be identified. It is now clearly established that the fifth amendment prohibition against compulsory self-incrimination is not violated when officers seize documents under the authority of a search warrant. This is true even if the seized documents had been prepared by the defendant himself. As noted by the

"The degree of specificity required varies with the circumstances and nature of the property sought and the right which is protected."

Supreme Court in a recent case involving the seizure, under a warrant, of documents from the law office of a fraud suspect:

> "'(T)he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him.'" [11]

When documents are seized under the authority of a warrant, the suspect *himself* is not compelled to do anything. He is not required to help locate the documents nor is he compelled to produce or authenticate them. The officers themselves locate and remove the evidence. And without some element of compulsion, the privilege against self-incrimination is not violated.

By contrast, fifth amendment values may be implicated when officers use a subpena to obtain records. In the language of the Supreme Court, "the Fifth Amendment may protect an *individual* from complying with a *subpoena* for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information. . . ." [12] (This limitation has application only to documents held by a sole proprietor or private individual. It has long been recognized that collective entities, such as corporations and some partnerships, cannot assert the fifth amendment, even if the subpenaed documents would incriminate one of the organization's officers.) [13]

Search warrants for personal documents and business records are subject to the same legal requirements imposed on other search warrants. Discussed below is one of those requirements which takes on special significance when the object of the warrant is documentary evidence.

Particularity of Description

The fourth amendment to the U.S. Constitution requires that search warrants particularly describe the "things to be seized." This is to make the search as precise as possible and avoid unnecessary rummaging. Specifically describing the objects of the search permits the judge issuing the warrant to make the determination of what items should be taken. If the warrant fails to describe narrowly the property, the decision to seize becomes an administrative one made by the searching officer, and the warrant will be condemned as a "general warrant."

The degree of specificity required varies with the circumstances and nature of the property sought [14] and the right which is protected. For example, a higher standard is imposed on warrants for items which involve first amendment considerations. [15] By contrast, when the property sought is contraband, general descriptions often suffice. This is because contraband is illegal to possess. And when the items named offend the law, there is no danger a suspect will be deprived of any lawful property. [16] Some stolen items can be adequately described by physical description and serial number, or perhaps model number, brand name, and quantity. But describing business documents presents unique problems. Serial numbers and brand names are unavailable. Yet, the fourth amendment's mandate of particularity must be satisfied. The following discussion outlines some of the approaches to this problem which have met with approval in the courts.

Many times, investigators will be aware of specific documents being sought. This is often the case when the described items are stolen papers. For example, in a case entitled *In Re Search Warrant,* [17] Federal agents obtained a warrant to search for documents stolen from the U.S. Government. The warrant described many of the items as individual documents, designating them by type (memo, report, etc.), date, subject, author, and addressee. This language was quite sufficient to pass the constitutional test of specificity. Officers applying for documentary search warrants should consider using similar descriptive terms whenever possible.

But often the task is not that simple. "Where the search is for business records generally, as opposed to a specific record, a general description is often all that is possible due to the general nature of the documentary evidence sought." [18] In that event, the searching officer can only "be expected to describe the generic class of items he is seeking." [19]

In some instances, generic descriptions (descriptions by class or group) alone may be sufficient. [20] But usually a general description of documents must be qualified by a standard to enable the executing officers to separate the papers to be seized from the general class of documents described. This standard is called a limiting phrase.

There are many possibilities for drafting limiting phrases. One is to limit the generic descriptions by referring to a smaller identifiable category within the class. For example, in a recent Oregon case, [21] a defendant was convicted of disseminating obscene material. During their investigation, officers had obtained a search warrant for the movie house where the allegedly obscene films were shown. Their purpose was to establish documentary proof of the defendant's ownership and possession of the theater. The warrant contained the generic description "business records," followed by the limiting phrase "pertaining to the ownership of the Star Theatre located at. . . ." The court noted that the generic term "business records" was impermissibly general standing alone. But the use of the limiting phrase gave "judicial direction to the officer as to what among the general class of 'business records' (was) to be seized and what (was) to be left." [22] The warrant was upheld.

