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THE SEARCH WARRANT— PRACTICE AND PROCEDURE

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INTRODUCTION

The language which constitutes the Bill of Rights to the Constitution of the United States is short and declarative; yet those words which make up the fourth amendment have generated billions of words in a controversy which will never end. It is often suggested that computerized research will replace that of today. If so, the general area of search and seizure will create an everlasting printout. What is a "reasonable" search? What is "probable cause"? These questions simply defy concrete analysis. My intent is not to make a vain attempt to digest cases on the general topic of search and seizure, but to focus on material which prosecutors must frequently encounter. My discussion will deal with the elements necessary to constitute a valid search warrant and proceedings associated thereto.

An able prosecutor must be able to assist law enforcement agents in the preparation and issuance of valid search warrants. Failure to give effective counsel may not only defeat effective prosecution, but also unnecessarily consume valuable time and money. The purpose of this article is to present both a practical and legal guide to the characteristics and usage of search warrants.

DEFINITIONS, BACKGROUND, AND PURPOSE

The Constitution enunciates an intent to strike a balance between the desire to provide for an orderly and effective government and the necessity to protect individual liberties. Nowhere is the balance more critical than in the enforcement of the criminal laws. Accordingly, the fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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A search warrant is an order in writing, in the name of the people, signed by a judicial officer, and directed to a peace officer, commanding him to search for personal property and to present it to a judicial officer.[1] In Illinois, judges alone are empowered to issue warrants.[2] Search warrants are in the nature of criminal process and may be invoked only in furtherance of public prosecutions. Statutes providing for their issuance and execution are sustained under constitutional provisions, which forbid unreasonable search and seizure, only as a necessary means in the suppression of crime and the detection and punishment of criminals. Search warrants have no relation to civil process or trials, are not available to individuals in the course of civil proceedings, and are unavailable for the maintainence of any private right.[3] Thus, the fourth amendment is designed to prevent wholesale intrusions upon the personal security of our citizenry.[4] Although neither point is an object of focus in this article, it must not be forgotten that the fourth amendment is applicable to the states, and that evidence seized in violation of the amendment is excluded and inadmissible.[5]

Illinois Statutory Requirements

As a general rule, a search warrant should be obtained when the objective is to seize tangible evidence and a physical trespass upon a person or a private place will be necessary. The only exceptions to this rule exist when there is valid consent to the trespass or where an emergency exists. However, since consent does not preclude obtaining a warrant, it is usually best to obtain one even where consent has been given. As assistant state's attorneys, we usually receive cases after the search has been made; yet, whenever police officers inquire about initiating a search, we always advise them that a warrant be procured, and we give advice on preparation, assuming, of course, that issuance is warranted.[6]

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1. Robert Simpson Co. v. Kempner, 208 N.Y. 16, 101 N.E. 794 (1913).
2. Ill. Rev. Stat. ch. 38, § 108-3 (1973).
3. Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).
4. Davis v. Mississippi, 394 U.S. 721 (1969).
5. Mapp v. Ohio, 367 U.S. 643 (1961).
6. All the statutory requirements for the issuance of a search warrant in Illinois are set forth in chapter 38, § 108 of the Illinois Revised Statutes. The four most important sections of the statutes that must be considered are:

§ 108-3. Grounds for a Search Warrant

Upon the written complaint of any person under oath or affirmation which states facts sufficient to show probable cause and which particularly describes the place or person, or both, to be searched and the things to be seized, any judge may issue a search warrant for the seizure of the following:

ELEMENTS OF A GOOD SEARCH WARRANT

The fourth amendment provides that search warrants must particularly describe the place to be searched and the persons or things to be seized.[7] The following is a discussion of the various elements comprising a search warrant and affidavit and the requirements for their validity.

