Search Warrants

There's a simple way for the police to avoid many complex search and seizure problems: Get a search warrant.[1]

That's good advice, except for two things: Officers cannot simply "get" a search warrant; they must *apply* for one. And there is nothing "simple" about the application process. On the contrary, even with the advent of email warrants it is one of the more tedious and vexing legal hoops through which officers are required to jump.[2] While some veterans, having suffered through the process for many years, can crank out search warrants with relative ease, for most officers it's a challenge. In this article, we hope to make it much less challenging.

But before we begin, it will be helpful to briefly explain the organization of the subject and some of its terminology. The legal issues can be divided into two broad categories. The first consists of the various requirements for establishing probable cause, a subject we covered in the Fall 2008 edition. The second—which is the subject of this article—covers the requirements as to the form and content of the warrant and, except for demonstrating probable cause, the affidavit. Although some of these requirements are technical in nature, most are substantive and, if not complied with, will invalidate a warrant just as surely as the absence of probable cause.

As for terminology, the following are the principal terms that are used in the law of search warrants and which are used in this article:

AFFIDAVIT: An affidavit is a document signed under penalty of perjury.[3]

AFFIANT: An affiant is a person who writes and signs an affidavit.

MAGISTRATE: In the context of search warrants, the term "magistrate" is synonymous with "judge."[4] In this article, we use the terms interchangeably.

GENERAL WARRANT: A warrant will be deemed "general"—and therefore unlawful—if it contained such a broad description of the evidence to be seized that officers were permitted to conduct a virtually unrestricted search of the premises.[5] Examples include warrants to search for "all evidence" or "stolen property." Unless the severance rule applies (discussed later), evidence seized pursuant to a general warrant will be suppressed.

OVERBROAD WARRANT: A warrant is "overbroad" if its affidavit failed to demonstrate probable cause to believe that each of the things that officers were authorized to search for and seize were, in fact, evidence of a crime and would be found in the place to be searched.[6] Overbreadth is a fatal defect unless the severance rule applies.

PARTICULARITY: The term "particularity" refers to the constitutional requirement that a search warrant must clearly describe (1) the places and things that officers may search, and (2) the property they are permitted to search for and seize.[7] (The terms "overbreadth" and "particularity" are often confused.[8])

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[1] *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 895.

[2] See *Alvidres* v. *Superior Court* (1970) 12 Cal.App.3d 575, 581 ["One of the major difficulties which confronts law enforcement … is the time that is consumed in obtaining search warrants."]; *U.S.* v. *Garcia* (7th Cir. 1989) 882 F.2d 699, 703 ["Yet, one of the major practical difficulties that confronts law enforcement officials is the time required to obtain a warrant."].

[3] See Code Civ. Proc. § 2003 ["An affidavit is a written declaration under oath, made without notice to the adverse party."].

[4] See Pen. Code §§ 807, 808 [magistrates are judges of the California Supreme Court, the Court of Appeal, and Superior Court]

[5] See *U.S.* v. *Kimbrough* (5th Cir. 1995) 69 F.3d 723, 727 ["The Fourth Amendment prohibits issuance of general warrants allowing officials to burrow through a person's possessions looking for any evidence of a crime."].

[6] See *People* v. *Hepner* (1994) 21 Cal.App.4th 761, 773-74 ["[T]he concept of breadth may be defined as the requirement that there be probable cause to seize the particular thing named in the warrant."]; *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702 ["Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based."].

[7] See *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702 ["Particularity means that the warrant must make clear to the executing officer exactly what it is that he or she is authorized to search for and seize."]; *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1024 ["Particularity is the requirement that the warrant must clearly state what is sought."].

[8] See *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702 ["The district court only made one inquiry, which explicitly conflated particularly and overbreadth."]; *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1024 ["We read the Fourth Amendment as requiring 'specificity,' which has two aspects, 'particularity and breadth.'"].

The Affidavit

A search warrant affidavit is a document signed under penalty of perjury that contains the following: (1) the statement of probable cause, (2) descriptions of the place to be searched and the evidence to be seized, (3) justification for implementing special procedures (if any), and (4) other information required by California law.

The statement of probable cause

Writing the statement of probable cause is, by far, the most difficult and time consuming part of the process, as the affiant must persuade the judge there is a fair probability that the evidence he is seeking exists, that it is now located at the place to be searched, and that it will still be there when the warrant is executed.[9]

ORGANIZE THE FACTS: The affiant should usually start by jotting down the main facts upon which probable cause will be based. This will reduce the chances that important facts are inadvertently left out.[10] Although a statement of probable cause will not be judged as "an entry in an essay contest,"[11] the affiant should present the facts in a logical sequence. This is especially important in complex cases.[12]

EDIT AND SIMPLIFY: The statement of probable cause should seldom include everything that officers have learned about the crime under investigation and the suspect. Instead, it "need only furnish the magistrate with information, favorable and adverse, sufficient to permit a reasonable, common sense [probable cause] determination."[13]

WHO SHOULD BE THE AFFIANT? The affiant should normally be the investigator who is "most directly involved in the investigation and most familiar with the facts stated in the affidavit."[14] While most affiants are peace officers, anybody can be one; e.g., a prosecutor or an informant.[15]

TRAINING AND EXPERIENCE: The affiant should include a *brief* statement of his training and experience if (1) the existence of probable cause will be based, even partly, on his opinion concerning the meaning or significance of information contained in the affidavit; or (2) the description of the evidence to be seized will be based in part on an inference he has drawn. (We will discuss descriptions based on training and experience later in this article.) Note that the affiant need not have qualified as an expert witness in court to offer an opinion.[16]

USING ATTACHMENTS: Probable cause may be based in part on information that is contained in another document, such as a police report, a fingerprint or DNA report, a witness's statement, or a photograph. The subject of incorporating attachments into affidavits and warrants is covered later in the section on describing evidence.

SHOULD A PROSECUTOR REVIEW IT? A prosecutor (preferably one who knows the law of search and seizure) should ordinarily review an affidavit if there are legal issues with which the affiant is unfamiliar or uncertain. A review is also recommended if the existence of probable cause is a close question. This is because a prosecutor's approval is a circumstance that the courts will consider in determining whether the good faith rule applies.[17]

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[9] See Pen. Code § 1527 ["The affidavit or affidavits must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist."]; *Illinois* v. *Gates* (1983) 462 U.S. 213, 238 [probable cause to search exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place"].

[10] See *People* v. *Bell* (1996) 45 Cal.App.4th 1030, 1956 ["[T]he most obvious and routine things are those easiest to forget and their absence least noticeable."].

[11] *United States* v. *Harris* (1971) 403 U.S. 573, 579. ALSO SEE *State* v. *Multaler* (Wis. 2002) 643 N.W.2d 437, 447 [an affidavit "is not a research paper or legal brief that demands citations for every proposition"].

[12] See *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 967 [a 157-page affidavit was "nonindexed, unorganized"].

[13] *People* v. *Kurland* (1980) 28 Cal.3d 376, 384.

[14] *Bennett* v. *City of Grand Rapids* (5th Cir. 1989) 883 F.2d 400, 407.

[15] See *People* v. *Bell* (1996) 45 Cal.App.4th 1030, 1055 ["no section of the [Penal] code requires the person seeking a search warrant be a peace officer"].

[16] See *Wimberly* v. *Superior Court* (1976) 16 Cal.3d 557, 565.

[17] See *People* v. *Camarella* (1991) 54 Cal.3d 592, 605, fn.5 ["It is, of course, proper to consider . . . whether the affidavit was previously reviewed by a deputy district attorney."]; *U.S.* v. *Otero* (10th Cir. 2009) 563 F.3d 1127, 1135 ["[One of the more important facts . . . is the officers' attempts to satisfy all legal requirements by consulting a lawyer."].

Other affidavit requirements

In addition to the statement of probable cause, the affidavit must include the following.

DESCRIPTIVE INFORMATION: The affidavit must contain descriptions of (1) the person, place, or thing to be searched; and (2) the evidence to be seized.[18] Although this information must also appear on the warrant, it must be included in the affidavit because the affiant must swear that it is true, and only the information contained in the affidavit is subject to the oath. The requirements pertaining to the quality and quantity of descriptive information are covered later in this article.

GROUNDS TO UTILIZE SPECIAL PROCEDURES: The affiant will usually request authorization to implement one or more special procedures, such as night service, no-knock entry, or affidavit sealing. While such authorization must appear on the warrant, the affidavit must contain the facts upon which the request is based. We will cover the subject of special procedures in the Summer 2011 edition.

THE OATH: The affiant must sign the affidavit under oath; e.g., *"I declare under penalty of perjury that the foregoing is true."*[19] By doing so, he is swearing that (1) the information within his personal knowledge is accurate; and (2) the information that was not within his personal knowledge was, in fact, received by him from others, and that he had no reason to doubt its accuracy.[20] Note it is inappropriate for affiants to swear that their information establishes probable cause (this is a legal determination to be made by the judge), or that they "believe" they have probable cause (this is irrelevant). As the court noted in *People* v. *Leonard*, "Warrants must be issued on the basis of facts, not beliefs."[21]

WHEN TO SIGN: The affiant must not sign the affidavit until he is directed to do so by the judge. This is because the judge must state on the warrant that the affidavit was "sworn to and subscribed before me." See "The jurat," below.

The Warrant: Technical Requirements

Because a search warrant is a court order,[22] it must contain the information that is necessary to constitute an enforceable judicial command, plus certain information required by California statute.

