
ASSET FORFEITURE

Financial Search Warrants

Richard S. Stolker

February 1989

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance

U.S. Department of Justice
Dick Thornburgh
Attorney General

Office of Justice Programs

Richard B. Abell
Assistant Attorney General

Bureau of Justice Assistance

Charles P. Smith
Director

Steven D. Dillingham
Deputy Director, Policy Development

Michael J. Dalich
Deputy Director, Program Management

Curtis H. Straub II
Director, Policy Development and Management Division

Eugene H. Dzikiewicz
Director, State and Local Assistance Division

James C. Swain
Director, Discretionary Grant Programs Division

William F. Powers
Director, Special Programs Division

Fred Wm. Becker
Asset Forfeiture Program Manager

Prepared under cooperative agreement No. 87-DD-CX-K090 by the Police Executive Research Forum.

The Assistant Attorney General, Office of Justice Programs, coordinates the activities of the following programs offices and bureaus: the Bureau of Justice Statistics, National Institute of Justice, Bureau of Justice Assistance, Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of this Agency.



U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance

Office of the Director

Washington, D.C. 20531

Dear Colleague:

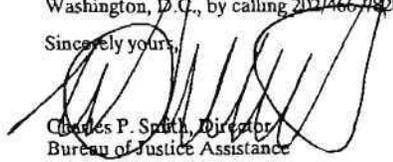
Illicit drug traffic continues to flourish in every part of the country. The cash received by the traffickers is often converted to assets that can be used by drug dealers in ways that suit their individual tastes. Since 1981, federal authorities have increased their attack on these assets through both criminal and civil forfeiture proceedings with remarkable success. The recent passage and use of state asset forfeiture laws offers an excellent means for state and local jurisdictions to emulate the federal success.

The Bureau of Justice Assistance (BJA), in the Office of Justice Programs, has funded a nationally focused technical assistance and training program to help state and local jurisdictions facilitate broader use of such laws. BJA selected the Police Executive Research Forum to develop and administer this program because of its history of involvement in practical, problem-oriented research to improve police operations and the Forum's central role in developing training materials for use by police agencies and chief executives.

As part of this project, the Forum has contracted with experts in the area of asset forfeiture and financial investigations to prepare a series of short manuals dealing with different concerns in the area of asset forfeiture. We hope these manuals help meet the rapidly unfolding needs of the law enforcement community as more and more agencies apply their own forfeiture laws and strive to learn from the successes and problems of their peers.

I welcome hearing your comments about this program. We have structured this project so that most requests for information or assistance can be handled through the Forum staff in Washington, D.C., by calling 202/466-7800.

Sincerely yours,


Charles P. Smith, Director
Bureau of Justice Assistance

Acknowledgments

We wish to thank several law enforcement experts for the material they contributed and the time they spent reviewing earlier drafts. Valuable material on financial research warrants was provided by Special Agent Greg Heck of the Criminal Investigation Division of the Internal Revenue Service in Phoenix; and Billie Rosen, formerly an Assistant U.S. Attorney in Phoenix and now with the Arizona Attorney General's Office there. We are also grateful to Donald Semesky, IRS-OCDEF Coordinator for the Mid-Atlantic Region in Baltimore, who provided an essential technical review, as did Judi Friedman, Special Assistant to the Assistant Attorney General of the Criminal Division, U.S. Department of Justice, in Washington.

The Police Executive Research Forum

Contents

Financial Search Warrants 7

Use with Caution 7

When Do You Need a Search Warrant? 8

What are the Significant Elements of the Search Warrant? 10

How Should you Execute the Search Warrant? 16

Endnotes 19

Table of Cases 21

Appendix 23

Financial Search Warrants

It is no secret that organized criminals try to escape detection by insulating themselves from evidence of their street-level activities. For example, heads of narcotics distribution rings distance themselves from contraband and other hard evidence by operating within complex organizations. Thus, traditional investigative methods often are not sufficient to reach the highest levels of a criminal organization.

However, a very basic and valuable tool is available by which investigators can frequently generate the type of evidence needed to make a case against drug kingpins and heads of other criminal groups: the search warrant, and more specifically, the *financial* search warrant. Most investigators have more than a passing acquaintance with the basic nuts and bolts of this valuable investigative tool. Probable cause, affidavits, the detached magistrate—all these are familiar territory for the well-trained investigator.

Just as the search warrant is widely used to produce physical evidence in narcotics and other types of investigations, why not use the same tool to obtain *financial* information about the narcotics ring? Financial information, which often may be gathered at the same time as “pill and powder” evidence, can be utilized to trace the financial fruits of the narcotics distribution network to the highest levels. For example, it can be used to make a case against the narcotics kingpin using a “net worth” approach. And financial evidence that can be gathered with a search warrant may later form the basis for asset forfeiture, which attacks the drug network’s pocketbook.

For all of the above reasons, the financial search warrant is a very formidable weapon in the law enforcement arsenal.

Use with Caution

A common tactic of defense attorneys is to argue about the historical abuses of search warrants in order to divert attention

from the facts at hand. It is, therefore, important to appreciate that the Founding Fathers never thought searches and seizures were to be avoided, but only that they first be approved by a judicial officer after full disclosure of the circumstances by the investigating officer.

As Justice Frankfurter once put it: "It makes all the difference in the world whether one recognizes . . . the Fourth Amendment search warrant requirement. . . [as] a safeguard against recurrence of abuses so deeply felt by the colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper."¹

The Fourth Amendment provides that "no Warrant shall issue, but upon probable cause." In actual practice, probable cause for obtaining a search warrant is a threefold test: (1) probable cause to believe that a crime has been committed, (2) probable cause to believe that specific items constitute evidence of a crime, and (3) probable cause to believe that such evidence is located at the place specified in the search warrant. "Probable" cause means that the investigator has to show "a fair probability," not a certainty or near-certainty.²

To observe the appropriate legal cautions when using a financial search warrant, an investigator should know when it is needed, what its significant elements are, and how to execute it—all topics that are discussed in the following sections.

When Do You Need a Search Warrant?

In general, a judicially authorized search warrant is required in all cases except when "exigent circumstances" exist.³ Some examples of exigent circumstances, requiring no search warrant, include:

1. Search incident to an arrest. But the warrantless search must be no broader than necessary to protect the arresting officer's safety or to prevent the individual being arrested from concealing or destroying evidence. Therefore, the search is limited to the area surrounding the individual's immediate control.⁴ A search exceeding this limited scope must be supported by a warrant.

2. Consent search. The burden is on the government to prove that the consent was knowingly and voluntarily given. Voluntariness is

determined from the circumstances viewed in their entirety.⁵ The courts have refused to imply consent from mere "acquiescence to lawful authority."⁶ On the other hand, investigators need not tell individuals that they have the right to refuse to allow the search.

3. Automobile searches. The twin justifications for warrantless searches of automobiles are their mobility and the lesser expectation of privacy an individual has in a vehicle as compared to a home.⁷ It should be noted that locked containers discovered and seized during an automobile search require a search warrant to open since the exigent circumstances cease to exist once the car is stopped and the container is seized.

4. Plain view. So long as probable cause exists, a law enforcement officer may seize evidence of a crime, or contraband, within "plain view" of a place in which the officer had the right to be.⁸

5. Certain administrative searches. Ordinarily, so-called "administrative searches" require a warrant issued on the same basis as any other search. (Examples of "administrative searches" include health, safety, and regulatory searches.) However, when a regulatory scheme provides for periodic searches—such as fire marshal searches for safety purposes—no warrant is required. Of course, if evidence of a crime is in "plain view" of the investigator conducting the administrative search, it may be seized so long as probable cause exists.

6. Border searches. No warrant is required to search an individual, luggage, packages, or mail crossing a national border or its "functional equivalent" (such as an international airport).⁹

7. Investigative stops. No warrant is needed to briefly detain an individual on the basis of "reasonable suspicion" (a less demanding standard than probable cause). An individual may be detained for an investigatory stop for as long as is reasonably necessary for the police to "confirm or dispel their suspicions quickly"¹⁰

8. Abandoned or discarded property. Property abandoned or otherwise disposed of as the result of a stop without reasonable cause cannot be seized. But property abandoned without any prior unlawful intrusion on a person's privacy can be seized without a warrant or probable cause.¹¹

Particularly in those marginal situations when, arguably, a warrant is not required, obtain it if at all possible. In deciding the constitutionality of a search, courts have a strong preference for searches based on a warrant.¹²

What are the Significant Elements of the Search Warrant?