Description of the Place or Person

In considering the description of the place or person to be searched, two important cases should be considered. The first dealt with the place to be searched. In *People v. Smith*[8] it was said that:

> A search warrant must contain a description of the premises to be searched so specifically and accurately as to avoid any unnecessary or unauthorized invasion of the right of security. It should identify the premises in such manner as to leave the officer no doubt and no discretion as to the premises to be searched.[9]

The second dealt with a description of the persons to be searched. In *People v. Staes*[10] the complaint for the search warrant stated that "'. . . the person observed carrying the betslips to the vehicle is described as a white male middle 40's having a hair lip (sic) and wearing a gold signet ring bearing the name Jim, on ring finger of left hand'"[11] and that the individual was known as John Doe. The Illinois Appellate Court, in its decision to quash the resulting warrant, indicated that while the complaint for the warrant particularly described the person whose name was unknown, the failure of the search warrant itself to describe the unnamed individual rendered the warrant invalid. It pointed out that this was so where the warrant did not incorporate the complaint by reference, even though the officer had the complaint with him. A search warrant for a person must

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(a) Any instruments, articles or things which have been used in the commission of, or which may constitute evidence of, the offense in connection with which the warrant is issued.

§ 108-7. Command of Search Warrant

The warrant shall command the person directed to execute the same to search the place or person particularly described in the warrant and to seize the instruments, articles or things particularly described in the warrant.

§ 108-13. When Warrant May Be Executed

The warrant may be executed at any time of any day or night.

§ 108-14. No Warrant Quashed For Technicality

No warrant shall be quashed nor evidence suppressed because of technical irregularities not affecting the substantial rights of the accused.

7. Trupiano v. United States, 334 U.S. 699 (1948).
8. 20 Ill. 2d 345, 169 N.E.2d 777 (1960).
9. *Id.* at 349, 169 N.E.2d at 780.
10. 92 Ill. App. 2d 156, 235 N.E.2d 882 (1st Dist. 1968).
11. *Id.* at 158, 235 N.E.2d at 884.

describe the person to be searched as specifically and as accurately as is required for the search of a place.

In *People v. Mecca*[12] a search warrant issued to search the basement of a rear house at 3322 South Western *Boulevard* instead of 3322 South Western *Avenue*. Although the house searched had imitation brick siding rather than brown siding, these discrepancies did not invalidate the warrant.

In *People v. Easterbrook*[13] the defendant and another were searched in the hallway of the building in question immediately after leaving an apartment yet to be searched under a valid warrant. The warrant itself, issued to seize illegal drugs, authorized the search of the particular apartment, the person occupying the premises, and " 'any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered.' "[14] Ruling on the warrant, the court said that:

> [T]he validity of a search conducted pursuant to such a warrant is dependent upon the facts of each case and, in particular, upon the issue of whether there is good reason to believe that anyone present at the specified premises is a participant in the criminal activity taking place at the scene. . . .
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> . . . .
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> The affidavit in support of this search warrant alleged that heroin was being used and sold in the apartment. In our opinion, it may be said that the criminal activity was of such a nature and the premises so limited that it was likely that everyone present was a party to the offense. Under the circumstances, we are of the opinion that the search of one *identified only by his physical nexus to the premises was valid in this case* and that the police officers had reasonable cause to believe that defendant was one who might 'have such property in his possession or under his control or to whom such property may have been delivered.'[15]

Compare this to Illinois Revised Statutes ch. 38, § 108-9, which states:

> In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
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> (a) To protect himself from attack, or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

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12. 132 Ill. App. 2d 612, 270 N.E.2d 456 (1st Dist. 1971).
13. 350 N.Y.S.2d 442 (1973).
14. *Id.* at 443.
15. *Id.* at 443-44 (emphasis added).

Description of the Material to be Seized

Under both United States and Illinois constitutional law materials to be seized must be described with particularity, and can be anything usable as evidence in proving the crime for which the search is conducted. In the 1927 decision of *Marron v. United States*[16] we find the requirement that warrants particularly describe the things to be seized, thus making general searches impossible and preventing the seizure of one thing under a warrant describing another. Nothing is left to the discretion of the officer executing the warrant with regard to the question of what is to be taken.