THE HEADING: Like any court order, the heading must identify the issuing court:

SUPERIOR COURT OF CALIFORNIA
County of _____

IDENTIFY THE OFFICERS: The warrant must identify the officers who are ordered to conduct the search. Thus, most warrants begin with the following: *The People of the State of California to any peace officer in the County of* _____.[23]

WHAT COUNTY? The county that is listed must be the same as the county in which the issuing judge sits. For example, if the warrant was issued by a judge in Alameda County, the warrant must be directed to "any peace officer in the County of Alameda." As we will discuss in the Summer 2011 edition, this requirement will not bar a judge from issuing a warrant to search a person, place, or thing located in another county in California.

THE JURAT AND IDENTIFICATION OF THE AFFIANT: The warrant must identify the affiant,[24] and the judge must confirm by means of the jurat that the affiant signed the affidavit under oath in the judge's

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[18] See *People* v. *Coulon* (1969) 273 Cal.App.2d 148, 152 ["both the affidavit upon which [the warrant] is based and the warrant itself must describe the place of search with particularity"].

[19] See *People* v. *Hale* (2005) 133 Cal.App.4th 942, 947 ["The test of the sufficiency of an officer's oath in support of a search warrant is whether he can be prosecuted for perjury should his statement of probable causes prove false."]; *People* v. *Leonard* (1996) 50 Cal.App.4th 878, 884 ["The failure of the affiant to swear to the truth of the information given to the magistrate cannot be construed as a 'technical' defect. It is a defect of substance, not form."].

[20] See *Johnson* v. *State* (Fla. 1995) 660 So.2d 648, 654 ["As to hearsay, officers obviously are vouching for nothing more than the fact that the hearsay was told them and they have no reason to doubt its truthfulness."].

[21] (1996) 50 Cal.App.4th 878, 883.

[22] See *People* v. *Fisher* (2002) 96 Cal.App.4th 1147, 1150 ["A search warrant is not an invitation that officers can choose to accept, or reject, or ignore . . . . It is an order of the court."]; Pen. Code § 1523 ["A search warrant is an order . . . directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property"].

[23] See Pen. Code §§ 1529, 1530; *People* v. *Fleming* (1981) 29 Cal.3d 698, 703.

[24] See Pen. Code § 1529 [the warrant must name "every person whose affidavit has been taken"].

Combination Warrant

presence; e.g., *"An affidavit by [name of affiant], sworn and subscribed before me on this date . . ."*[25] Note that if the affiant is a confidential informant who is covered under California's nondisclosure privilege, the warrant may be modified as follows: *"An affidavit by a confidential informant . . ."*[26]

DISPOSITION OF SEIZED EVIDENCE: The warrant must include instructions as to what the officers must do with any evidence they seize. Although Penal Code sections 1523 and 1529 state that the officers must bring the evidence to the judge, Penal Code sections 1528(a) and 1536 state that the officers must retain it pending further order of the court. Because judges do not want officers to deliver to their chambers loads of drugs, firearms, stolen property, and other common fruits of search warrants, the Court of Appeal has ruled that the evidence must be retained by the officers unless the warrant directs otherwise.[27]

Note that because the officers hold the evidence on behalf of the court, they may not transfer possession of it to any other person or agency except per further court order. As the California Supreme Court explained, "Law enforcement officers who seize property pursuant to a warrant issued by the court do so on behalf of the court, which has authority pursuant to Penal Code section 1536 to control the disposition of the property."[28]

EVIDENCE CLASSIFICATION: Penal Code section 1524(a) states that search warrants may be issued for certain types of evidence, depending mainly on whether the crime under investigation was a felony or misdemeanor. (See this footnote for a listing of seizable evidence.[29]) Consequently, the affiant should specify (usually by checking one or more preprinted boxes) that the listed evidence falls into one or more of these categories.

The question has arisen whether officers who are investigating a misdemeanor can obtain a warrant to search for evidence that is not listed in Penal Code section 1524(a). It is arguable that a judge could do so because the statute does not say that judges are prohibited from issuing warrants for other types of evidence; it is merely a permissive statute, and the distinction between prohibitive and permissive statutes has long been recognized by the courts.[30] Furthermore, evidence that was obtained by means of a warrant that was constitutionally valid cannot be suppressed on grounds that the warrant violated a state statute.[31] As a practical matter, however, judges may be unwilling to issue warrants that do not comply with state law.

FORMS AVAILABLE: Search warrant forms and related documents are available to officers and prosecutors. For information, go to our website: www.le.alcoda.org (click on "Forms").

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[25] See *People* v. *Egan* (1983) 141 Cal.App.3d 798, 801, fn.3 ["Although no particular form is required, a proper and usual form of jurat is 'sworn to and subscribed before me,' followed by the date and the taking officer's signature."]. **NOTE**: It appears that a warrant will not be invalidated if the judge did not administer the oath to the affiant, so long as the affiant signed the affidavit under penalty of perjury. See *U.S.* v. *Bueno-Vargas* (9th Cir. 2001) 383 F.3d 1104, 1110 [court rejects argument that a faxed statement of probable cause under penalty of perjury was constitutionally deficient "because no one administered an oath to [the affiant]."

[26] See *People* v. *Sanchez* (1972) 24 Cal.App.3d 664, 677-78, fn.8.

[27] *People* v. *Superior Court (Loar)* (1972) 28 Cal.App.3d 600, 607, fn.3 ["[Pen. Code §§ 1528 and 1536] prevail[] over conflicting language in Penal Code Sections 1523 and 1529"]. ALSO SEE *Oziel* v. *Superior Court* (1990) 223 Cal.App.3d 1284, 1292-93 ["possession by the officer is, in contemplation of the law, possession by the court."].

[28] *People* v. *Superior Court (Laff)* (2001) 25 Cal.4th 703, 713.

[29] **NOTE**: Penal Code § 1524(a) states that a warrant may authorize the seizure of evidence pertaining to a felony when the evidence (1) tends to identify the perpetrator, (2) tends to show that a felony was committed, or (3) was used to commit a felony. A warrant may be issued to seize evidence pertaining to any crime when the evidence (1) is possessed by a person who intends to use it as a means of committing a felony or misdemeanor; (2) consists of stolen or embezzled property; (3) is possessed by a person to whom it was delivered for the purpose of concealing it; (4) consists of records in the possession of a provider of an electronic communications service or a remote computing service, and it tends to prove that certain property was stolen; (5) tends to show that sexual exploitation of a child occurred in violation of Penal Code § 311.3; or (6) tends to show that a person possesses child pornography in violation of Penal Code § 311.11. Warrants may also authorize a search for a person who is wanted on an arrest warrant, or for deadly weapons inside premises that are (1) occupied or controlled by a person who is being held in custody pursuant to Welfare and Institutions Code § 5150, (2) occupied or controlled by a person who has been arrested for domestic violence involving threatened harm, or (3) owned or controlled by a person who is prohibited from possessing firearms pursuant to Family Code § 6389.

[30] See *United States* v. *Ramirez* (1998) 523 U.S. 65, 72.

[31] See *Virginia* v. *Moore* (2008) 553 U.S. 164, 176; *People* v. *McKay* (2002) 27 Cal.4th 601, 608.

Describing the Place To Be Searched

The requirement that search warrants describe the people, places, and things that may be searched will be deemed satisfied if the quality and quantity of the descriptive information is such that the search team can "ascertain and identify the place intended" with "reasonable effort."[32] While this "reasonable effort" test is somewhat ambiguous, as we will now discuss, the courts have generally agreed on what descriptive information will suffice.

SINGLE-FAMILY RESIDENCES: In most cases, a simple street address will do if the place to be searched is a house, apartment, condominium, or motel room.[33] If, however, street signs or unit numbers are lacking or obscured, the warrant must include a physical description of the premises or some other information that will direct the officers to the right place; e.g., a photograph, diagram, map, or image from Google Earth or Google Street View.[34] Although affiants sometimes describe the premises by inserting the name of the owner, this is not a requirement.[35] Moreover, it would ordinarily be of dubious value because ownership is a legal determination that seldom can be made at the scene prior to entry.

DETACHED BUILDINGS: If officers have probable cause to search detached structures on residential property (e.g., detached garage, storage shed), the warrant must indicate which structures may be searched. There are two ways to do this. First, the affiant can describe their physical characteristics; e.g., "The house at 415 Hoodlum Place and the red storage shed located approximately 100 feet behind the house." The other method is to insert the word "premises" in the description of the place to be searched (e.g., "The *premises* at 415 Hoodlum Place") as the courts have interpreted the word "premises" as expanding the scope of the search to all outbuildings that are ancillary to the main house.[36]

MULTI-OCCUPANT RESIDENCES: A multi-occupant residence is loosely defined as a building that has been divided into entirely separate living units, each under the exclusive control of different occupants. For example, a motel is a multi-occupant building, while a single motel room is a single-family residence. Another example of a multiple-occupant residence (although unusual) is found in *Mena* v. *Simi Valley*[37] where a single-family house was occupied by several unrelated people, each of whom occupied rooms that were "set up as studio apartment type units, with their own refrigerators, cooking supplies, food, televisions, and stereos."

The rule regarding multiple-occupant residences is straightforward: If, as is usually the case, officers have probable cause to search only a particular living unit, the warrant must direct them to search only *that* unit; e.g., "apartment 211," "the lower unit of the two-story duplex," "room number one of the Bates Motel."[38] As the court explained in *People* v. *Estrada*, a warrant for a multiple-occupant residence must "limit the search to a particular part of

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[32] *Steele* v. *United States* (1925) 267 U.S. 498, 503. ALSO SEE *People* v. *Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 222.

[33] See *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469 ["As the search warrant included the street address of the premises, the premises were adequately identified"]; *People* v. *Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 225 ["the more conventional method of identifying a particular residence [is] by street number"] ALSO SEE *U.S.* v. *Hinton* (7th Cir. 1955) 219 F.2d 324, 325-26 ["searching two or more apartments in the same building is no different than searching two or more completely separate houses"].

[34] See *People* v. *Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 225 [description was necessary because the homes on the street "did not have house numbers, nor were the streets described by signs"].