An example of a thorough, detailed application for a search warrant is *United States v. 6121 East Calle Tuberia*, a case which originated in the Federal District Court of Phoenix, Arizona.* It is very useful as an example both because of its clear and convincing draftsmanship and because it contains virtually all of the significant elements of a well-drafted search warrant, including the twelve listed below:

1. A detailed description of the places and things to be searched.

Some examples of descriptions which have been held constitutionally sufficient include:

- a. A description without reference to state and county.¹³
- b. A description without street address but with reference to a mailbox that had the suspect's name on it.¹⁴
- c. A description of a mobile home by color, noting its attached carport and its location along a road.¹⁴
- d. "325 Atkinson Street" instead of "325 Short Street," when an officer misread a street sign at the corner.¹⁶
- e. Entrance to a farmhouse described as "1.6 miles from the overpass" rather than ".6 miles" and gate not "rust color" but painted with galvanized paint.¹⁷

On the other hand, the following descriptions have been held insufficiently detailed to be constitutionally valid:

- a. "Premises to be identified by Trooper Sullivan prior to execution of the warrant."¹⁸
- b. Wrong street address and no other descriptive information.¹⁹
- c. A description with wrong street address (and executing officer knew address was wrong).²⁰

In short, the description should *physically* describe the property in such a way that an officer unfamiliar with the property could locate and identify the property in question.

2. Description of vehicles. Include year, make, model, color, vehicle identification number, license plate number, and usual location. Just as with premises descriptions, minor unintended errors in the description do not render the warrant unconstitutional for want of particularity, so long as the warrant adequately describes the vehicle

* This search warrant application is available upon request from the Police Executive Research Forum. An attachment to this paper contains specific examples of language that one may wish to include in various sections of a financial search warrant affidavit.

and eliminates the possibility that the wrong vehicle may be searched by mistake. Thus, it is fair to say that a Chevrolet must be described with greater particularity than an exotic car, and that a car to be found on a busy city street must be described in greater detail than a car to be found on a farm.

3. Description of persons to be targeted for search along with premises. Include name, height and weight, age, race, skin, eye and hair color, nickname or alias, location or family relationship when possible. A warrant can authorize a search of "John Doe" so long as the executing officer can identify with reasonable certainty the person(s) to be searched and the persons *not* to be searched.

Examples of *valid* descriptions of persons include:

- a. "Persons being met at Epley Airfield by Roger Struble on the evening of June 30, 1977" sufficiently described individuals intending to participate in a cocaine deal with an undercover agent.²¹
- b. "John Doe, a white male with black wavy hair and stocky build observed using the telephone in Apartment 4-C, 1806 Patricia Lane, East McKeesport, Pennsylvania."²²
- c. "All persons on the premises." If the person(s) to be searched can be adequately determined without discretion, then the particularity requirement is met. Blanket search warrants authorizing the search of "any or all persons present" on search premises are unconstitutional²³ because they allow for the exercise of discretion by executing officials. A person may not be lawfully searched just because he or she is present on premises to be searched.²⁴ However there are circumstances that provide exceptions to the general rule that mere presence on the premises does not give rise to a right to search.²⁵

4. Detailed description of the property to be seized. The description of the property to be seized should be as specific as possible about the nature of each item and its appearance. If serial numbers or other specific descriptions are available, they should be used. In essence, property to be seized should be particularized either by a specific description of the property or in relation to the underlying violations cited in the affidavit and search warrant.

A complete description of property to be seized pursuant to a financial search warrant might include:

- a. Books, records, receipts, etc., relating to the purchase and distribution of named controlled substances.
- b. Papers, tickets, notes, schedules, etc., relating to domestic travel between named points.
- c. Address/telephone books reflecting names, addresses, and

- telephone numbers of persons named but not limited to said persons.
- d. Books, records, receipts, bank statements, etc., evidencing the obtaining, secreting, transfer and/or concealment of assets and the secreting, transfer, concealment and/or expenditure of money.
 - e. Currency and other valuables.
 - f. Photographs, especially of co-conspirators and/or of controlled substances.
 - g. Controlled substances, especially cocaine,
 - h. Drug paraphernalia.
 - i. Indicia of ownership or occupancy, including utility and telephone bills,
 - j. Any other material evidence relating to possession, use of communication facilities, conspiracy, racketeering, interstate transportation.

5. Contraband and fruits of crime. A general description in a search warrant of "contraband" (i.e., items which are *per se* illegal to possess) is generally sufficient under the Fourth Amendment if the exact nature of the contraband is not known. For example, "paraphernalia used in the manufacture of counterfeit federal reserve notes" is an adequate description.²⁶

As with contraband, fruits of crime often cannot be identified in advance. But, unlike contraband, fruits of crime are not unlawful to possess in and of themselves. Therefore, they must be described more specifically. A search warrant purportedly authorizing the seizure of "stolen property" does not satisfy the particularity requirement of the Fourth Amendment. "8-track electronic tapes . . . which are unauthorized 'pirate' reproductions" do not adequately identify the property to be seized.²⁷

6. Documentary evidence. Perhaps the highest standard of particularity under the Fourth Amendment applies to documents, since by their nature documents require analysis to see whether they do or do not fit under the description contained in a search warrant. But the "analysis" can be described equally as a general search through a person's private papers. Thus, with documents it is important to be specific about not only the kinds of documents sought but also the location and other *physical* descriptions that may be available. Search warrants authorizing the search and seizure of the following documentary evidence have been held valid under the Fourth Amendment:

- a. Documents, records, etc., which are evidence and fruits of certain [specified] commodities fraud statutes, sought from an

- b. operation which was completely "permeated with fraud."²⁸
- b. Documents, papers, receipts, and other writings which are evidence of a conspiracy to import heroin.²⁹
- c. Representative handwriting samples.³⁰
- d. "Papers" indicating the ownership or occupancy of premises used for a drug laboratory.³¹
- e. "AH checkbooks, cancelled checks, deposit slips, bank statements, trust account receipts, check stubs, books and papers, etc., which would tend to show a fraudulent intent or any elements of the crime of false pretense or embezzlement."³²

On the other hand, the following descriptions have been held insufficient:

- a. "[Certain property, namely notebooks, notes, documents, address books and other records . . . which are evidence of violations of [certain statutes identified only by number]."³³
- b. All records pertaining to the suspect's bail bonding business for the past six years.³⁴
- c. In connection with a tax fraud investigation, all "files, bank records, employee records, precious metal records, marketing and promotional literature."³⁵
- d. "Documentary evidence tending to show the whereabouts of [defendant]" on certain dates.³⁶

7. Investigator's training, expertise and experience. The magistrate is entitled, and should be encouraged, to consider the background of the experienced officer. The warrant application should indicate the officer's current employment, how long the position has been held, and other similar investigations with which he or she has been involved. If there is a task force or cooperative enterprise with a federal law enforcement agency, the mission of the task force and the officer's role therein should be set out. Any specialized training should be listed with specific reference to the titles and dates of DEA or other specialized courses. Any conversations the officer may have had with other law enforcement personnel about the investigation should be detailed as well, since hearsay evidence can be used in the application for a search warrant.

B. Information pertinent to this investigation. The specific facts regarding the investigation should be set forth in sufficient detail for the magistrate to make a finding of probable cause. The attached itemization of ideal search warrant contents shows the detail that may be needed to satisfy the probable cause elements needed to obtain a search warrant which are: (1) probable cause that a crime was committed; (2) probable cause that the property to be seized is crime-connected; and (3) probable cause that the property is in a

particular place. When an informant is involved, the application should include background on the informant which would show his/her past reliability along with evidence corroborating the informant's information.

9. Other investigative information to be set out in an application for a financial search warrant might include:

- a. Nature of physical surveillance.
- b. Observation by affiant and/or other agents.
- c. Corroborative information provided by governmental or private business sources, such as vehicle registration, fair market value, proof of purchase from car dealers or title companies.
- d. Information regarding subject's bank accounts—and source of information.
- e. Information regarding subject's tax returns—and source of information.
- f. What was seen in plain view (e.g., house for sale, furnishings, auto in driveway or garage).
- g. Information regarding telephone toll records—and source of information.
- h. Information obtained from "authorized" pen register.
- i. Information regarding subject's travels—and source of information.