Another possibility is to limit by reference to a specific crime or event. An example appears in *United States* v. *Scharfman.* [23] Officers obtained a warrant to search a store for stolen furs. To enable them to search for documentary evidence of the defendant's involvement in the sale of the stolen furs, the descriptive phrase "books and records" was added to the warrant. Standing alone, this phrase clearly would be condemned as being too broad. It would have authorized seizure of every document in the store, whether or not related to the stolen furs. However, following "books and records," the warrant contained the limiting phrase "as are being used as means and instrumentalities of the (theft of fur articles)." The court concluded that this limiting phrase restricted the search to documents related only to the stolen furs. The warrant was thus adequately particularized.

Several courts have been critical of limiting phrases which limit the search merely by reference to a broad criminal statute. For example, *United States* v. *Roche* [24] was a case involving an investigation into an extensive automobile insurance fraud scheme. A warrant was issued which authorized seizure of a wide range of documents described in generic terms (books, records, account journals, invoices, etc.). A limiting phrase was also included which restricted the generic description to "evidence . . . of the violation of Title 18, United States Code, Section 1341."

The court of appeals held that this description made the search impermissibly broad. It reasoned that section 1341 (the Mail Fraud statute) makes illegal *all* frauds that use the mails, and the warrant would have authorized a general search for evidence of any type of mail fraud. Because the affidavit only established probable cause to believe records of a motor vehicle insurance fraud were on the premises, searches conducted pursuant to the warrant were invalid. The court strongly suggested that the warrant would have been valid had it limited seizure to records relating to automobile insurance. The description would have been even more insulated from attack had it further narrowed the documents to be seized by reference to category (liability, collision policies, etc.), specific time periods, and known victims of the fraud.

Using the benefit of hindsight, it is possible to reconstruct a description of the documents sought in *Roche* as follows:

> "Books, records, account journals, invoices, etc. . . (listing all known classes of documents), covering the period 1/1/78–1/1/79, pertaining to motor vehicle liability and collision insurance, which documents constitute evidence of a violation of T. 18, U.S. Code, Section 1341 (Mail Fraud)."

Note that this description begins with a reference to the broad generic class of items sought (books, records, etc.) and then through the use of limiting phrases, narrows the general class by time period (1/1/78–1/1/79), category (liability and collision insurance), and type of offense (mail fraud.) The result is language specific enough to enable an officer executing the warrant to distinguish between innocent documents and those which constitute evidence.

In most instances, the limiting phrase will appear in the warrant itself. This is because it is the *warrant* that is the object of the fourth amendment's specificity requirement. But under some circumstances limiting language may appear in the *affidavit,* which is the supporting document containing the statement of probable cause. It is frequently advantageous to the prosecution to be allowed to refer to the affidavit for descriptive language, because the affidavit usually contains a very comprehensive account of the criminal activity and the items sought.

"Search warrants for personal documents and business records are subject to the same legal requirements imposed on other search warrants."

In order to limit a warrant's broad description by referring to the specific language in the affidavit, the affidavit must accompany the warrant, and the warrant must contain words of reference incorporating the affidavit.[25] It is also advisable to physically attach the affidavit to the warrant. Then by leaving a copy of both at the search location, the purposes of the fourth amendment's specificity requirement are satisfied (limit the discretion of the executing officers and give notice to the party searched).

A good example of the use of this technique is the case of *In Re Search Warrant,*[26] discussed earlier. The search warrant contained a lengthy description of specific documents, followed by the following general language:

"Any and all fruits, instrumentalities, and evidence (at this time unknown) of the crimes of conspiracy, obstruction of justice and theft of government porperty (sic) . . . *which facts recited in the accompanying affidavit make out.*" [27]

The defense contended this language granted the investigators authority to search for and seize *any* evidence of conspiracies to steal Government property and obstruct justice and amounted to a general warrant. The court of appeals rejected this contention and ruled that the italicized phrase in the description incorporated into the warrant the attached 33-page affidavit. Because the affidavit went into great particularity regarding the offenses that the documents sought were designed to prove, precise limits were placed on the searching agents. They were only authorized to seize evidence of the conspiracies described in the "accompanying affidavit."

It is noteworthy that in several other recent document search cases, reviewing courts have suggested that the generality of the warrants could have been saved by the specificity of the affidavits, if the affidavits had been served with and incorporated into the warrants.[28] Investigators contemplating the preparation and service of documentary search warrants for the detailed examination of voluminous records should consider the use of this procedure.