[35] See *Hanger* v. *U.S.* (8th Cir. 1968) 398 F.2d 91, 99 ["Although desirable, a search warrant otherwise sufficient is not rendered invalid by the omission of the name of the owner or occupant"].

[36] See *People* v. *Mack* (1977) 66 Cal.App.3d 839, 859 ["premises" included "both the house and [detached] garage"]; *People* v. *Dumas* (1973) 9 Cal.3d 871, 881, fn.5 ["premises" included "outbuildings and appurtenances in addition to a main building when the various places searched are part of a single integral unit"]; *People* v. *Grossman* (1971) 19 Cal.App.3d 8, 12 ["premises" authorized search of a cabinet in an adjacent carport]; *People* v. *Weagley* (1990) 218 Cal.App.3d 569, 573 ["premises" authorized a search of a mailbox]; *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469 ["premises . . . has been held to embrace both the house and the garage"].

[37] (9th Cir. 2000) 226 F.3d 1031.

[38] See *People* v. *Govea* (1965) 235 Cal.App.2d 284, 300 ["A warrant directing a search of an apartment house or other dwelling house containing multiple living units is void unless issued on probable cause for searching each apartment or living unit or for believing that the entire building is a single living unit."]; *People* v. *MacAvoy* (1984) 162 Cal.App.3d 746, 754-55 ["the warrant would allow the officers to search every part of the fraternity house [but] probable cause existed to search appellant's room"].

the premises either by a designation of the area or other physical characteristics of such part or by a designation of its occupants."[39]

Note that a single-family residence does not turn into a multiple-occupant residence merely because the occupants had separate bedrooms; e.g., roommates. For example, in *People* v. *Gorg*[40] officers in Berkeley developed probable cause to believe that a man named Fontaine was selling marijuana out of a three-bedroom flat that he shared with Gorg and another man. So they obtained a warrant to search the flat and, in the course of the search, found marijuana in Gorg's bedroom. Gorg argued that the flat was a multiple-occupant residence and, therefore, the search of his bedroom was unlawful because the warrant did not restrict the search to Fontaine's bedroom and the common areas. The court disagreed, explaining:

> [The warrant] was issued for a search of the lower flat in question, and Fontaine was named as the one occupying the named premises. Actually three people lived in this flat, sharing the living room, kitchen, bath and halls. The three bedrooms opened on these rooms and were not locked. All of the rooms constituted one living unit.

BUSINESSES: If the business occupies the entire building, and if there is probable cause to search the entire business, the warrant can simply identify the building by its street address and direct officers to search the entire structure. But, as with multiple-occupant residences, a more restrictive description will be required if probable cause is limited to a certain area or room.[41]

DETACHED COMMERCIAL STRUCTURES: If officers also have probable cause to search structures that are ancillary to the main business office, the affiant should ordinarily describe each building for which probable cause exists. This is because the relationship between the various structures on commercial property is often ambiguous,

VEHICLES: It is sufficient to identify vehicles by their license number and a brief description. If the license number is unknown or if there are no plates on the vehicle, it may be identified by its VIN number, or its location and a detailed description.[42] A warrant may authorize a search of "all vehicles" on the premises, but only if there is probable cause to believe that at least some of the listed evidence will be found in *each* vehicle.[43]

PEOPLE A warrant to search a person must identify the person by name, physical description, or both.[44] If necessary, a photograph of the person may be attached to the warrant; e.g., DMV or booking photo.[45] A warrant may authorize a search of "all residents" of the premises or everyone who is present when officers arrive, but only in those rare cases in which the affidavit establishes probable cause to believe that at least some of the listed evidence will be found on *every* resident or occupant.[46]

COMPUTERS: If officers have probable cause to search a home or business for information, data, or graphics, it is usually reasonable to believe that some or all of it has been stored in a computer or external storage device. But officers will seldom know what type of computer or device they will find; and the only way they can learn is to obtain a warrant. A classic Catch-22 situation.

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[39] (1965) 234 Cal.App.2d 136, 148. Edited.

[40] (1958) 157 Cal.App.2d 515. ALSO SEE *People* v. *Superior Court (Meyers)* (1979) 25 Cal.3d 67, 79 [house occupied by several individuals]; *Hemler* v. *Superior Court* (1975) 44 Cal.App.3d 430, 433 ["At most, the evidence shows that three individuals lived in the residence, sharing the living room, bathroom, kitchen and hallways, and that defendant's bedroom opened onto the other rooms and was not locked."]; *People* v. *Govea* (1965) 235 Cal.App.2d 285, 300-301 ["[The evidence disclosed] that Mendoza used the front of the house as a bedroom and that defendant Govea and his family, at least on the night of the search, were using a bedroom. This does not show that the premises were not a single living unit."].

[41] See *Dalia* v. *United States* (1979) 441 U.S. 238, 242, fn.4.

[42] See *People* v. *Dumas* (1973) 9 Cal.3d 871, 881 [the warrant "must, at the very least, include some explicit description of a particular vehicle or of a place where a vehicle is later found"]; *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469 [warrant was sufficient when it described the car as a gold Cadillac with a black landau top and no license plates, and that it was parked in certain driveway].

[43] See *People* v. *Sanchez* (1981) 116 Cal.App.3d 720, 727-28; *U.S.* v. *Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1341.

[44] See Pen. Code § 1525 [affidavit must contain the name or description of the person]; *People* v. *Tenney* (1972) 25 Cal.App.3d 16, 22-23 [warrant to search "unidentified persons" was not sufficiently particular].

[45] See *People* v. *Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 220 [CDL was attached to warrant].

[46] See *Ybarra* v. *Illinois* (1979) 444 U.S. 85, 91; *People* v. *Tenney* (1972) 25 Cal.App.3d 16, 22-23.

Some courts have resolved this dilemma by ruling that authorization to search all computer devices on the premises will be implied if the warrant authorized a search for data that could have been stored digitally.[47] But the better practice is to seek express authorization by particularly describing the data or graphics to be seized, then adding language that authorizes a search for it in any form in which it could have been stored; e.g., *"[After particularly describing the data to be seized] whether stored on paper or on electronic or magnetic media such as internal or external hard drives, diskettes, backup tapes, compact disks (CDs), digital video disks (DVDs), optical discs, electronic notebooks, video tape, or audio tape."*[48]

Describing the Evidence

Next to establishing probable cause, the most difficult part of the application process is usually describing the evidence to be seized. This is because officers will not know exactly what the evidence looks like unless they had seen it. As we will discuss, however, the problem is not insurmountable, as the courts have ruled that descriptions may be based on reasonable inference.

But before going further, we must stress that providing a description of the evidence is not a mere "technical" requirement that requires little effort. On the contrary, it is crucial because a detailed description provides the courts with the necessary assurance that the officers will confine their search to places and things in which specific evidence may be found, and that they will seize only evidence for which probable cause exists. Thus, the Ninth Circuit noted that search warrants will be deemed invalid "when they are so bountiful and expansive in their language that they constitute a virtual, all-encompassing dragnet of personal papers and property to be seized at the discretion of the State."[49]

It is understandable that affiants may worry that their searches will be unduly restricted if they describe the evidence too narrowly. But this is seldom a problem because most warrants include authorization to search for small objects (such as drugs) or documents (such as indicia) that can be found almost anywhere on the premises.

The "particularity" requirement

While a warrant must contain a description of the evidence to be seized, not just any description will do. The description must be "particular," a word having such significance that it was incorporated into the Fourth Amendment to the United States Constitution.[50] Thus, the Supreme Court ruled that "a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."[51]

What, then, constitutes a "particular" description? Although the issue "has been much litigated with seemingly disparate results,"[52] a description will ordinarily suffice if it imposes a "meaningful restriction" on the scope of the search,[53] or if it otherwise "sets out objective standards"[54] by which officers can determine what they may, and may not, search for and seize.

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[47] See *People* v. *Balint* (2006) 138 Cal.App.4th 200, 218 [a laptop "amounts to an electronic container capable of storing data similar in kind to the documents stored in an ordinary filing cabinet, and thus potentially within the scope of the warrant"]; *U.S.* v. *Giberson* (9th Cir. 2008) 527 F.3d 882, 887 [search of computer was impliedly authorized "where there was ample evidence that the documents authorized in the warrant could be found on [the] computer"].

[48] See *U.S.* v. *Banks* (9th Cir. 2009) 556 F.3d 967, 973 ["computer storage devices" was sufficient "because there was no way to know where the offending images had been stored"]; *U.S.* v. *Upham* (1st Cir. 1999) 168 F.3d 532, 535 [the description, "Any and all computer software and hardware . . . computer disks, disk drives . . . " was sufficient because it "was about the narrowest definable search and seizure reasonably likely to obtain the images"]; *U.S.* v. *Brobst* (9th Cir. 2009) 558 F.3d 982, 994 ["At the time Detective Yonkin applied for the warrant, he could not have known what storage media Brobst used."].

[49] *U.S.* v. *Bridges* (9th Cir. 2003) 344 F.3d 1010, 1016. Edited.

[50] See U.S. Const. Amend. IV. ALSO SEE Pen. Code § 1525.

[51] *Massachusetts* v. *Sheppard* (1984) 468 U.S. 981, 988, n.5.

[52] *U.S.* v. *Upham* (1st Cir. 1999) 168 F.3d 532, 535.

[53] See *Burrows* v. *Superior Court* (1974) 13 Cal.3d 238, 249 [the warrant must impose "a meaningful restriction upon the objects to be seized"]; *People* v. *Tockgo* (1983) 145 Cal.App.3d 635, 640 ["meaningful restriction" is required].