10. Absence of evidence of possibly legitimate income. This is crucial to aid the magistrate in finding that assets to be found and subsequently seized probably represent the unlawful fruits of crime. Although the old adage "You can't prove a negative" still holds, a magistrate should have no difficulty concluding that the subject lacks legitimate income when a thorough investigation has failed to turn up any indication of legitimate employment or other income sources. Federal income tax returns, because of the tremendous amount of personal financial information they contain, are extremely valuable in this area. Unfortunately, Title 26 United States Code, Section 6103 allows disclosure of Federal tax returns for "Federal" criminal investigations *only*. One method of obtaining a copy of a Federal income tax return is from the accountant or return preparer. The identity of the accountant or return preparer may be obtained by getting a copy of your target's State income tax return.

11. Investigator's conclusions, based on training, experience, and participation in other cases. Of course, the investigator wants the magistrate to conclude that probable cause exists. It is helpful to the magistrate to state what your conclusions are. Indicate what training and experience you have drawn upon in reaching those conclusions. For instance, an investigator's experience in investigating other cases

may have taught him or her a great deal about how drug traffickers work, what records they maintain, and what steps they use to accumulate and hide their assets. Some examples of cumulative knowledge of these facts and patterns include:

- a. Drug traffickers' financial habits.
- b. Property titled in other names as a means to avoid detection.
- c. Use of large amounts of currency and the proximity of where that currency is kept.
- d. Maintenance of books and records about the illicit enterprise.
- e. Hiding contraband in one's residence.
- f. How drug traffickers invest and "launder" their cash proceeds.
- g. Lack of a domestic source for cocaine.
- h. Maintenance of address books and photographs.
- i. Maintenance of paraphernalia.
- j. The connection between unexplained wealth and drug trafficking.

It is important to emphasize again that the officer's burden of proof in obtaining a search warrant is "Probable Cause." Thus, when stating, in the affidavit, what the affiant knows about how drug traffickers work, maintain records and accumulate and hide their wealth, words such as "frequently, often and commonly" should be used. An example of this would be, "your affiant knows, based on his training, expertise and participation in other investigations involving the distribution of large quantities of heroin that heroin dealers and traffickers of other controlled dangerous substances *often* place assets which they, in fact, purchased and own in names other than their own to avoid detection of those assets by government agencies."

Federal courts have held that the expertise of the affiant should be considered by the issuing judicial officer in his/her determination of probable cause and objective good faith.

12. Update of possible stale information. When information obtained early in the investigation (such as motor vehicle records) is significant to the finding of probable cause, it is helpful to update that information shortly before presenting the affidavit to a magistrate.

Opinions as to when probable cause becomes stale is like the old saying, . . . everybody has one. In deciding staleness the case law looks to the *nature* of the property to be seized. Property such as books and records of drug trafficking, bank records, travel documents, photographs, phone books and the like are much more apt to remain in a location for longer periods of time than narcotics. Thus, the court, in exercising its reasonable, common sense approach in determining probable cause and staleness, should differentiate between documents and narcotics.

How Should You Execute the Search Warrant?

To avoid negating the effectiveness of a valid search warrant, consider the following:

1. **Timeliness.** In virtually every state, a statute sets the maximum period following issuance of a search warrant during which the warrant may be executed. After the statutory period has expired, the warrant is no longer of any effect. Evidence seized under an expired warrant is subject to suppression.³⁷ Even when the warrant is executed within the statutory time period, it nonetheless may be "stale," meaning that the grounds for probable cause as set forth in the affidavit did not continue to exist at time of execution.³⁸

2. **Presence of the warrant at the search scene.** Can a search begin without the physical presence of a warrant? In a federal case, the court stated:

While it may be foolhardy to proceed in the absence of the physical presence of the warrant, it is not unconstitutional.³⁹

The best course of action, when exigent circumstances exist, is to secure the premises to be searched, then wait for the arrival of the warrant before commencing to search.

3. **Items in plain view.** It is important to remember that evidence seized pursuant to a search warrant or found in plain view during the execution of a warrant⁴⁰ must be connected by probable cause to the commission of a crime.⁴¹ When the incriminating nature of evidence is "immediately apparent" to the executing officers who have lawfully seen it in plain view, and if there is probable cause to seize the evidence then its seizure is constitutional—unless the officers had known about the evidence and planned to seize it but purposely left it out of the affidavit.⁴²

Examples include seizure of a gun in plain view during execution of a search warrant for drugs;⁴³ and seizure of plain view evidence of other burglaries during execution of search warrant for stolen radio equipment.⁴⁴ During execution of a search warrant for narcotics, \$88,860 in cash was found; seizure was held constitutional as the probable fruits of criminal activity.⁴⁵ Letters and photographs were seized during execution of a search warrant for heroin; the seizure was held constitutional as "providing evidence of these defendants' identities."⁴⁶ And during execution of a search warrant for narcotics, seizure of a Social Security letter was held constitutional as demonstrating the defendant's possession of the premises.⁴⁷

On the other hand, during execution of a search warrant for specifically named documents, seizure of tape recordings, paper bags, and cash register receipts was held unconstitutional, absent proof of

"some specific and articulable fact from which a rational link between the item seized and criminal behavior can be inferred."⁴⁸ And during execution of a search warrant for handguns, the officers' seizure of photographs was unconstitutional since the police could not have a reasonable belief that the photographs would aid in [defendant's] apprehension.⁴⁹

4. **Fifth Amendment considerations.** Is there a Fifth Amendment privilege against self-incrimination in the seizure of private papers? Apparently, there is not.⁵⁰ So long as Fourth Amendment requirements have been met, seizure of private papers does not contravene the Fifth Amendment protection against compulsory self-incrimination since the author or possessor of the papers has not been "asked to say or to do anything. . . . The search for and seizure of these records [is] conducted by law enforcement personnel. . . . Any compulsion of [the person in possession] to speak, other than the inherent psychological pressure to respond at trial to unfavorable evidence, is not present."⁵¹ That Supreme Court finding involved a case where state investigators obtained a search warrant to search a lawyer's office for records involving a real estate fraud case. They found a number of private records that tended to incriminate the lawyer. On appeal, the Supreme Court held that agents may take incriminating business records of the lawyer because (1) the lawyer prepared the records voluntarily and not under compulsion, (2) he was not required to authenticate the seized records at trial, and (3) he was not required to assist the officers in finding the records during execution of the search warrant. Therefore, there was no compulsion sufficient to invoke the Fifth Amendment privilege against compulsory self-incrimination.

Where one is the owner of a sole proprietorship and is compelled by subpoena to produce business records, the act of producing them may have communicative aspects and therefore be subject to fifth amendment protection. A grant of "use immunity" however, will cure any fifth amendment problems.⁵²

5. **Experts.** Should experts be brought to the premises at the time of search warrant execution? In many instances, a photographer will prove useful. Photographs may show the location of evidence at time of seizure—i.e., whether it was in plain view or whether it was at or near the place described in the affidavit, or whether its incriminating nature was "immediately apparent." (See also item 7 below regarding law office searches.)

6. **Computer records.** Is a search warrant needed to obtain computer records? Computerized information may include financial records, personal notes, trade secrets, and so forth. The argument may be

raised that when one makes computerized information available by telephone to anyone knowing (or being able to discover) the password, that person has "consented" in advance to a search of computer records. But that argument is no more valid than an argument that a person with a key to another's home is, therefore, authorized in advance to search the house.⁵³

There has been little law on this subject to date, but what decisions there are have essentially treated computer records just like other kinds of records.⁵⁴ When there has been disclosure, however, the individual's expectation of privacy is waived and the records may be disclosed. And the courts have sometimes reached to find "disclosure." For example, the Supreme Court has held that an individual has "no legitimate 'expectation of privacy'" in the banks' records of his accounts.⁵⁵ In another case, the court held that by dialing telephone numbers which were recorded at the telephone company central office, a person did not have an expectation of privacy in the numbers dialed since the telephone company could record the numbers and produce them for legitimate business purposes.⁵⁶

When seizure of computer records is contemplated the property to be seized section of the affidavit and warrant should not only include the computer software, which contains the incriminating information, but also include the program software, computer manuals and possibly the computer itself. If the computer itself is not seized, the make and model of the computer should be noted. All of these items are necessary for extracting the information from the computer software. As a final note, the presence of a computer expert at the search site would be extremely helpful. If one is not available to be present, it is recommended that one be available for telephone consultation since no computer should be turned off, unplugged, or disconnected without first consulting an expert. Valuable information could be lost if the computer is disconnected from its power source improperly.