However, officers and agents are not considered robots without human sense or reason. Courts often find that explicit adherence to the specific affidavit and warrant is unnecessary. In *United States v. Cook*[17] a warrant, which listed various components of a bomb as evidence to be seized, used the catchall description of "other instrumentalities." That phrase was held sufficient to seize a tool used in making a homemade bomb, the court noting that none of the particular tools required for making the bombs in question could have been known. In *People v. Williams*,[18] a murder prosecution, complaints for warrants, together with supporting affidavits, requested seizure of .22 caliber firearms, shells and shell casings, as well as bloodstained wearing apparel. These were held sufficiently specific to justify issuance of the warrant and validation of seizures made thereunder. Similarly, in *People v. Scott*[19] a complaint to search for "all records of horse bets, sports bets and miscellaneous gambling paraphernalia, or any other evidence thereof"[20] was sufficiently specific. The broadest description, and one found to be invalid, was that calling for the seizure of "other articles of merchandise too numerous to mention."[21]

Miscellaneous "Technicality"

The writing of a search warrant is subject to valid attack for many reasons, but occasionally a defect comes within the scope of Illinois Revised Statutes ch. 38, § 108-14—"No Warrant Quashed for Technicality"—and is held valid in spite of technical errors. In *People v. Wilson*,[22] where there were two different dates (one typed and one stamped) on the body of the

16. 275 U.S. 192 (1927).
17. 432 F.2d 1093 (7th Cir. 1970).
18. 40 Ill. 2d 522, 240 N.E.2d 645 (1968).
19. 46 Ill. 2d 433, 264 N.E.2d 15 (1970).
20. *Id.* at 435, 264 N.E.2d at 16.
21. People v. Sovetsky, 343 Ill. 583, 175 N.E. 844 (1931).
22. 4 Ill. App. 3d 766, 281 N.E.2d 740 (1st Dist. 1972).

search warrant complaint, the defense claimed that the document was not sworn to for some six weeks after the warrant had been issued and executed. The court held that the conflict was not such as to affect any substantive rights of the defendant. In *People v. Foster*[23] the failure of the police officers to properly return the warrant did not render void either the warrant or the search made thereunder; the defendant was not entitled to have the warrant quashed and the evidence suppressed, even though the warrant was marked "not executed" when returned.

Probable Cause and the Complaint for Search Warrant

Under present Illinois law, all evidence considered in establishing probable cause for the issuance of a search warrant must appear in the complaint for the search warrant. This has come to be known as the *Bak/Mitchell* four corners rule. Illinois law limits the relitigation of probable cause to a discussion of only that which appears on the complaint itself. Because of this, each assistant state's attorney should extract from the police officer as much knowledge as the officer has concerning probable cause. *People v. Bak*[24] deals with the proposition that both the Illinois and United States Constitutions contemplate that only judicial officers, upon evidence presented under oath, have the power to make a finding of probable cause for the issuance of a warrant. *People v. Mitchell*[25] tells us that complaints for search warrants fall into two major categories—the "non-informer" warrants and the "informer hearsay" warrants. In both cases the issue of probable cause is identical. The non-informer warrant is based upon the personal observation of the affiant; the informer warrant has the added dimension of the use of hearsay, the affiant relating facts given to him by an informant. Both can be valid.

The law requires that the complaint itself show probable cause to believe that the objects sought by means of the search are in the place or on the person to be searched. The issuing magistrate must be given enough information to make an independent determination of the presence of probable cause: mere belief is not enough.[26] To fulfill this requirement the affiant must establish in his application either personal knowledge of the matters alleged or set forth the basis for his belief.[27] The affidavit cannot merely set forth an officer's suspicions or be-

23. 72 Ill. App. 2d 337, 219 N.E.2d 683 (1st Dist. 1966).
24. 45 Ill. 2d 140, 258 N.E.2d 341 (1970).
25. 45 Ill. 2d 148, 258 N.E.2d 345 (1970).
26. Aguilar v. Texas, 378 U.S. 108 (1964).
27. Giordenello v. United States, 357 U.S. 480 (1958).