[54] *U.S.* v. *Lacy* (9th Cir. 1997) 119 F.3d 742, 746, fn.7. ALSO SEE *Davis* v. *Gracey* (10th Cir. 1997) 111 F.3d 1472, 1478 ["[We ask] did the warrant tell the officers how to separate the items subject to seizure from irrelevant items"].

Later, we will discuss specific applications of this test. But first, it is necessary to cover the principles that the courts apply in determining whether a description was sufficiently particular, and also some practices that have tended to cause problems.

PRACTICAL—NOT ELABORATE—DESCRIPTIONS: While some courts in the past elevated form over substance and required technical precision and elaborate specificity,[55] that has changed. Today, as the Court of Appeal observed, "the requirement that a search warrant describe its objects with particularity is a standard of 'practical accuracy' rather than a hypertechnical one."[56]

Consequently, a description will suffice if it contains just the amount of information that is reasonably necessary to identify the evidence to be seized.[57] Or, in the words of the First Circuit, the warrant must provide "clear, simple direction":

> Specificity does not lie in writing words that deny all unintended logical possibilities. Rather, it lies in a combination of language and context, which together permit the communication of clear, simple direction.[58]

TOTALITY OF DESCRIPTIVE INFORMATION: In determining whether a description was sufficiently particular, the courts will consider the descriptive language as a whole, meaning they will not isolate individual words and ignore the context in which they appeared.[59] As the Supreme Court observed, "A word is known by the company it keeps."[60]

REASONABLY AVAILABLE INFORMATION: As noted, it happens that, despite their best efforts, officers are simply unable to provide a detailed description of the evidence. In these situations, a description will ordinarily suffice if the affiant provided as much descriptive information as he had or could have obtained with reasonable effort (including, as we will discuss later, as much descriptive information as he could reasonably infer).[61] Thus, the Eleventh Circuit pointed out the following in *U.S.* v. *Santarelli*:

> There are circumstances in which the law enforcement officer applying for a warrant cannot give an exact description of the materials to be seized even though he has probable cause to believe that such materials exist and that they are being used in the commission of a crime. In these situations we have upheld warrants when the description is as specific as the circumstances and the nature of the activity under investigation permit.[62]

This also means, however, that a warrant is apt to be invalidated if officers could have—but did not—provide a particular description. For example, in

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[55] See, for example, *People* v. *Frank* (1985) 38 Cal.3d 711, 726.

[56] *People* v. *Superior Court* (*Nasmeh)* (2007) 151 Cal.App.4th 85, 95.

[57] See *United States* v. *Ventresca* (1965) 380 U.S. 102, 108 [interpret in "a commonsense and realistic fashion"]; *People* v. *Amador* (2000) 24 Cal.4th 387, 392 ["Complete precision in describing the place to be searched is not required."]; *People* v. *Minder* (1996) 46 Cal.App.4th 1784, 1788 ["Technical requirements of elaborate specificity have no proper place in this area."]; *U.S.* v. *Meek* (9th Cir. 2004) 366 F.3d 705, 716 ["The prohibition of general searches is not to be confused with a demand for precise *ex ante* knowledge of the location and content of evidence related to the suspected violation."]; *U.S.* v. *Williams* (4th Cir. 2010) 592 F.3d 511, 519 [the description "should be read with a commonsense and realistic approach, to avoid turning a search warrant into a constitutional straight jacket."]; *U.S.* v. *Otero* (10th Cir. 2009) 563 F.3d 1127, 1132 ["A warrant need not necessarily survive a hypertechnical sentence diagramming and comply with the best practices of *Strunk & White* to satisfy the particularity requirement."].

[58] *U.S.* v. *Gendron* (1st Cir. 1994) 18 F.3d 955, 966. **NOTE**: In *Marron* v. *United States* (1927) 275 U.S. 192, 196 the U.S. Supreme Court seemed to set an impossibly high standard for search warrant descriptions when it said, "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Over the years, however, most courts have interpreted this language in a practical manner. See, for example, *People* v. *Rogers* (1986) 187 Cal.App.3d 1001, 1007 ["but few warrants could pass [the *Marron* test] and thus it is more accurate to say that the warrant must be sufficiently definite so that the officer executing it can identify the property sought with reasonable certainty."]; *U.S.* v. *Wuagneux* (11th Cir. 1982) 683 F.2d 1343, 1349, fn.4 ["[if *Marron*] were construed as a literal command, no search would be possible"].

[59] See *Andresen* v. *Maryland* (1976) 427 U.S. 463, 480; *People* v. *Schilling* (1987) 188 Cal.App.3d 1021, 1031.

[60] *Gustafson* v. *Alloyd Co.* (1995) 513 U.S. 561, 562.

[61] See *Maryland* v. *Garrison* (1987) 480 U.S. 79, 85 ["The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate."]; *People* v. *Smith* (1986) 180 Cal.App.3d 72, 89 ["particularity" reflects "the degree of detail known by the affiant and presented to the magistrate"]; *U.S.* v. *Meek* (9th Cir. 2004) 366 F.3d 705, 716 ["The proper metric of sufficient specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation"].

[62] (11th Cir. 1985) 778 F.2d 609, 614.

U.S. v. *Stubbs* the court ruled that a warrant obtained by IRS agents to search the defendant's office for evidence of tax evasion was not sufficiently particular because, as the court pointed out, "The IRS knew both what the seizable documents looked like and where to find them, but this information was not contained in the warrant."[63]

Similarly, in *Center Art Galleries* v. *U.S.*[64] officers developed probable cause to search several art galleries for stolen paintings by Salvador Dali. In the course of the investigation, they obtained warrants to search the defendant's galleries for, among other things, "sales records and customer/client information, lithographic and etching plates." But the court ruled this description was insufficiently particular because it "failed to limit the warrants to items pertaining to the sale of Dali artwork." This failure, said the court, was especially egregious because "the government had the means to identify accounts which may have involved Dali artwork. The lead government investigator was aware that a special card was created for the file of all clients who were interested in Dali artwork."

Problem areas

Before we discuss the ways in which officers can provide a particular description, it is necessary to address some issues and practices that have tended to cause problems or confusion.

BOILERPLATE: In the context of search warrants, the term "boilerplate" means a list—usually lengthy—of descriptions copied verbatim from other warrants and affidavits.[65] Because boilerplate is now commonly stored in computer files, it now takes only a few clicks or keystrokes to provide *pages* of boilerplated descriptions—much of it worthless, if not potentially destructive.

The problem with boilerplate is that, unless it has been carefully edited, the descriptions it contains often have little or no resemblance to the evidence for which there is probable cause. Thus, warrants that authorize searches for boilerplated evidence often contain overbroad descriptions that may render the warrant invalid unless, as discussed below, the severance rule applies. This does not mean that officers should never utilize boilerplate. As we will discuss later, it may properly be used to provide descriptions of evidence that can only be described by inference.

TRAINING AND EXPERIENCE: Like boilerplate, statements by affiants of their training and experience tend to be too lengthy and are frequently unnecessary. In the context of describing evidence, they are usually relevant only if the description was based on an inference that, in turn, was based on the affiant's training and experience; e.g., a description of drug paraphernalia based on the affiant's knowledge of the common instrumentalities used by drug users and traffickers. (For a discussion of training and experience as it pertains to establishing probable cause, see "The Affidavit," above.)

"AMONG OTHER THINGS": Affiants will sometimes provide a particular description of some evidence, then add some language that authorizes a search for similar things that have not been described; e.g., "including, but not limited to," "among other things," "etc." Such indefinite language—sometimes called a "wildcard"[66] or a "general tail"[67]—may render a warrant insufficiently particular if, when considered in context, it authorizes an unrestricted search.

For example, a warrant that simply authorizes a search for "Heroin, among other things" is insufficiently particular (and also overbroad) because it contains no restriction on what officers may search for and seize. Thus, in *Aday* v. *Superior Court*[68] the California Supreme Court invalidated a warrant to search for "all other records and paraphernalia" connected with the defendants' business because,

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[63] (9th Cir. 1989) 873 F.2d 210, 211. ALSO SEE *People* v. *Tockgo* (1983) 145 Cal.App.3d 635; *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016.

[64] (9th Cir. 1989) 875 F.2d 747.

[65] See *People* v. *Frank* (1985) 38 Cal.3d 711, 722 ["boilerplate lists [are] routinely incorporated into the warrant without regard to the evidence"]; *U.S.* v. *Ribeiro* (1st Cir. 2005) 397 F.3d 43, 51 [boilerplate is "stereotyped or formulaic writing"]; *Cassady* v. *Goering* (10th Cir. 2009) 567 F.3d 628, 636, fn.5 [the affiant used "stock language" that "could be applied to almost any crime"].

[66] *In re Search Warrant Dated July 4, 1977* (D.C. Cir. 1977) 572 F.2d 321, 329.

[67] See *U.S.* v. *Abrams* (1st Cir. 1980) 615 F.2d 541, 547.

[68] (1961) 55 Cal.2d 789.

said the court, "[t]he various categories, when taken together, were so sweeping as to include virtually all personal business property on the premises and placed no meaningful restriction on the things to be seized."

Similarly, in *U.S.* v. *Bridges*[69] the affiant described the evidence to be seized as all records relating to the suspect's clients and victims, "including but not limited to" certain records that were particularly listed in the warrant. But because this language effectively authorized a search for "all records"—regardless of whether they were particularly described—the court ruled the warrant was invalid. As it pointed out, "[I]f the scope of the warrant is not limited to the specific records listed on the warrant, it is unclear what is its precise scope or what exactly it is that the agents are expected to be looking for during the search."