7. Law Office Searches. Agents searching through file cabinets might invade the attorney-client privilege. The privilege extends to communications between attorney and client having to do with the motivation for creating the attorney-client relationship, possible litigation strategy [and bills, ledgers, statements, and time records. These items are not privileged unless there is a communication involved.] Possibly, even the *identity* of a client may be privileged and the attorney-client privilege could be invaded by looking at *names* on file folders. A federal court granted an injunction against searching a lawyer's office but refused to hold that searches of law offices were illegal in general.⁵⁷

Endnotes

1. *United States v. Rabinowicz*, 339 U.S. 56, 56 (1950).
2. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *Brinegar v. United States*, 338 U.S. 160, 175 (1949).
3. *E.g., McDonald v. United States*, 335 U.S. 451, 456 (1948); *New York v. Belton*, 453 U.S. 545, 457 (1981); *Coolidge v. New Hampshire*, 403 U.S. 443, 470-471 (1971).
4. *Chimel v. California*, 395 U.S. 752, 762-763 (1969).
5. *Schneekloth v. Bustamonte*, 412 U.S. 218, 248-249 (1967).
6. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).
7. *United States v. Ross*, 456 U.S. 798, 809 (1982).
8. *Coolidge v. New Hampshire*, 403 U.S. 433 (1971); *Texas v. Brown*, 460 U.S. 730 (1983).
9. *Carroll v. United States*, 267 U.S. 132, 154 (1925); *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *California Bankers Association v. Schultz*, 416 U.S. 21 (1974).
10. *United States v. Sharpe*, 470 U.S. 675, 686 (1985); *United States v. Place*, 462 U.S. 696, 709 (1983).
11. The seizure without a warrant was lawful. *State v. Fleming*, 457 So.2d 1232 (La. 1984).
12. As the Supreme Court stated in *United States v. Leon*, 468 U.S. 897, 913-914 (1971):
Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime' . . . we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail."
13. *Conn. v. States*, 496 N.E.2d 604 (Ind. App. 1986).
14. In *luster v. State*, 443 So.2d 481 (Ala. App. 1983), the executing officers stated they were familiar with the area and had no difficulty going directly to the residence.
15. *State v. Myrick*, 299 S.E.2d 439 (N.C. App. 1983).
16. *Lyons v. Robinson*, 738 F.2d 737 (8th Cir. 1985).
17. In *United States v. Delozier*, 644 F. Supp. 135 (E.D. Tex. 1986), the premises were under constant surveillance.
18. *Commonwealth v. Douglas*, 503 N.E.2d 28, 30 (Mass. 1987).
19. Such a description is insufficient where lacking any other descriptive information [*People v. Royse*, 477 P.2d 32 (Wash. 1984)]; or with wrong exterior description and wrong location [*Shedd v. State*, 358 So.2d 1117 (Fla. App. 1978)]; or where there was nothing to distinguish the appearance of the house from neighboring properties [*State v. Horon*, 504 A.2d 803 (N.J. Super. 1985)].
20. *Finch v. State*, 479 So.2d 1314 (Ala. App. 1985).
21. *United States v. Muckenthaler*, 584 F.2d 240, 245-246 (8th Cir. 1978).
22. *United States v. Ferrone*, 548 F.2d 381, 389 (3rd Cir.), cert. denied, 402 U.S. 1008 (1971). See also, *Webster v. State*, 250 A.2d 279 (Md. App. 1969); *State v. Moriarity*, 338 A.2d 14, 17-18 (N.J. Super. 1975); *People v. Johnson*, 267 N.Y.S.2d 301, 304 (1966).
23. *E.g., Beeler v. State*, 677 P.2d 653, 656 (Okla. App. 1984); Burkhoff, *Search Warrant Law Deskbook*, Section 8.5 and cases cited therein.
24. *Ybarra v. Illinois*, 444 U.S. 90, 92 n.4 (1979).
25. For a pre-Ybarra line of cases holding just the opposite, see *United States v. Berryhill*, 445 F.2d 1189 (9th

Cir. 1971); *United States v. Poms*, 484 F.2d 919 (4th Cir. 1973); *United States v. Simmons*, 567 F.2d 314 (7th Cir. 1977); but see *United States v. Flett*, 806 F.2d 823 (8th Cir. 1986) and *United States v. Bell*, 762 F.2d 495 (6th Cir. 1985) (which hold that there is no "automatic companion" rule justifying the pat-down of a companion to an arrestee).

26. *Grimaldi v. United States*, 606 F.2d 332, 338-339 (1st Cir.), cert. denied, 444 U.S. 971 (1979).

27. *United States v. Klein*, 565 F.2d 183 (1st Cir. 1977). Particularly in light of the information available to the agents in the *Klein* case "which could have served to narrow the scope of the warrant and protect the defendant's personal rights, the warrant was inadequate." *Id.* at 186-190.

28. *United States v. Sawyer*, 799 F.2d 1494, 1508 (11th Cir.), cert. denied, 107 S.Ct. 961 (1987).

29. *United States v. Vanichrotmanee*, 742 F.2d 340, 347 (7th Cir. 1984).

30. *United States v. Gomez-Soto*, 723 F.2d 649, 563 (9th Cir.), cert. denied, 466 U.S. 977 (1984).

31. *United States v. Whitten*, 706 F.2d 1000, 1008-1009 (9th Cir.), cert. denied, 465 U.S. 1100 (1984).

32. *State v. Komegay*, 326 S.E.2d 881, 894-895 (N.C. 1985).

33. *United States v. Spilotro*, 800 F.2d 959, 966 (9th Cir. 1986).

34. *In Re Grand Jury Proceedings*, 716 F.2d 493, 496-499 (8th Cir. 1983). The court held that this was a "general warrant" violating the Fourth Amendment.

35. *Voss v. Bergsgaard*, 774 F.2d 402, 404-406 (10th Cir. 1985).

36. *People v. Frank*, 700 P.2d 415 (Cal. 1985).

37. *Sgro v. United States*, 287 U.S. 206 (1932).

38. *United States v. Bedford*, 519 F.2d 650, 655 (3rd Cir.), cert. denied, 424 U.S. 917 (1976).

39. *United States v. Hepperle*, 810 F.2d 836, 839 (8th Cir. 1987).

40. *Payton v. New York*, 445 U.S. 573, 587 (1980); see also, *Andresen v. Maryland*, 427 U.S. 463, 483-484 (1976).

41. *Warden v. Hay den*, 387 U.S. 294, 307 (1967).

42. *E.g.*, see *Arizona v. Hicks*, 107 S.Ct. 1149 (1987); *Texas v. Brown*, 460 U.S. 730, 741-744 (1983); *Coolidge v. New Hampshire*, 403 U.S. 443, 466-471 (1971).

43. *Lyons v. Robinson*, 738 F.2d 737 (8th Cir. 1985).

44. *Snider v. State*, 681 S.W.2d 60, 63 (Tex. Crim. App. 1984).

45. *People v. Lot 23*, 707 P.2d 1001, 1004 (Col. App. 1985).

46. *State v. Williams*, 263 S.E.2d 571, 573 (N.C. 1980).

47. *Ellerbee v. State*, 631 S.W.2d 480, 483 (Tex. Crim. App. 1982).

48. *People v. Hill*, 528 P.2d 1, 25-26 (Cal. 1974).

49. *People v. Secrest*, 321 N.W.2d 368, 370-371 (Mich. 1982).

50. *Fisher v. United States*, 425 U.S. 391 (1976).

51. *Andresen v. Maryland*, 427 U.S. 463, 473 (1976).

52. *United States v. Doe*, 465 U.S. 605 (1984). See however, *Braswell v. United States*, 43 CrL 3103 0une 22, 1988), where the sole shareholder of a corporation could not assert the fifth amendment in response to a subpoena for corporate records over which he was custodian. See also, *Doe v. United States*, 43 CrL 3130 (June 22, 1988), where compelling defendant to sign a consent directive authorizing foreign banks to disclose account records was not a violation of his fifth amendment privilege against self incrimination.

53. See "Note: Warrant Requirement for Searches of Computerized Information," 67 *Boston University Law Review* 179 (1987).

54. *E.g.*, *Long v. IRS*, 596 F.2d 362 (9th Cir.), cert. denied, 446 U.S. 917 (1980);

United States v. Davey, 404 F. Supp. 1283 (S.D.N.Y. 1975), modified 543 F.2d 996 (2nd Cir. 1976).