Catch-All Phrases

Nowhere is the tension between the fourth amendment's particularity requirement and an officer's desire to seize business records more noticeable than in those cases in which a warrant's description includes a broad "catch-all" phrase (general reference to unknown documents). Such phraseology was the subject of recent Supreme Court scrutiny in *Andresen* v. *Maryland.*[29]

Andresen involved an investigation of fraudulent real estate activities in Maryland. In the course of the investigation, officers obtained a search warrant for the defendant's law offices. The warrant's description named approximately 20 specific generic classes of documents which were limited by the phrase "pertaining to sale, purchase, settlement and conveyance of lot 13, block T. . . ." It also included the following "catch-all" phrase: "[t]ogether with other fruits, instrumentalities and evidence of crime at this time unknown." [30]

The defendant conceded that the generic descriptions and the limiting phrase were models of particularity, but contended that the quoted catch-all language rendered the warrant fatally general because it authorized the search for evidence of other "unknown" crimes for which no probable cause had been established. The Court disagreed and held that the challenged phrase was not a separate sentence, but rather appeared at the end of a lengthy sentence which included the generic descriptions and limiting phrase noted above. Thus the word "crime" in the catch-all language did not refer to other unrelated offenses, but only to the crime described in the sentence in which it appeared (fraud related to lot 13T). As such, it did not authorize a general search for evidence of other crimes.

In reaching its decision the Court appeared to acknowledge that in some cases officers will not know the precise nature of all the documents needed to prove their case.[31] Probable cause may exist to believe that relevant documentary evidence is present, but a particular description is impossible. A catch-all description may "be the very best they can provide." [32] This would seem especially true in complex cases, such as antitrust investigations or real estate schemes, "whose existence (can) be proved only by piecing together many bits of evidence." [33]

A word of caution should be stated here. Prudent officers would be wise not to include broad catch-all phrases as standard "boiler plate" language in all warrants for documentary evidence. The few cases which have approved the use of such phrases involved warrants in which the challenged language followed "a lengthy list of specified and particular items," [34] limited by reference to a specific crime. Because "the law is still largely unformed in this difficult area," [35] it would be wise to restrict the use of catch-all phrases to cases in which similar conditions exist.

Conclusion

The task of obtaining documentary evidence in white-collar crime investigations poses special problems. Because documents are easily destructible, the use of search warrants is often advantageous. To be lawful, search warrants must satisfy the particularity requirement of the fourth amendment which requires a specific description of the documents to be seized. But many times the precise nature of the records sought is not known in advance. To resolve this dilemma, several courts have indicated that generic descriptions of the documents (descriptions by class or category) are permissible if followed by limiting language enabling the executing officers to separate the papers to be seized from the general class of documents described. Limiting phrases may narrow the general class of documents by reference to time periods, category, type of offense involved, or specific events or individuals.

In some instances, broad catch-all language may be used if included in a description which contains a lengthy list of specified documents, limited by reference to specific crimes.

To be sure, there is no "litmus paper" test for determining whether a warrant's descriptive language meets the standard mandated by the fourth amendment. Many subtle factors are considered by reviewing courts when examining a warrant for constitutional sufficiency. Nevertheless, it may be helpful to officers engaged in the difficult task of drafting documentary search warrants to ask themselves this simple question. "What documents would this warrant authorize me to seize"? If the answer is, "only those which I have established probable cause to believe are evidence of the crime under investigation," the warrant most likely will be upheld. However, if the answer is, "read literally, this warrant would permit the seizure of documents other than those for which probable cause has been established," the warrant may be overly broad and should be redrafted. **FBI**

Footnotes

[1] Chamber of Commerce of the United States, *White Collar Crime* (Washington, D.C.: Chamber of Commerce of the United States, 1974), p. 6.

[2] A. Bequal, *White-Collar Crime: A 20th Century Crisis,* at 5 (1978).

[3] It should be emphasized that this article only discusses the seizure of business records and stolen documents. It does not address the special first amendment problems raised in obscenity cases when warrants authorize seizure of magazines or "books, and the basis for their seizure is the ideas which they contain." *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965).

[4] *Warden* v. *Hayden,* 387 U.S. 294 (1967) (abolishing "mere evidence" rule).

[5] See *Abel* v. *United States,* 362 U.S. 217 (1960) (personal papers seized during search of accused's hotel room); *Marron* v. *United States,* 275 U.S. 192 (1927) (business records seized in search of accused's business).

[6] *Gouled* v. *United States,* 255 U.S. 298, 309 (1921).