This does not mean that wildcards are forbidden. In fact, there are three situations in which they are regularly used without serious objection. First, there are situations in which the evidence is limited to fruits or instrumentalities of a certain crime, and the wildcard could be interpreted as merely providing descriptive examples of seizable evidence pertaining to that crime.[70] For instance, in *Toubus* v. *Superior Court*[71] a warrant authorized a search for "any papers or writings, records that evidence dealings in controlled substances, including, but not limited to address books, ledgers, lists, notebooks, etc." In ruling that this language did not render the warrant insufficiently particular, the court pointed out that it permitted a seizure of only those things pertaining to "dealings in controlled substances."

Second, a wildcard may be appropriate when a warrant authorized a search of a crime scene, but officers could not be expected to know exactly what types of evidence pertaining to the crime they would find. For example, in *People* v. *Schilling*[72] the body of a woman was discovered in the Angeles National Forest. Having developed probable cause to believe that Schilling had shot and killed the woman in his home, a homicide detective with the Los Angeles County Sheriff's Department obtained a warrant to search Schilling's house for, among other things, "scientific evidence, including but not limited to fingerprints, powder burns, blood, blood spatters, photographs, measurements, bullet holes, hair, fibers." On appeal, Schilling argued that the "but not limited to" language rendered the warrant insufficiently particular, but the court disagreed, pointing out that the warrant "simply authorized seizure of additional scientific evidence" pertaining to the murder that the affiant "was unable to detail."

Third, as we will discuss later, wildcards are commonly used to provide examples of the types of indicia that officers may seize.

THE SEVERANCE EXCEPTION: If the affiant fails to satisfactorily describe some, but not all, of the listed evidence, the courts will ordinarily suppress only those items that were inadequately described.[73] For example, if items A and B were adequately described but item C was not, it is likely that only item C would be suppressed.

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[69] (9th Cir. 2003) 344 F.3d 1010. ALSO SEE *Roman Catholic Archbishop of Los Angeles* v. *Superior Court* (2005) 131 Cal.App.4th 417, 460 ["But the crucial defect in *Bridges* was that the search warrant nowhere stated what criminal activity was being investigated."].

[70] See *People* v. *Balint* (2006) 138 Cal.App.4th 200, 207 ["the itemized list following the word 'including' may reasonably be interpreted as nonexclusive and merely descriptive examples of items likely to show who occupied the residence"]; *U.S.* v. *Riley* (2nd Cir. 1990) 906 F.2d 841, 844 ["In upholding broadly worded categories of items available for seizure, we have noted that the language of a warrant is to be construed in light of an illustrative list of seizable items."]; *U.S.* v. *Washington* (9th Cir. 1986) 797 F.2d 1461, 1472; *U.S.* v. *Abrams* (1st Cir. 1980) 615 F.2d 541, 547 ["the general 'tail' of the search warrant will be construed so as not to defeat the 'particularity' of the main body of the warrant."]; *Roman Catholic Archbishop of Los Angeles* v. *Superior Court* (2005) 131 Cal.App.4th 417, 460 [subpoena for documents including "but are not limited to" was not insufficiently particular because it was linked to language indicating "what criminal activity was being investigated"]. ALSO SEE *Andresen* v. *Maryland* (1976) 427 U.S. 463, 479-80 [Warrant: "[listing of documents pertaining to Lot 13T] together with other fruits, instrumentalities and evidence of crime at this time unknown." Court: "[T]he challenged phrase must be read as authorizing only the search for and seizure of evidence relating to 'the crime of false pretenses with respect to Lot 13T'"].

[71] (1981) 114 Cal.App.3d 378.

[72] (1987) 188 Cal.App.3d 1021, 1031.

[73] See *People* v. *Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 415; *U.S.* v. *Gomez-Soto* (9th Cir. 1984) 723 F.2d 649, 654; *U.S.* v. *Christine* (3rd Cir. 1982) 687 F.2d 749759 ["redaction is an efficacious and constitutionally sound practice, and should be utilized in order to avoid unnecessary social costs"].

The severance exception will not, however, be applied if the inadequately-described evidence so predominated the warrant that it effectively authorized a general search. As the Ninth Circuit observed, "[S]everance is not available when the valid portion of the warrant is a relatively insignificant part of an otherwise invalid search."[74] For example, in *Burrows* v. *Superior Court* the court ruled that, "[a]ssuming arguendo that the warrant is severable, the direction to seize 'any file or documents' relating to the [suspects] is too broad to comport with constitutional requirements."[75] (Note that severance may also be appropriate when the affidavit fails to establish probable cause to search for some—but not all—of the listed evidence.[76])

Basics of providing particular descriptions

Although the courts understand that officers may sometimes be unable to provide much descriptive information, they expect them to utilize all reasonably available means to limit, at least to some extent, the scope of their warranted searches. The following are the most common ways in which this is done.

AVOID GENERAL TERMS: The use of precise language to describe evidence is the mark of a particular description. The following are examples:

- illegal drugs consisting of heroin and crack cocaine[77]
- records relating to loan sharking and gambling, including pay and collection sheets, lists of loan customers, loan accounts, line sheets, bet slips, and tally sheets[78]
- blue plaid long-sleeved flannel shirt[79]
- fingerprints, powder burns, blood, blood spatters, bullet holes[80]
- vehicles with altered or defaced identification numbers[81]
- a 14-inch security hole opener cutter attached to a hole opener[82]
- oil and water drill bits in sizes from four inches to 18 inches, having altered or defaced serial numbers[83]

In contrast, the following descriptions were plainly inadequate:

- stolen property[84]
- all other property owned by [the theft victim].[85]
- any and all illegal contraband[86]
- certain personal property used as a means of committing grand larceny[87]
- all business records and paraphernalia[88]
- other evidence[89]

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[74] *In re Grand Jury Subpoenas* (9th Cir. 1991) 926 F.2d 847, 858. ALSO SEE *Aday* v. *Superior Court* (1961) 55 Cal.2d 789, 797; *U.S.* v. *Sears* (9th Cir. 2005) 411 F.3d 1124, 1130 ["We also take into account the relative size of the valid and invalid portions of the warrant in determining whether severance is appropriate."]; *Cassady* v. *Goering* (10th Cir. 2009) 567 F.3d 628, 641 ["Here, the invalid portions of the warrant are sufficiently broad and invasive so as to contaminate the whole warrant."]; *U.S.* v. *Sells* (10th Cir. 2006) 463 F.3d 1148, 1158 ["Total suppression may still be required even where a part of the warrant is valid (and distinguishable) if the invalid portions so predominate the warrant that the warrant in essence authorizes a general [search]."].

[75] (1974) 13 Cal.3d 238, 250.

[76] See, for example, *People* v. *Joubert* (1983) 140 Cal.App.3d 946, 952-53; *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 707].

[77] See *People* v. *Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 415; *People* v. *Walker* (1967) 250 Cal.App.2d 214, 216, fn.1.

[78] See *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 965.

[79] *People* v. *Kraft* (2000) 23 Cal.4th 978, 1049.

[80] See *People* v. *Schilling* (1987) 188 Cal.App.3d 1021, 1030-31.

[81] See *U.S.* v. *Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1341.

[82] See *People* v. *Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 76-77. ALSO SEE *People* v. *Lowery* (1983) 145 Cal.App.3d 902, 906 ["Synertek 2716 integrated circuits further described as rectangular objects approximately 1-¼" by ¾", having 24 gold colored pins extending downward . . . "].

[83] See *People* v. *Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 78.

[84] See *Lockridge* v. *Superior Court* (1969) 275 Cal.App.2d 612, 625; *Thompson* v. *Superior Court* (1977) 70 Cal.App.3d 101, 108; *People* v. *Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 77 ["Without a specific means of identification, the police had no means of distinguishing legitimate goods from stolen goods."].

[85] See *People* v. *Smith* (1986) 180 Cal.App.3d 72, 89.

[86] See *Cassady* v. *Goering* (10th Cir. 2009) 567 F.3d 628, 635

[87] See *People* v. *Mayen* (1922) 188 Cal. 237, 242.

[88] See *Aday* v. *Superior Court* (1961) 55 Cal.2d 789, 795-96.

[89] See *Stern* v. *Superior Court* (1946) 76 Cal.App.2d 772, 784.

DESCRIBE BY LOCATION: If officers know exactly where on the premises the evidence is located (e.g., in a certain room, closet, cabinet, file, or box), this information may be included in the description.[90] But unless officers are certain that the evidence will be found only in that location when the warrant is executed, the affiant should explain that this information is being provided only to assist in the identification of evidence, not to restrict the scope of the search.

UTILIZING ATTACHMENTS: One of the most efficient means of inserting information into affidavits and warrants—whether to establish probable cause or to provide a description—is to incorporate documents that already contain that information; e.g., witness statements, prior affidavits, police reports, autopsy reports, rap sheets, business records, maps, photographs. As the court observed in *State* v. *Wade*, incorporation "is a recognized method of making one document of any kind become a part of another separate document without actually copying it at length in the other."[91]

An attachment will not, however, be deemed incorporated merely because it was submitted to the judge along with the affidavit and search warrant. Instead, the law imposes three requirements that are designed to eliminate any confusion as to the status of supplementary documents:

(1) **IDENTIFY THE ATTACHMENT**: The affiant must clearly identify the document that is being incorporated into the warrant or affidavit.[92] This is typically accomplished by assigning it an exhibit number or letter, then writing that number or letter in a conspicuous place at the top of the attachment.

(2) **INCORPORATE BY REFERENCE**: The affiant must then insert into the search warrant or affidavit "appropriate words of reference"[93] or other "clear words"[94] that give notice to the judge that the identified document is being incorporated.[95] As the Third Circuit explained in *United States* v. *Tracey,* "Merely referencing the attached affidavit somewhere in the warrant without expressly incorporating it does not suffice."[96] Although there are no "magic" or required words of incorporation,[97] it is usually best to use the direct approach; e.g., *"The police report containing the list of stolen property, identified as Exhibit 4, is attached hereto and incorporated by reference."*[98]

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[90] See *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469; *In re Search Warrant Dated July 4, 1977* (D.C. Cir. 1978) 572 F.2d 321, 324. COMPARE *U.S.* v. *Kow* (9th Cir. 1995) 58 F.3d 423, 427 [the affidavit summarized in detail the various locations within the business where the evidence was located, "this information was excluded from the warrant"].