55. *United States v. Miller*, 425 U.S. 435, 442 (1976).

56. *Smith v. Maryland*, 442 U.S. 735 (1979).

57. *Klitzman, Litzman & Gallagher v. Krut*, 591 F- Supp. 258 (D. NJ. 1984).

Table of Cases

Andresen v. Maryland, 427 U.S. 463 (1976).

Arizona v. Hicks, 107 S.Ct. 1149 (1987).

Beeler v. State, 677 P.2d 653 (Okla. App. 1984).

Brinegar v. United States, 338 U.S. 160 (1949).

Bumper v. North Carolina, 391 U.S. 543 (1968).

California Bankers Association v. Schullz, 416 U.S. 21 (1974).

Carroll v. United States, 267 U.S. 132 (1925).

Chimel v. California, 395 U.S. 752 (1969).

Commonwealth v. Douglas, 503 N.E.2d 28 (Mass. 1987).

Conn. v. States, 496 N.E.2d 604 (Ind. App. 1986).

Coolidge v. New Hampshire, 403 U.S. 433 (1971).

Finch v. State, 479 So.2d 1314 (Ala. App. 1985).

Fisher v. United States, 425 U.S. 391 (1976).

Grimaldi v. United States, 606 F.2d 332 (1st Cir.), cert. denied, 444 U.S. 971 (1979).

Illinois v. Gates, 462 U.S. 213 (1983).

In Re Grand Jury Proceedings, 716 F.2d 493 (8th Cir. 1983).

Long v. IRS, 596 F.2d 362 (9th Cir.), cert. denied, 446 U.S. 917 (1980).

Luster v. State, 443 So.2d 481 (Ala. App. 1983).

Lyons v. Robinson, 738 F.2d 737 (8th Cir. 1985).

McDonald v. United States, 335 U.S. 451 (1948).

New York v. Bellon, 453 U.S. 545 (1981).

Payton v. New York, 445 U.S. 573 (1980).

People v. Frank, 700 P.2d 415 (Cal. 1985).

People v. Johnson, 267 N.Y.S.2d 301 (1966).

People v. Royse, 477 P.2d 32 (Wash. 1984).

Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Sgro v. United States, 287 U.S. 206 (1932).

Shedd v. State, 358 So.2d 1117 (Fla. App. 1978).

SrWn- v. Stote, 681 S.W.2d 60 (Tex. Crim. App. 1984).

State v. Fleming, 457 So.2d 1232 (La. 1984).

State v. Horon, 504 A.2d 803 (N.J. Super. 1985).

State v. Kornegay, 326 S.E.2d 881 (N.C. 1985).

State v. Moriarity, 338 A.2d 14 (N.J. Super. 1975).

State v. Myrick, 299 S.E.2d 439 (N.C. App. 1983).

Texas v. Brown, 460 U.S. 730 (1983).

United States v. Bedford, 519 F.2d 650 (3rd Cir.), cert. denied, 424 U.S. 917 (1976).

United States v. Davey, 404 F. Supp. 1283 (S.D.N.Y. 1975), modified 543 F.2d 996 (2nd Cir. 1976).

United States v. Delozier, 644 F. Supp. 135 (E.D. Tex. 1986).

United States v. Ferrone, 548 F.2d 381 (3rd Cir.), cert. denied, 402 U.S. 1008 (1971).

United States v. Gomez-Soto, 723 F.2d 649 (9th Cir.), cert. denied, 466 U.S. 977 (1984).

United States v. Klein, 565 F.2d 183 (1st Cir. 1977).

United States v. Leon, 468 U.S. 897 (1971).

United States v. Miller, 425 U.S. 435 (1976).

United States v. Muckenthaler, 584 F.2d 240 (8th Cir. 1978).

United States v. Place, 462 U.S. 696 (1983).

United States v. Rabinowitz, 339 U.S. 56 (1950).

United States v. Ramsey, 431 U.S. 606 (1977).

United States v. Ross, 456 U.S. 798 (1982).

United States v. Sawyer, 799 F.2d 1494 (11th Cir.), cert. denied, 107 S.Ct. 961 (1987).

United States v. Sharpe, 470 U.S. 675 (1985).

United States v. Spilotro, 800 F.2d 959 (9th Cir. 1986).

United States v. Vanichromanee, 742 F.2d 340 (7th Cir. 1984).

United States v. Whitten, 706 F.2d 1000 (9th Cir.), cert. denied, 465 U.S. 1100 (1984).

Voss v. Bergsgaard, 774 F.2d 402 (10th Cir. 1985).

Warden v. Hayden, 387 U.S. 294 (1967).

Webster v. State, 250 A.2d 279 (Md.App. 1969).

Ybarra v. Illinois, 444 U.S. 904 (1979).

Appendix

FINANCIAL SEARCH WARRANTS*

A financial search warrant (FSW) should include the following:

- a. Affiant's training, experience and expertise.
- b. Criminal activity detailed.
- c. Financial evidence.
- d. Evidence of lack of legitimate income.
- e. Description of place to be searched and nexus between location and target of investigation.
- f. Items to be seized as evidence, fruits and instrumentalities of articulated violations.

Definition

FSW—A search warrant which is based *in part* on an agent's expertise that leads to the belief that evidence relating to the crime is present at the location to be searched. A FSW differs from a traditional search warrant because the affiant relies on his or her expertise to form conclusions.

Background and Purpose of Financial Search Warrant

The purpose of the FSW is to seize financial records. In theory and application, the FSW can be used in any type of case involving financial records.

Consideration should be given to the use of FSW's in cases involving significant financial implications, specifically where the elements of the statutes being violated require the documentation of substantial income or wealth accumulations.

Most FSW's have been utilized in investigations of large-scale drug traffickers. In these cases, which are generally multi-agency grand jury investigations, the underlying statute for which the search warrant is being sought is for evidence of violation of 21 USC 848, Continuing Criminal Enterprise

* This material was developed by Special Agent Gregory Heck, Criminal Investigation Division, Internal Revenue Service, Phoenix, Arizona, and Billie Rosen, former Assistant United States Attorney, Phoenix.

(CCE). This statute is also known as the "drug king-pin" statute since it is primarily utilized to prosecute the heads of drug organizations. The penalty upon conviction includes a sentence of 10 years to life, without parole; \$1,000,000 fine; forfeiture of assets derived from the drug enterprise; and costs of prosecution.

The introduction of evidence showing unexplained wealth is relevant in drug conspiracy investigations. Therefore, the FSW can be used to obtain financial records needed to prove unexplained wealth.

FSW's have been utilized at every stage of investigation including during the early stage (first month or so), in the middle, and at the end, just prior to or after an indictment is returned. When a FSW should be executed is a decision that must be made by you and the prosecutor on a case-by-case basis. In multi-agency investigations, the affiant can be any Federal agent. The search warrant affidavit must include the prerequisite agent's expertise, but the expertise of the other agents can and should be used.

Contents of a Search Warrant Affidavit

Affidavits for FSW's should contain the following elements:

1. Affiant's experience.
2. Detailed account of the criminal activity.
3. Description of place(s) to be searched.
4. Financial evidence.
5. Items to be seized.
6. Affiant's expertise (conclusion).

Affiant's Experience. As the affiant, you should identify your experience, training, and investigative background.