[7] For a discussion of a case involving wholesale alteration and erasure of computer tapes, see T. Whiteside, *Computer Capers,* at 17 (1978) (discussion of the Equity Funding fraud.)

[8] Of course, officers contemplating forcible entries to premises must comply with their respective announcement statutes. See *Sabbath* v. *United States,* 391 U.S. 585 (1968).

[9] *Andresen* v. *Maryland,* 427 U.S. 463 (1976).

[10] *Zurcher* v. *Stanford Daily,* 436 U.S. 547 (1978). Officers should be aware that a number of legislatures have restricted, or are considering restricting, the use of search warrants directed at the premises of innocent third parties. For example, bills now pending in Congress would require the use of subpenas, rather than search warrants, unless the Federal agents could show reason to believe the use of subpenas would result in the destruction of evidence. See S. 1790, 96th Cong., 1st sess. (1979); H.R. 3486, 96th Cong., 1st sess. (1979). The legislatures of California and Montana have already enacted similar statutes. And recently, the Minnesota Supreme Court held that a search warrant for documents in possession of a third-party attorney violated State law unless the attorney was also involved in the wrongdoing. The court indicated a preference for a less intrusive method, such as a subpena duces tecum directed to the lawyer. See *O'Connor* v. *Johnson,* 287 N.W. 2d 400 (Minn. 1979).

[11] *Andresen, supra* note 9, at 475 (1976), quoting *United States* v. *White,* 322 U.S. 694, 698 (1944).

[12] *Andresen, supra* note 9, at 473, 474 (emphasis added).

[13] See *Wilson* v. *United States,* 221 U.S. 361 (1911) (corporation); *Bellis* v. *United States,* 417 U.S. 85 (1974) (dissolved law partnership).

[14] See La Fave, *Search and Seizure; Course of the True Law,* 1966 U. Ill. L. Rev. 255, 268.

[15] See *Stanford* v. *Texas, supra* note 3.

[16] A good example is the Prohibition Era case of *Steele* v. *United States,* 267 U.S. 498 (1925), in which the Supreme Court upheld the descriptive phrase "cases of whiskey."

[17] 572 F. 2d 321 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 925 (1978).

[18] *State* v. *Tidyman,* 568 P. 2d 666, 671 (Or. App. 1977).

[19] *James* v. *United States,* 416 F. 2d 467, 473 (5th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970).

[20] Some courts have approved broad generic descriptions when the evidence sought is very similar to other innocuous items and "for all practical purposes the collection (can) not be precisely described for the purpose of limiting the scope of the seizure." *United States,* v. *Cortellesso,* 601 F. 2d 28, 32 (1st Cir. 1979). In those cases the supporting affidavit must show that a large collection of similar items are present and explain how the officers will distinguish the suspected items from the innocent ones. And when the property sought is contraband, generic descriptions are usually sufficient. See note 16, *supra.* (Of course, documents are hardly ever characterized as contraband.)

[21] *State* v. *Tidyman,* 568 P. 2d 666 (Or. App. 1977).

[22] *Id.* at 672.

[23] 448 F. 2d 1352 (2d Cir. 1971), *cert. denied,* 405 U.S. 919 (1972).

[24] 614 F. 2d 6 (1st Cir. 1980).

[25] See *United States* v. *Johnson,* 541 F. 2d 1311, 1315 (8th Cir. 1976); *Moore* v. *United States,* 461 F. 2d 1236 (D.C. Cir. 1972); *Frey* v. *State,* 3 Md. App. 38, 237 A. 2d 774 (1968).

[26] 572 F. 2d 321 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 925 (1978).

[27] *Id.* at 323 (emphasis added).

[28] See *United States* v. *Roche,* 614 F. 2d 6 (1st Cir. 1980); *Application of LaFayette Academy, Inc.,* 610 F 2d 1 (1st Cir. 1979).

[29] 427 U.S. 463 (1976).

[30] *Id.* at 479.

[31] *Id.* at 482 n. 11.

[32] *United States* v. *Abrams,* 615 F.2d 541, 548 (1st Cir. 1980) (Campbell, J., concurring).

[33] *Andresen, supra* note 9, at 480 n. 10.

[34] Id. at 480; See also *In Re Search Warrant, supra* note 26, at 326-327.

[35] *United States* v. *Abrams, supra* note 32, at 549.

END