[91] (Fla. App. 1989) 544 So.2d 1028, 1030. ALSO SEE *Baranski* v. *Fifteen Unknown ATF Agents* (6th Cir. 2006) 452 F.3d 433, 440 ["[A]ll of the courts of appeals (save the Federal Circuit) have permitted warrants to cross-reference supporting affidavits and to satisfy the particularity requirement through an incorporated and attached document—at least when it comes to the validity of the warrant at the time of issuance."].

[92] See *People* v. *Egan* (1983) 141 Cal.App.3d 798, 803 ["It is necessary that the incorporated document be clearly identified."].

[93] *Groh* v. *Ramirez* (2004) 540 U.S. 551, 557-58 ["Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." Citations omitted.]. ALSO SEE *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 699 ["A warrant expressly incorporates an affidavit when it uses suitable words of reference."]; *U.S.* v. *Vesikuru* (9th Cir. 2002) 314 F.3d 1116, 1121 ["Our case law requires only suitable words of incorporation"].

[94] See *U.S.* v. *Tracey* (3rd Cir. 2010) 597 F.3d 140, 148 ["our Court requires clear words of incorporation"].

[95] See *Groh* v. *Ramirez* (2004) 540 U.S. 551, 557 ["most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant."]; *People* v. *Egan* (1983) 141 Cal.App.3d 798, 803 ["Incorporation by reference occurs when one complete document expressly refers to and embodies another document."].

[96] (3rd Cir. 2010) 597 F.3d 140, 149.

[97] *U.S.* v. *Vesikuru* (9th Cir. 2002) 314 F.3d 1116, 1121.

[98] BUT ALSO SEE *U.S.* v. *Tracey* (3rd Cir. 2010) 597 F.3d 140, 148 ["Other Courts of Appeals have accepted phrases such as 'attached affidavit which is incorporated herein,' 'see attached affidavit,' and 'described in the affidavit,' as suitable words of incorporation." Citations omitted.]; *Nunes* v. *Superior Court* (1980) 100 Cal.App.3d 915, 933 [sufficient notice was given when the warrant authorized a search for "stolen property as indicated in the Affidavit and attached Police report"]; *Marks* v. *Clarke* (9th Cir. 1996) 102 F.3d 1012, 1030-331 ["see attached lists"]; *U.S.* v. *Waker* (2nd Cir. 2008) 534 F.3d 168, 172, fn.2 ["see attached Affidavit as to Items to be Seized"]; *Rodriguez* v. *Beninato* (1st Cir. 2006) 469 F.3d 1, 5 ["See attached affidavit"]; *Baranski* v. *Fifteen Unknown ATF Agents* (6th Cir. 2006) 452 F.3d 433, 439-40 ["See Attached Affidavit"].

(3) **PHYSICAL ATTACHMENT**: If the attachment is being utilized solely to establish probable cause in the affidavit, the courts do not require that it be physically attached to the affidavit[99] (but it's a good practice). If the attachment is used to describe the place to be searched or the evidence to be seized, the United States Supreme Court indicated in *Groh* v. *Ramirez* that the attachment need only be "present" when the warrant is served; i.e., physical attachment is not required.[100] But because some pre-*Groh* cases in California required physical attachment,[101] it is recommended that officers avoid this issue by affixing to the warrant any attachments containing descriptive information.

Two other things about attachments to warrants and affidavits. First, they must be legible.[102] Second, because judges are required to read all attachments to affidavits,[103] officers should not incorporate lengthy attachments that contain only a small amount of relevant information. Instead, this information should be extracted from the attachment or summarized in the affidavit.

SEARCH PROTOCOLS: If the affiant is unable to particularly describe the evidence to be seized, but there is a procedure that will enable the search team to identify it after they enter the premises, it may be deemed sufficiently described if the search warrant sets forth a procedure—commonly known as a "protocol"—by which officers could make the determination. For example, if officers want to look for stolen property that may have been intermingled with similar looking items, they may seek authorization to employ a protocol that would permit them to seize items that conform to certain criteria; e.g., a particular VIN or serial number.[104]

One of the most common uses for protocols today is in computer searches when officers expect to find seizable files intermingled with non-seizable files. In such cases, they may seek authorization to conduct the search pursuant to a protocol that sets forth the manner in which the search team can distinguish between the two. For example, in one case the protocol required "an analysis of the file structure, next looking for suspicious file folders, then looking for files and types of files most likely to contain the objects of the search by doing keyword searches."[105]

Having covered the general principles pertaining to descriptions of evidence, we will now look at the ways in which evidence may be described when the description is based on direct observation or inference. We will also examine warrants to search for entire classes of items and documents, including documents stored in computers.

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[99] See *Baranski* v. *Fifteen Unknown ATF Agents* (6th Cir. 2006) 452 F.3d 433, 444.

[100] (2004) 540 U.S. 551, 560. ALSO SEE *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1026 [the affidavit must be either "attached physically to the warrant or at least accompan[y] the warrant"]; *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 699 ["We consider an affidavit to be part of a warrant, and therefore potentially curative of any defects the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search."]; *Baranski* v. *U.S.* (8th Cir. 2008) 515 F.3d 857, 861 [there is no "bright line rule that an incorporated affidavit must accompany the warrant"]; *U.S.* v. *Towne* (9th Cir. 1993) 997 F.2d 537, 547 ["[I]n no case have we ever held that an affidavit that was expressly incorporated by reference and that did accompany the warrant when the search was authorized and carried out could not be treated as part of the warrant because it was not physically attached to it."].

[101] See, for example, *People* v. *Tockgo* (1983) 145 Cal.App.3d 635, 643 ["Absent such physical and textual incorporation, the affidavit may not be used to narrow and sustain the terms of the warrant."]; *People* v. *MacAvoy* (1984) 162 Cal.App.3d 746, 755 ["The requirement that the affidavit be incorporated into and attached to the warrant insures that both the searchers and those threatened with search are informed of the scope of the searcher's authority."].

[102] See *Kaylor* v. *Superior Court* (1980) 108 Cal.App.3d 451, 457.

[103] See *Kaylor* v. *Superior Court* (1980) 108 Cal.App.3d 451, 457 ["[A]ll the writings offered in support [of the warrant] must be read."].

[104] See *U.S.* v. *Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1341 [warrant to search wrecking yard for stolen cars contained authorization to implement "procedures to differentiate stolen vehicles from those legally owned"]. COMPARE *U.S.* v. *Klein* (1st Cir. 1977) 565 F.2d 183, 188 ["[The government] failed to establish that there was a large collection of contraband in defendant's store and it failed to explain the method by which it intended to differentiate that contraband from the rest of defendant's inventory."]; *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 965 ["the warrant provides no basis for distinguishing [the stolen] diamonds from others the government could expect to find on the premises"].

[105] *U.S.* v. *Burgess* (10th Cir. 2009) 576 F.3d 1078, 1094. ALSO SEE *U.S.* v. *Hill* (9th Cir. 2006) 459 F.3d 966, 978 ["[W]e look favorably upon the inclusion of a search protocol; but its absence is not fatal."]; *U.S.* v. *Cartier* (8th Cir. 2008) 543 F.3d 442, 447 [court notes "there may be times that a [computer] search methodology or strategy may be useful or necessary"].

Description based on direct observation

Officers will sometimes seek a warrant to search for evidence that an officer, victim, or witness had previously observed, such as property that the victim of a burglary had reported stolen, a handgun or clothing that was seen in a surveillance video, or drug lab equipment that an undercover officer or informant had seen when negotiating a drug purchase. Describing this type of evidence is, of course, much easier than describing evidence whose appearance can only be based on inference. But, as discussed earlier, because the affiants in such cases have the ability to provide a particular description, the courts will readily invalidate a warrant if they fail to do so.

For example, in *Millender* v. *County of Los Angeles*[106] a woman notified sheriff's deputies that her boyfriend, Jerry Bowen, had tried to shoot her during an argument. Although the woman described the weapon as a "black sawed-off shotgun with a pistol grip," and even though she provided deputies with a photograph of the weapon, they obtained a warrant to search Bowen's house for the following: *"All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition."* In ruling that this language rendered the warrant insufficiently particular, the court said:

> [W]here the police do have information more specifically describing the evidence or contraband, a warrant authorizing search and seizure of a broader class of items may be invalid.

Another example is found in *People* v. *Tockgo*[107] where officers in Los Angeles developed probable cause to believe that boxes containing stolen cigarettes were located in a certain liquor store. They had also learned from the victim that certain invoice numbers were printed on each box, that each box contained a tax stamp, and that the cigarette cartons were sealed with a unique colored glue. Although this information was contained in the affidavit, it was omitted from the warrant, which simply described the evidence to be seized as "cigarettes, cellophane wrappers, cigarette cartons." In ruling that this description was insufficient, the court pointed out that "[t]he vice of this uncertainty is particularly objectionable because the procuring officer's affidavit provided a ready means for effective description and identification of the particular cigarette packages to be seized."

Descriptions based on inference

In many cases, an affiant cannot provide a particular description of evidence inside a home or business because, for example, no officer or informant had been inside or because the evidence was hidden. As we will now discuss, in situations such as these officers may ordinarily provide a description that, based on their training and experience, can be reasonably inferred.