Example 1

a. I am a special agent with the Criminal Investigation function of the IRS and have been so employed for the past 14 years. During this time, I have been involved in approximately 100 investigations concerning Title 26 (income tax) violations by narcotics traffickers. For the past six years, I have been detailed by the IRS to the Drug Enforcement Administration, Federal Bureau of Investigation, and

various other Federal, State, and local law enforcement agencies. I have worked closely with agents of the Drug Enforcement Administration and other agencies concerning documentation of proceeds pursuant to Title 18, United States Code, Sections 1961-1963; Title 21, United States Code, Section 848; Title 21, United States Code, Section 881; and Arizona Revised Statutes 2301, et. seq.

b. During my tenure with the Financial Task Force, I have been involved in approximately 30 drug/income tax investigations jointly with the Drug Enforcement Administration wherein 25 search warrants have been executed for documents, records, and the proceeds of the sale of drugs. I have assisted agents of the Drug Enforcement Administration and the Assistant United States Attorney in the preparation of the affidavits for these search warrants and the processing of the seized evidence. These search warrants were for records, ledgers, and documentation reflecting sale of controlled substances, and the amassing and concealing of proceeds of those sales. In all but two instances, the search warrants have resulted in the seizure of documents, records, and proceeds of the sale of controlled substances.

c. In addition to my personal experience as a special agent with the IRS, I have received specialized training in the area of narcotics-based economic crime by attending a financial investigations seminar offered by the Drug Enforcement Administration. I have been qualified in U.S. District Court in Phoenix, Arizona, as an expert in the areas of money laundering and drug ledger analysis. I have taught Financial Investigations Drug Asset Forfeiture and Money Laundering in the continued training of Federal, State, and local law enforcement agents.

d. As a specialist in the documentation, identification, and seizures of proceeds of narcotics trafficking and in the tracing of the conversion of such proceeds into other assets, I communicate extensively with other Federal and State law enforcement personnel who also specialize in this area. I have also had extensive experience in debriefing defendants, participant witnesses, informants, and other persons who have had personal experience and knowledge of the amassing, spending, converting, transporting, distributing, and concealing of proceeds of narcotics trafficking.

e. In connection with the Taos Teton cocaine distribution organization, I have worked closely with Nolan Roberts, Special Agent, Drug Enforcement Administration; Hale Lake and Eddy Knox, Drug Enforcement Administration Task Force; and Allen Bates, Special Agent, Federal Bureau of Investigation. They have provided

me with information obtained from confidential, reliable informants and their investigations spanning from July 1984 to the present.

Criminal Activity Detailed. The Criminal Activity Section is the part of the FSW affidavit in which you organize and present the various forms of drug organization or other illegal activity evidence that has been developed throughout the investigation. This evidence is commonly presented in the following format:

- Informant Statements

The informant can be named or unnamed; if unnamed (for example Confidential Informant #1), a statement of reliability is required unless substantially corroborated through other evidence presented in the affidavit.*

Example 2—Lee Rusk

On July 26, 1984, Lee Rusk was arrested by members of the Drug Enforcement Administration (DEA)—Arizona Department of Public Safety (DPS) Task Force after Rusk and Hays Russell delivered one pound of cocaine, a controlled substance according to the laws of the State of Arizona, to DEA-DPS Task Force undercover agents. Subsequently, Rusk failed to appear for court and was re-arrested on November 9, 1985, in Scottsdale, Arizona, by agents of the DEA-DPS Task Force. On January 8, January 10, and January 13, 1986, Rusk, after being apprised of his rights per *Miranda* and having voluntarily waived those rights, provided information against his penal interest to special agents of DEA, IRS, and the DEA-DPS Task Force. Rusk has since testified under oath before a Federal grand jury in Phoenix, Arizona, regarding portions of the information provided on January 8, 10, and 13, 1986. Your affiant personally interviewed Rusk on January 8, 10, and 13, 1986,** that information including that related below indicates that:

a. During the fall of 1983, Rusk was purchasing gram quantities of cocaine from Zapata, and selling this cocaine to Rusk's friends on

* In order to be fully effective, the informant's information needs to include *both* independent corroboration of the informant's information and statements concerning the informant's reliability; e.g., the fact that information provided by the informant has previously resulted in the arrest and conviction of other defendants.

** It may be necessary to obtain a court order allowing the use and release of Grand Jury testimony prior to including it in the search warrant affidavit. One should be sensitive to local court rules and practices in this regard.

weekends. Rusk stated Zapata was obtaining the cocaine from persons identified to Rusk only as Lane and Alex.

b. Rusk stated his legitimate business began to fail and Rusk asked Zapata if Rusk could purchase larger quantities of cocaine. Zapata stated he could not provide larger quantities of cocaine but would introduce Rusk to Zapata's source of supply. Rusk was subsequently introduced by Zapata to Lane Rice at 3409 E. Alpine, Phoenix, Arizona. Also present at this meeting was Hays Russell. Rusk discussed with Rice the purchase of one-fourth pound quantities of cocaine.

Rice agreed to sell Rusk one-quarter pound quantities of cocaine for \$6,000. It was also agreed that Zapata would act as intermediary for the sales. Rusk stated that Wolfe was loaning Rusk the money to purchase the cocaine for a portion of the profits from the sale of the cocaine. Rusk stated that Rusk and Wolfe made two one-fourth pound cocaine purchases from Rice and Zapata. This cocaine was distributed by Rusk, Russell, and Wolfe. After learning Wolfe was using too much cocaine personally, Rusk proposed to Zapata and Rice that Rice sell cocaine directly to Rusk without benefit of the capital provided by Wolfe. Rice agreed to do this. Rice subsequently contacted Rusk and told Rusk that Zapata would no longer be involved in the distribution of the cocaine because Zapata was also using too much cocaine personally. Rusk stated that Rusk purchased about 1 to IV2 ounces of cocaine per week from Rice after Wolfe and Zapata were removed from the distribution organization.

- Corroborating Evidence.

This is evidence from various third parties that tends to corroborate what informants have stated.

Example 3—Hotel Records

a. Records for the Hudson Inn, Hialeah, Florida, reflect that Lane Rice was registered at this hotel on June 8 and 9, 1984. These dates reflect dates when Rice and Lee Rusk were to have purchased cocaine from Zieback in Florida.

b. The records of the Sterling Resort Hotel, Scottsdale, Arizona, indicate that Lane Rice was registered at the Sterling Hotel on three occasions between June 26, 1984, and July 27, 1984. According to Lee Rusk, these dates would correspond to occasions when Rusk and Rice would purchase cocaine from Zieback in Miami, Florida, and return to Phoenix, Arizona, to distribute the cocaine.

- Surveillance.

This would include physical surveillance, consensual monitorings, pen registers, undercover contacts, garbage retrieval, and, when authorized, wire taps. These techniques provide up-to-date, current evidence that the criminal activity is ongoing.

Example 4—Pen Register

As of February 18, 1986, installation of the pen registers was authorized by a United States District Judge in Phoenix, Arizona. Special Agent Harmon of the Internal Revenue Service has listed and categorized the telephone numbers recorded by the pen registers beginning February 18, 1986, until the present and I have personally reviewed those listings and categorizations done by Special Agent Harmon and these records indicate that:

- a. Lane Rice maintains regular contact with a telephone number listed to Rice International, Driggs, Idaho. Rice is listed as president of this company and allegedly utilizes Rice International to purchase race horses. Investigation by the DEA-DPS Task Force indicates these horses are purchased with the proceeds of the sale of cocaine.*
- b. Lane Rice maintains regular contact with a Zieback in Miami, Florida. Zieback is a source of supply for cocaine.**

- Arrests and Seizures.

Include information or evidence relating to arrests of individuals within the organization and other seizures which support allegations of the crime, such as contraband and paraphernalia.

In the strictly tax-related FSW, the evidence of the violation is presented first in summary form before being detailed. In some tax-related offenses, especially when complex financial transactions are involved, a summary presentation is recommended to avoid confusion created by a long narrative affidavit.

* This language asserts in a conclusive manner that affiant "knows" that certain property was purchased by proceeds derived from drug trafficking. It is best if the affidavit includes facts showing the source and reliability of that information upon which the conclusion was based.

** Again, it is best if the affidavit includes additional facts showing the source and reliability of the information upon which the conclusion is based.

Description of Places to be Searched. Although the face of the search warrant contains a detailed description of the place(s) to be searched, often evidence that the defendant(s) exercises dominion and control over these places must be presented in the affidavit. Frequently, one affidavit is utilized to execute multiple search warrants. A lengthy affidavit can confuse the reader (U.S. Magistrate) as to the connection between the places being searched and the defendants involved in the criminal activity.

It is essential to present evidence in the affidavit which establishes control of the location of the associates involved in the criminal activity. The following are typical examples of what types of information show control:

- Utility records.
- Warranty deeds.
- Rental/lease agreements.
- Surveillance.
- Vehicle registration.
- Telephone records.
- Tax return addresses.
- Places where interviews with associates occurred.
- Interview information secured from third parties.

It is recommended that a heading in the affidavit be styled "Control of Premises." Following is a typical example which shows a presentation of the control evidence for a residence and a business:

Example 5—Hill Ownership and Control of Residence, 617 S. Garfield Ave., and business 7130 E. Alcorn.

- a. The Southwestern Bell Telephone book for Tulsa, Oklahoma lists the address of Leon Hill as 617 S. Garfield Avenue.