liefs without an adequate statement of supporting facts.[28]

In Cook County, the prosecutor often speaks to officers who "know" that X has the proceeds of a burglary at his home. We have no doubt that the experienced policeman is correct when he advances such information. However, our Constitution, as interpreted in *Nathanson v. United States*,[29] reminds us that suspicion or belief does not justify the issuance of a warrant. In *People v. Marino*,[30] where the affidavit stated on its face that stolen articles, other than those sought through use of the warrant, had been discovered in the defendant's former residence, it was considered reasonable for the magistrate to conclude that there was probable cause to believe the defendant might also have stolen property at his current address. The warrant, not based solely upon suspicion, was upheld.

If hearsay information is used, the affiant must disclose his basis for believing that the source of his information is reliable and that the information itself is worthy of credibility. In *Spinelli v. United States*,[31] the Supreme Court held that the affidavit must set forth reasons supporting the claim that the informant is credible or reliable, and must set forth sufficient "underlying circumstances" to enable the judge to make an independent judgment of the validity of the informant's information. The hearsay "tip" may provide sufficient "underlying circumstances" if it is based on the informant's personal observations or if the informant describes the accused's criminal activity in sufficient detail to enable the magistrate to know that it is something more than mere rumor. Due to the very nature of narcotics cases, the prosecution must often rely on informants. If the affidavit does not demonstrate the manner in which the informer obtained his information, the "tip" must describe the defendant's criminal activity in great detail so as to obviate the possibility that the informer is passing on information of doubtful value. If the supporting affidavit states that some of its information is derived from an officer's personal observations, it also must detail those observations.[32] Where an informant is undisclosed,[33] the trustworthiness of his information may be supported by showing prior dealings with him, which proved to be reliable,[34] and by presenting facts which

28. Nathanson v. United States, 290 U.S. 41 (1933).
29. *Id.*
30. 5 Ill. App. 3d 778, 284 N.E.2d 54 (2d Dist. 1972).
31. 393 U.S. 410 (1969).
32. Riggan v. Virginia, 384 U.S. 152 (1966).
33. The informant's identity, or the contents of his communication, will later have to be disclosed where "relevant and helpful to the defense." Rovario v. United States, 353 U.S. 53 (1957).
34. United States v. Ramirez, 279 F.2d 712 (2d Cir. 1960). *See also* Wong Sun v. United States, 371 U.S. 471 (1963).

indicate that the informant had gained his information in a reliable way. For example, in *People v. Young*,[35] the court found a conclusionary assertion—that a reliable police informant had "[g]iven information resulting in three narcotics convictions"[36]—insufficient to establish the reliability of the informant, where the affiant did not tell the issuing magistrate to whom or when this information was given. The court wrote:

> For all that appears, affiant was relying, not on what was told by some reliable person; he was repeating rumor and gossip. As worded, this affidavit would allow affiant to explain, if called on, that he merely believed the informer 'in the past has given information resulting in three narcotic convictions.' An affidavit in support of a search warrant must be such that, if false, it will support a prosecution for perjury.[37]

CONCLUSION

The knowledge contained in the constitutional provisions relating to search and seizure is only the starting point for an attorney. Like so much of criminal law, the practitioner should use his common sense in addition to his knowledge of the substantive law. As professionals, we must act with propriety; nothing is gained by the issuance of an invalid search warrant. The prosecutor must remember that his duty extends to the entire public. Therefore, he must closely scrutinize affidavits and warrants with consideration for the prevention and solution of crime. He should take care to consider the reasonableness of the search, the supporting probable cause, and the particularity of description of persons, places, and items. Nothing is more embarrassing to an assistant state's attorney than losing a case on a motion to suppress where he personally approved the invalid warrant. By proceeding with care, one can be sure that his actions will be lawful and that the search will stand up in court.

35. 4 Ill. App. 3d 602, 279 N.E.2d 392 (1st Dist. 1972).
36. *Id.* at 604, 279 N.E.2d at 393.
37. *Id.* at 605, 279 N.E.2d at 394.