FRUITS AND INSTRUMENTALITIES OF A CRIME: Descriptions are commonly based on inference when officers have probable cause to believe that the premises are being used to carry out a certain type of criminal activity and, thus, they have probable cause to believe that the premises contain the common fruits and instrumentalities of such a crime.[108] For example, in *United States* v. *Holzman*[109] officers in Scottsdale, Arizona arrested Holzman and Walsh for using and possessing stolen credit cards. Having probable cause to believe they were co-conspirators in an identify theft operation, but not knowing exactly what fruits and instrumentalities they possessed, an officer obtained a warrant to search their hotel rooms for, among other things, "All credit

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[106] (9th Cir. 2010) 620 F.3d 1016. ALSO SEE *Bay* v. *Superior Court* (1992) 7 Cal.App.4th 1022, 1027 [court notes that a warrant to search for "all chairs" on the premises would lack particularity if officers only had probable cause to search for a "brown leather-covered" one]; *Lockridge* v. *Superior Court* (1969) 275 Cal.App.2d 612.

[107] (1983) 145 Cal.App.3d 635.

[108] See *Andresen* v. *Maryland* (1976) 427 U.S. 463, 480, fn.10; *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 964 [the affiant "could have narrowed most of the descriptions in the warrant" by "describing in greater detail the items one commonly expects to find on premises used for the criminal activities in question"]; *U.S.* v. *Gomez-Soto* (9th Cir. 1984) 723 F.2d 649, 654 [Since the DEA sought articles it claims are typically found in the possession of narcotics traffickers, the warrant could have named or described those particular articles."]; *U.S.* v. *Santarelli* (11th Cir. 1985) 778 F.2d 609 [the officers knew that loan sharks ordinarily kept business records such as loans outstanding, interest due, and payments received]; *U.S.* v. *Scharfman* (2nd Cir. 1971) 448 F.2d 1352, 1354 [reasonable to believe that "books and records would be utilized as instrumentalities in connection with the crime of disposing of hundreds of fur garments through a façade of legitimacy"].

[109] (9th Cir. 1989) 871 F.2d 1496.

cards under miscellaneous issuance names and account numbers" and "credit card drafts under miscellaneous issuance and names." In ruling that these descriptions were sufficiently particular, the court said, "In the absence of complete and detailed knowledge on the part of the police, the magistrate was justified in authorizing the search for these generic classes of items."

Similarly, if the affiant has probable cause to believe that the suspect is selling drugs out of his house, a general description of typical sales paraphernalia and instrumentalities ought to suffice; e.g., items commonly used to ingest, weigh, store, and package drugs; documents identifying buyers and sellers; drug transaction records.[110]

Another example is found in cases where officers are seeking a warrant to search for evidence of sexual exploitation of a child. Here, a description might include such things as sexually explicit material or paraphernalia used to lower the inhibition of children, sex toys, photography equipment, address ledgers, journals, computer equipment, digital and magnetic storage devices.[111] Finally, a warrant to search for evidence of loan sharking or gambling might authorize a search for pay and collection sheets, lists of loan customers, loan accounts and telephone numbers, line sheets, and bet slips.[112]

EVIDENCE AT CRIME SCENES: At crime scenes, officers will often have probable cause to believe that certain evidence will be found on the premises depending on the nature and freshness of the crime. But because they cannot know exactly what's there, the courts permit them to describe the evidence in terms of what is commonly found at the scenes of such crimes.

For example, in *People* v. *Schilling,*[113] discussed earlier, an LASD homicide detective developed probable cause to believe that Schilling had shot and killed an out-call masseuse whose body had been dumped in a remote area. Because the woman had had an appointment to meet with Schilling at his home shortly before the approximate time of death, the detective sought a warrant to search the house for evidence that, based on his training and experience, would likely be found at the scene of a shooting; namely, "scientific evidence, including but not limited to fingerprints, powder burns, blood, blood spatters, bullet holes, hairs, fibers." The search turned up incriminating evidence which, according to Schilling, should have been suppressed because the description was too general. But the court disagreed, saying it "was clearly a particularized specification of the scientific evidence that could reasonably be obtained in defendant's residence in light of the facts set forth in [the] affidavit."

Warrant to seize entire class

A warrant may authorize the seizure of every item in a broad class (e.g., all credit cards, all firearms) if there is a fair probability that all such items are evidence. For example, in *Vitali* v. *U.S.*[114] officers obtained a warrant to search Vitali's offices for all Speidel watch bands on the premises, having developed probable cause to believe that he was selling these types of watch bands from a back room. In ruling the warrant was sufficiently particular, the First Circuit said:

> Where goods are of a common nature and not unique there is no obligation to show that the ones sought (here a substantial quantity of watch bands) necessarily are the ones stolen, but only to show circumstances indicating this to be likely.

If officers have probable cause to believe that only some of the items in the class are evidence, the warrant may authorize a search for, and inspection of, all items in the class to determine which are seizable if the warrant provides them with some criteria for making this determination. As the Ninth Circuit explained:

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[110] See *People* v. *Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 415; *U.S.* v. *Burgess* (10th Cir. 2009) 576 F.3d 1078, 1091. ALSO SEE *U.S.* v. *Johnson* (8th Cir. 1976) 541 F.2d 1311, 1314 ["the term 'paraphernalia' is not unknown in criminal law having been used in several state gambling statutes, and as a result, having appeared frequently in search warrant descriptions"].

[111] See *U.S.* v. *Meek* (9th Cir. 2004) 366 F.3d 705; *U.S.* v. *Gleich* (8th Cir. 2005) 397 F.3d 608.

[112] See *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 965.

[113] (1987) 188 Cal.App.3d 1021.

[114] (1st Cir. 1967) 383 F.2d 121. ALSO SEE *U.S.* v. *Klein* (1st Cir. 1977) 565 F.2d 183, 188 ["the level of particularity required in a warrant may decline when there is reason to believe that a large collection of similar contraband is present on the premises"].

> When there is probable cause to believe that premises to be searched contains a class of generic items or goods, a portion of which are stolen or contraband, a search warrant may direct inspection of the entire class of all of the goods if there are objective, articulated standards for the executing officers to distinguish between property legally possessed and that which is not.[115]

An example of a case in which a warrant failed to provide officers with an adequate means of identifying seizable evidence in a class is found in *U.S.* v. *Klein.*[116] Here, officers developed probable cause to believe that the owners of a music store were selling pirated 8-track tapes. So they obtained a warrant to search the store for "8-track electronic tapes and tape cartridges which are unauthorized 'pirate' reproductions." In ruling the warrant was not sufficiently particular, the court noted that "the affidavit and the warrant failed to provide any before the fact guidance to the executing officers as to which tapes were pirate reproductions."

In cases such as *Klein* where a cursory examination of a class of items may be insufficient to identify seizable evidence, the warrant may include a protocol (discussed on page 14), describing a procedure that officers must utilize to make the determination. For example, in *U.S.* v. *Hillyard*[117] FBI agents developed probable cause to believe that stolen vehicles were being stored in a certain wrecking yard. Although the agents were able to describe some of the stolen vehicles, they had probable cause to believe there were others on the premises. So they obtained a warrant authorizing a seizure of the particularly described vehicles plus any others on the premises that "possess altered or defaced identification numbers or which are otherwise determined to be stolen." In upholding the warrant, the court pointed out that "the affidavit explained that vehicle alterations could be discovered by comparing secret identification numbers with those openly displayed, that true numbers could be checked with law enforcement computerized lists."

Describing documents and computer files

The rule that warrants must describe the evidence to be seized with reasonable particularity seems to be enforced more strictly when the evidence consists of documents, whether hard copies or computer files. There are four reasons for this. First, a search for documents is especially intrusive as officers must usually examine every room, container, and computer file in which they may be found. Second, every document and computer file on the premises must ordinarily be read (or at least skimmed) to determine whether it is covered under the warrant.[118] Third, the reading of documents constitutes "a very serious intrusion into personal privacy."[119] Fourth, officers will usually have *some* information that would have made it possible to distinguish between relevant and irrelevant documents.

Even so, the courts require only reasonable particularity. As the court explained in *U.S.* v. *Phillips*:

> A warrant need not—and in most cases, cannot—scrupulously list and delineate each and every item to be seized. Frequently, it is simply impossible for law enforcement officers to know in advance exactly what business records the defendant maintains.[120]

Consequently, a warrant to search for documents, like other types of warrants, will be deemed sufficiently particular if officers described the documents as best they could.

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[115] *U.S.* v. *Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1340. ALSO SEE *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1025 [a warrant for "classes of generic items" may be permissible "if the warrant establishes standards that are sufficiently specific"].

[116] (1st Cir. 1977) 565 F.2d 183.

[117] (9th Cir. 1982) 677 F.2d 1336.

[118] See *Andresen* v. *Maryland* (1976) 427 U.S. 463, 482 ["In searches for papers, it is certain that some innocuous documents will be examined"]; *People* v. *Alcala* (1992) 4 Cal.4th 742, 799 ["law enforcement officers would be unable to conduct a search for a rental receipt were they prohibited from reading papers"]; *U.S.* v. *Hunter* (D. Vt. 1998) 13 F.Supp.2d 574, 582 ["Records searches are vexing in their scope because invariably some irrelevant records will be scanned in locating the desired documents."].

[119] *U.S.* v. *Leary* (10th Cir. 1988) 846 F.2d 592, 603, fn.18.

[120] (4th Cir. 2009) 588 F.3d 218, 225. ALSO SEE *U.S.* v. *Reyes* (10th Cir. 1986) 798 F.2d 380. 383 ["[I]n the age of modern technology and commercial availability of various forms of items, the warrant could not be expected to describe with exactitude the precise form the records would take."].