- b. A Federal grand jury indictment was returned on April 4, 1985, charging Hill with violations of Title 21, United States Code. When arrested at approximately 11:00 p.m., on April 4, 1985, Leon Hill provided his residence address as 617 S. Garfield Avenue, Tulsa, Oklahoma.

- c. The Southwestern Bell Telephone book for Tulsa, Oklahoma, lists the address of Hill Aircraft as 7130 E. Alcorn.

d. I have seen a new account application for Second National Bank, dated December 3, 1980, for Oakland Enterprises. This application was signed by Leon Hill. The business address listed by Hill on this application was 7130 E. Alcorn. HiU listed himself as "owner of ship."

e. On March 8, 1985, I interviewed Upton Vance, who was at that time an employee of Hill Aircraft, 7130 E. Alcorn, Tulsa, Oklahoma. I interviewed Vance at the office of Hill Aircraft at 7130 E. Alcorn, Tulsa, Oklahoma.

Financial Evidence. This section of the FSW details the documentation of major asset purchases and/or expenditures made by the defendants. It also describes any acts of deceit or fraudulent schemes uncovered, such as the use of nominees/aliases or the existence of any money laundering activities. Tax information (filing records) should be presented in this section. Sometimes it is appropriate to use expert testimony, i.e., handwriting experts and the special agent summaries/analyses, to emphasize certain financial transactions.

Items to be Seized. This is the itemized list of specific property (documents/evidence) to be seized. It is attached to the search warrant, and a copy is left at the location of the search. This list should be prepared exclusively from the evidence or expertise detailed in the search warrant affidavit. Close attention should be given to insure that each item in the list of items to be seized is addressed somewhere in the affidavit. It should be noted that the expertise (conclusion) section of the affidavit is directly related to most of the items to be seized. The following are examples of lists of items to be seized:

Example 6—Property to be Seized—Drug Related

- a. Books, records, receipts, notes, ledgers, and other papers relating to the transportation, ordering, purchase, and distribution of controlled substances; in particular, cocaine, a Schedule II Narcotics Drug Controlled Substance.
- b. Papers, tickets, notes, schedules, receipts, and other items relating to domestic travel, including, but not limited to, travel to, from, and between Phoenix, Arizona; Des Moines, Iowa; Kansas City, Missouri; Florida; and California.
- c. Address and/or telephone books and papers reflecting names,

addresses and/or telephone numbers, including, but not limited to, names of, addresses for, and/or telephone numbers of Kay Wake, Kearny Walker, Kemper Ward, Kendall Warren, Garfield Wheeler, Gibson White, Gilmer Will, and Alynn Will.

d. Books, records, receipts, bank statements and records, money drafts, letters of credit, money order and cashier's check receipts, passbooks, bank checks, and other items evidencing the obtaining, secreting, transfer, and/or concealment of assets and the obtaining, secreting, transfer, concealment, and/or expenditure of money.

e. United States currency, precious metals, jewelry, and financial instruments, including, but not limited to, stocks and bonds.

f. Photographs, in particular, photographs of co-conspirators, of assets, and/or of controlled substances, in particular, cocaine.

g. Controlled substances, in particular, cocaine.

h. Paraphernalia for packaging, cutting, weighing, and distributing cocaine, including, but not limited to, scales, baggies, and spoons.

i. Indicia of occupancy, residency, and/or ownership of the premises described above, including, but not limited to, utility and telephone bills, cancelled envelopes, and keys.

j. Any and all other material evidence of violations of 21 U.S.C. Section 841(a)(1), 843(b), 846 and 848, and 18 U.S.C. Section 1952 (possession with intent to distribute and distribution of controlled substances, in particular, cocaine; use of a communication facility to facilitate such possession and distribution; conspiracy to distribute and to possess with intent to distribute controlled substances, in particular, cocaine; engaging in a Continuing Criminal Enterprise; and interstate transportation in aid of racketeering).

Example 7—Property to be Seized—Tax Related

The following documents, books, ledgers, records, files, computer software, including but not limited to, disks, magnetic tapes, programs, and computer printouts, and any and all other correspondence relating to the kickback conspiracy for the period January 1, 1983, to the present:

- a. Articles of Incorporation, corporate resolutions, corporate minute books, corporate stock books, corporate state charter, and record of corporate franchise taxes paid.
- b. General journals, cash receipt journals, cash disbursement journals, and sales journals.
- c. General ledgers and subsidiary ledgers which include notes

receivables, accounts receivables, accounts payable, notes payable, and closing ledgers.

d. Bank statements, deposit slips, withdrawal slips, and cancelled checks for any and all bank accounts, including all funds on deposits such as certificates of deposit and money market accounts.

e. Receipt and invoices for all expenditures.

f. All Federal income tax returns, Forms 1040, 1120, 1120S, 940, 941, filed or not filed, and supporting workpapers, summary sheets, and analyses used in the preparation of the tax returns.

g. Financial statements, contract bids, proposals, work estimates, budgets, operating plans, and written correspondence with representatives of Yuma Communication, Inc., and Essex Communication, Inc.

h. Contracts, franchises, modifications, riders, and other records of agreements between Yuma and cable firms including all notes, typed or handwritten, which are evidence and/or instrumentalities of violation of 26 U.S.C. Sections 7201 (income tax evasion), 7206 (false and fraudulent statements as to a material matter), and 18 U.S.C. Section 371 (conspiring to defraud the United States by impeding, impairing, obstructing, and defeating the lawful functions of the Internal Revenue Service in the collection of income taxes) and any other fruits, instrumentalities, and evidence (at this time unknown) in furtherance of these crimes for the period January 1, 1983, to the present.

Specific Considerations When Listing Items to be Seized

You should keep several points in mind:

- Specific mention should be made of the time frame for which documents/evidence are being sought.
- In conspiracy cases, this time frame coincides with the dates of the conspiracy.
- Although specific classifications of records are reflected in the items to be seized, it *does not* create a general warrant, and thus, a potential legal problem, by inserting a catch all paragraph, i.e., "Any other records/evidence in violation of... ."
- The specific statutes that are alleged to be violated should be disclosed in this part of the search warrant.
- Since unexplained accumulations of wealth are often evidence of illegal activity, sometimes real and personal assets are

listed as items to be seized. This is characteristic in drug FSW's.

Generally, the following procedures should be used in listing items to be seized.

- List financial records which your investigation and agent expertise have concluded may be present, for example, bank records, invoices or real estate contracts. Normally, these types of records should be requested for a specific beginning and ending time period.
- It is extremely important to realize that as seizing agent, you must be able to use the search warrant to identify which documents are to be removed from the search location. A good example would be bank records that are located at the scene. The search warrant should generally identify the time period for which bank records are sought.
- Basically, a good search warrant will be a combination of specific listings coupled with more general language. For example, the use of the following terminology provides the seizing officer with a broad latitude:
"and other tangible items evidencing the obtaining, secreting, transfer and/or concealment of assets and/or money obtained through or used in the importation, purchase, and/or distribution of cocaine."

Other examples are:

- "Travel records and receipts, bank safety deposit records, correspondence, ledgers, telephone books, and other documents tending to establish customers for amphetamine and sources of money for amphetamine."
- Evidence of ownership and control of premises.
- Notes, ledgers, airline tickets, money orders, cashier's checks, and other papers relating to the transportation, ordering, sale, and distribution of controlled substances.
- Books, records, receipts, notes, ledgers maintained, and all tangible evidence pertaining to "front" (provide cocaine on consignment) to customers.

Affiant's Expertise. As previously indicated, what distinguishes the FSW from the traditional search warrant is not the P.C. (because that standard remains the same for all search war-

rants), but the reliance on your expertise to establish that records and other evidence will be at specific locations. The wording of the narrative about your expertise should be designed to cover the types of records and evidence that are believed to exist. You, in effect, draw conclusions, based on your experience, that documents or other evidence will be present at the search site. The following is an example of the detail to be used to document your expertise in a FSW when the CCE statute was the underlying crime for which evidence is sought:

Example 8—Illegal Drugs

Based upon my training, experience, and my participation in other pending financial investigations involving large amounts of cocaine, I know that:

- a. Drug traffickers very often place assets in names other than their own to avoid detection of these assets by Government agencies.
- b. That even though those assets are in other persons' names, the drug dealers continue to use those assets and exercise dominion and control over them.
- c. That large-scale drug traffickers must maintain, on hand, large amounts of United States currency in order to maintain and finance their ongoing drug business.
- d. That drug traffickers maintain books, records, receipts, notes, ledgers, and other papers relating to the transportation, ordering, sale, and distribution of controlled substances, even though such documents may be in code. That drug traffickers commonly "front" drugs (provide controlled substances on consignment) to their clients. That the aforementioned books, records, receipts, notes, ledgers, etc., are commonly maintained where the drug traffickers have ready access to them, i.e., homes, offices, and automobiles.
- e. That it is common for large-scale drug dealers, to secret contraband, proceeds of drug sales, and records of drug transactions, drug sources, and drug customers, in secure locations within their residences, offices, garages, storage buildings, and safety deposit boxes for ready access, and also to conceal such items from law enforcement authorities.
- f. That persons involved in large-scale drug trafficking conceal caches of drugs, large amounts of currency, financial instruments, precious metals, jewelry, and other items of value and/or proceeds of drug transactions, and evidence of financial transactions relating to obtaining, transferring, secreting, or spending large sums of money

made from engaging in drug trafficking activities, in their residences, offices, garages, storage buildings, automobiles, and safety deposit boxes.

- g. That drug traffickers commonly maintain addresses or telephone numbers in books or papers which reflect names, addresses, and/or telephone numbers for their associates in the drug trafficking organization, even if said items may be in code.
- h. That drug traffickers frequently take, or cause to be taken, photographs of themselves, their associates, their property, and their product, and that these traffickers usually maintain these photographs in their residences.
- i. That when drug traffickers amass large proceeds from the sale of drugs, that the drug traffickers attempt to legitimize these profits. I know that to accomplish these goals, drug traffickers utilize, including but not limited to, foreign and domestic banks and their attendant services, securities, cashier's checks, money drafts, letters of credit, brokerage houses, real estate, shell corporations, and business fronts.
- j. That it is common for cocaine traffickers to travel to major distribution centers, such as Miami, Florida, to purchase cocaine. I know that after purchasing cocaine, these cocaine traffickers will transport or cause cocaine to be transported to the areas in which they will distribute the cocaine. I know that the methods of transportation include, but are not limited to, commercial airlines, private airplanes, rental automobiles, and private automobiles.
- k. That cocaine traffickers usually keep paraphernalia for packaging, cutting, weighing, and distributing of cocaine. These paraphernalia include, but are not limited to, scales, plastic bags, and cutting agents, such as mannite or manitol.
- l. That the courts have recognized that unexplained wealth is probative evidence of crimes motivated by greed, in particular trafficking in controlled substances.

Note in the above example that these type items can be expected at the search site, and that you know this because of your experience or from someone else's experience:

- Currency.
- Assets in nominee names.
- Books, records, receipts, notes, and ledgers.
- Contraband and drug paraphernalia.
- Addresses and telephone numbers.

-
- Photographs.
 - Foreign and domestic bank records.
 - Cashier's checks, money drafts, and letters of credit.
 - Property deeds.
 - Brokerage records.
 - Travel records.

The conclusions used in a kickback case center on your experience which shows that businesses typically maintain books and records at their business location, and that these records are used to prepare income tax returns. Following is an example of the expertise and conclusions used in a kickback investigation:

Example 9—Kickbacks—Expertise and Conclusion of the Affiant

a. Based on my experience, knowledge, and training, I have found that businesses and corporations typically maintain books and records at their location of business. I have further found that it is common practice in the business community to maintain journals, ledgers, and other records showing the receipt and disposition of funds. I have also found in my experience in dealing with business records that the flow of funds into and out of a company can be tracked by tracing the paper trail. The paper trail is created by the entries into the business records and bank accounts, and by the documents received or prepared to support a transaction.

b. I have further found that the business records of individuals, businesses, and companies are used as a basis for the preparation of business, corporate, or personal income tax returns. I also have found that business records are ordinarily kept and maintained at the place of business for extended periods of time, often several years, in order to provide support for revenue and expense transactions if questioned by IRS examiners at a later date, among other reasons.

c. Based on my experience as a special agent for the IRS, I have found that businesses and corporations involved keep records of illegal payments, including kickback payments disguised as legitimate expenses, in order to eliminate drawing attention to themselves and their criminal activity. I have further found that the violators will often deduct the illegal payment disguised as a legitimate business expense, such as consulting fees, promotion fees, etc., in order to further profit from their illegal activity. I have found that violators employ many tactics to deduct the illegal payments, including the use

of currency, the alteration and falsification of records, the use of shell companies as fronts, and the use of fictitious accounts and nominees because they know as a matter of law kickbacks and other illegal payments are not legally deductible as a business expense on Federal income tax returns.

d. Therefore, based on my experience as a special agent and the facts set out in this affidavit, I have probable cause to believe and do believe that Kay Nash; Tate Wolfe; Duval, Inc.; Oakland, Inc.; and Atoka, Inc.; and others, both known and unknown by me, were involved in a conspiracy to conceal and cover up illegal kickback payments by preparing and causing to be prepared false corporate documents, falsifying corporate books and records, and filing fraudulent income tax returns which were false as to a material matter, in such a way so as to defraud the United States, by impeding and impairing the IRS in its function of examination, assessment, and collection of Federal income taxes, in violation of 18 United States Code 371.

Based on the above information contained herein, I have probable cause to believe and do believe that within the office premises and residence described in the attachment to this affidavit are now located records of this illegal scheme, including all records described in the Description of Property attachment to this affidavit for search warrant.

A Conclusion is not a Substitute for Probable Cause

The inclusion of documentation on your expertise which substantially represents that the desired records exist based on experience, is not a substitute for the essential P.C. necessary for the warrant. The P.C. must stand alone and must be sufficient for the issuance of a warrant. Your experience is used to show that, in all probability, the desired records exist. It should be noted that the records need not be described as to a specific location within the premises. It is sufficient to state that they exist at or on the premises to be searched.

Exploratory Type Search Warrants

FSW's are viable investigative techniques and should be considered when the opportunity to use them presents itself. However, extreme caution should be used in making sure that

general/exploratory type search warrants are not being created. This is accomplished by doing your homework. Make sure the criminal activity exceeds the standard of mere P.C, that is, has been corroborated adequately, and that the affiant's expertise is sufficient enough to justify what you are searching for.

Equally important, *you should insure that records seized do not go beyond the scope of the search warrant.* Obtaining documents that exceed your warrant can imply that you were not operating in good faith, thereby resulting in an invalid warrant.

The FSW can be used in many situations, including income tax investigations. The applicability of the FSW is varied, and you should consider using this investigative tool to include all investigations of Title 26 U.S.C. and Title 31 U.S.C.

Business Records Subject to Seizure

1. Cash Receipts and Disbursements Journal.
2. Payroll Journal.
3. Sales Journal.
4. Purchases Journal.
5. General Journal.
6. Any other journal maintained in the regular course of business.
7. General Ledger (all accounts and subsidiary accounts).
8. Operating Accounts.
9. Financial Statements.
10. Invoices, bills, bills of lading, statements, and all other source documents.
11. Bank records, including signature cards, statements, checks, deposit tickets, debit and credit memos, check registers, and correspondence.
12. Contracts, including rental or lease agreements.
13. Insurance policies.
14. Federal and state tax returns.
15. State Board of Equalization tax returns.
16. Partnership agreements.
17. Articles of Incorporation and Bylaws.
18. Minute Books.
19. Correspondence.

Title Company Records Subject to Seizure

1. Title Search and Examination file.
2. Title Reports.
3. Title Policies.
4. Certificate of Title.
5. Correspondence.

Escrow Company Records Subject to Seizure

1. Escrow Instructions (Buyer's & Seller's).
2. Contract.
3. Payoffs of existing financing.
4. New loan instructions and documents.
5. Title Reports.
6. Identity Statements.
7. Demands and/or Beneficiary Statements.
8. Closing Statements (Buyer's & Seller's).
9. Correspondence.

About the Author

Richard Stolker is a former prosecutor with the U.S. Department of Justice. Currently, he practices law in Rockville, Maryland.

Police Executive Research Forum

Darrel W. Stephens, *Executive Director*

Clifford L. Karchmer, *Project Manager*

John Stedman, *Project Director*

William Lenck, *Legal Consultant*

BJA Asset Forfeiture Project

Police Executive Research Forum

2300 M Street, N.W., Suite 910

Washington, D.C. 20037