DESCRIPTION LIMITED BY SENDER, RECIPIENT, DATE: If the relevance of a document depends on who sent it, its date, or to whom it was addressed, this information should be included as it will significantly narrow the description.[121]

DESCRIPTION LIMITED BY CRIME OR OTHER SUBJECT MATTER: Probably the most common method of describing documents is to state their subject matter, such as the nature of the crime for which the documents are evidence.[122] The following are some examples:

- "Loan records reflecting the $500,000 teamster trust fund loan and its subsequent disbursement."[123]
- "Drug trafficking records, ledgers, or writings identifying cocaine customers, sources."[124]
- Documents "pertaining to the Windward International Bank."[125]
- "All property constituting evidence of the crimes of making and conspiring to make extortionate extensions of credit, financing extortionate extensions of credit, and collections of and conspiracy to collect extortionate extensions of credit."[126]
- "Books" and "records" that "are being used as means and instrumentalities" by the perpetrators of hijackings.[127]
- "Title notes and contracts of sale pertaining to the crime of false pretenses pertaining to Lot 13T."[128]
- "Child pornography."[129]
- "Documents, photographs, and instrumentalities" constituting harassment and threats.[130]
- "Monopoly money" and "maps of Churchill County" (Monopoly money was found near the body of the murder victim in Churchill County, Nevada).[131]

In contrast, the following descriptions of documents were plainly insufficient because they contained absolutely no limiting criteria:

- All financial records.[132]
- All medical records.[133]
- Any and all records and paraphernalia pertaining to [defendant's] business.[134]

Note that a description that is limited only by reference to a broadly-worded criminal statute may not suffice. Thus, affiants who restrict the seizure of documents to general crimes should describe the crime or the manner in which it was carried out;[135] e.g., affidavit provided details of defendant's illegal kickbacks to physicians,[136] the affidavit "described the extortion scheme in detail, including that [the suspect] possessed a computer-generated database and communicated with Paycom over email."[137]

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[121] See *Burrows* v. *Superior Court* (1974) 13 Cal.3d 238, 249-50 [the warrant "permitted the seizure of all of petitioner's financial records without regard to the persons with whom the transactions had occurred or the date of transactions"]; *U.S.* v. *Rude* (9th Cir. 1996) 88 F.3d 1538, 1551 ["post-May 1992 documents"]. COMPARE *U.S.* v. *Kow* (9th Cir. 1995) 58 F.3d 423, 427 ["The government did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place, even though [the affidavit] indicates that the alleged criminal activity began relatively late in HK Video's existence."]; *U.S.* v. *Abrams* (1st Cir. 1980) 615 F.2d 541, 543, 545 [although officers were aware that the relevant records pertained to certain dates, "there is no limitation as to time"].

[122] See *Bay* v. *Superior Court* (1992) 7 Cal.App.4th 1022, 1027 [reference to a certain crime "would have provided the executing officer with meaningful limits on the nature of the items to be seized in order to ensure there was probable cause for all the items seized"].

[123] *U.S.* v. *Wuagneux* (11th Cir. 1982) 683 F.2d 1343, 1350.

[124] *U.S.* v. *Reyes* (10th Cir. 1986) 798 F.2d 380, 382.

[125] *U.S.* v. *Federbush* (9th Cir. 1980) 625 F.2d 246, 251.

[126] *U.S.* v. *Santarelli* (11th Cir. 1985) 778 F.2d 609.

[127] *U.S.* v. *Scharfman* (2nd Cir. 1971) 448 F.2d 1352.

[128] *Andresen* v. *Maryland* (1976) 427 U.S. 463, 479-82.

[129] See *U.S.* v. *Banks* (9th Cir. 2009) 556 F.3d 967, 973; *Davis* v. *Gracey* (10th Cir. 1997) 111 F.3d 1472, 1479 ["pornographic material"]; *US* v. *Burke* (10th Cir. 2011) __ F.3d __ [2011 WL 310520].

[130] *U.S.* v. *Williams* (4th Cir. 2010) 592 F.3d 511, 520.

[131] *U.S.* v. *Wong* (9th Cir. 2003) 334 F.3d 831, 838.

[132] *Burrows* v. *Superior Court* (1974) 13 Cal.3d 238, 249.

[133] *U.S.* v. *Abrams* (1st Cir. 1980) 615 F.2d 541, 545.

[134] *Aday* v. *Superior Court* (1961) 55 Cal.2d 789, 795-96.

[135] See *U.S.* v. *Leary* (10th Cir. 1988) 846 F.2d 592, 602 ["unadorned reference to a broad federal statute" was unsufficient].

[136] *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 691-92.

[137] *U.S.* v. *Adjani* (9th Cir. 2006) 452 F.3d 1140, 1145.

ALL DOCUMENTS: "PERMEATED WITH FRAUD": There is a long-standing exception to the specificity requirement for business records when the affiant establishes probable cause to believe that the enterprise was so corrupt—so "permeated with fraud"—that all, or substantially all, of its records would likely constitute evidence of a crime.[138] As the Ninth Circuit explained in *United States* v. *Kow:*

> A generalized seizure of business documents may be justified if the government establishes probable cause to believe that the entire business is merely a scheme to defraud or that all of the business's records are likely to evidence criminal activity.[139]

For example, in *People* v. *Hepner*[140] the California Court of Appeal concluded that authorization to seize all files in a doctor's office was justified under the "permeated with fraud" rule because the affidavit demonstrated that about 90% of his files constituted evidence of insurance fraud. Similarly, in a case involving a precious metals investment scam, *U.S.* v. *Bentley,* the Fourth Circuit upheld a search for "21 categories of documents that collectively covered every business document" on the premises because, said the court, "This is the rare case in which even a warrant stating 'Take every piece of paper related to the business' would have been sufficient. [The business] was fraudulent through and through. Every transaction was potential evidence of that fraud."[141]

A "permeated with fraud" warrant must not, however, authorize the seizure of all documents if it is reasonably possible to isolate those documents that constitute evidence of the crime.[142] For example, if the fraud pertained only to a certain product or occurred only during a certain time period, the warrant should ordinarily authorize a search for documents pertaining only to *that* product or *that* period. Similarly, the Ninth Circuit pointed out in *Solid State Devices, Inc.* v. *U.S.* that, "[w]here a business appears to be engaged in some legitimate activity, this Court has required a more substantial showing of pervasive fraud."[143]

Finally, it should be noted that the "permeated with fraud" doctrine may also be applied to searches of homes, but the required level of proof of widespread fraud may be greater.[144]

COMPLEX "PAPER PUZZLE" CASES: The courts may ease the requirement for a particular description of documents in cases where a detailed description is impossible because (1) the crime under investigation was a complex scheme that could only be proved by linking many bits of documentary evidence, and (2) officers described the documents as best they could.[145] As the California Supreme Court observed, "In a complex case resting upon the piecing together of many bits of evidence, the warrant properly may be more generalized than would be the case in a more simplified case resting upon more direct evidence."[146]

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[138] See *U.S.* v. *Rude* (9th Cir. 1996) 88 F.3d 1538, 1551 ["it is clear that NPI's central purpose was to serve as a front for defrauding prime bank note investors"]; *U.S.* v. *Smith* (9th Cir. 2005) 424 F.3d 992, 1006 [a "warrant authorizing the seizure of essentially all business records may be justified when there is probable cause to believe that fraud permeated the entire business operation"]; *U.S.* v. *Falon* (1st Cir. 1992) 959 F.2d 1143, 1147 ["no indications of legitimate business"].

[139] (9th Cir. 1995) 58 F.3d 423, 427. ALSO SEE *Solid State Devices, Inc.* v. *U.S.* (9th Cir. 1997) 130 F.3d 853, 856.

[140] (1994) 21 Cal.App.4th 761, 776-77.

[141] (7th Cir. 1987) 825 F.2d 1104, 1110. ALSO SEE *People* v. *Farley* (2009) 46 Cal.4th 1053, 1101 [personnel records for "any and all documents and correspondence relating to" defendant was not overbroad because he had killed and wounded several people at his workplace].

[142] See *U.S.* v. *Stubbs* (9th Cir. 1989) 873 F.2d 210, 211 ["The affidavit fails to provide probable cause for a reasonable belief that tax evasion permeated Stubbs's entire real estate business."]; *U.S.* v. *Bentley* (7th Cir. 1987) 825 F.2d 1104, 1110 ["[I]f the fraud infects only one part of the business, the warrant must be so limited"].

[143] (9th Cir. 1997) 130 F.3d 853, 857. Edited.

[144] See *U.S.* v. *Falon* (1st Cir. 1992) 959 F.2d 1143; *U.S.* v. *Humphrey* (5th Cir. 1997) 104 F.3d 65, 69, fn.2 ["only in extreme cases" will an "all documents" search of a residence be upheld].

[145] *See Andresen* v. *Maryland* (1976) 427 U.S. 463, 482, fn.10; *U.S.* v. *Wuagneux* (11th Cir. 1982) 683 F.2d 1343, 1349 ["complex financial transactions and widespread allegations of various types of fraud" necessitate "practical flexibility"]; *Kitty's East* v. *U.S.* (10th Cir. 1990) 905 F.2d 1367, 1374 ["Evidence of conspiracy is often hidden in the day-to-day business transactions"].

[146] *People* v. *Farley* (2009) 46 Cal.4th 1053, 1102. ALSO SEE *U.S.* v. *Phillips* (4th Cir. 2009) 588 F.3d 218, 225 ["Indeed, especially in cases such as this one—involving complex crime schemes, with interwoven frauds—courts have routinely upheld the search of items described under a warrant's broad and inclusive language."].

For example, in a real estate fraud case, *Andresen* v. *Maryland,* the United States Supreme Court ruled that a warrant to search a lawyer's office for an array of documents was sufficiently particular because, said the Court:

> Like a jigsaw puzzle, the whole picture of petitioner's false-pretense scheme could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little.[147]

The Court added that, when officers have probable cause to search for large numbers of documents "[t]he complexity of an illegal scheme may not be used as a shield to avoid detection."

Indicia

When a warrant authorizes a search for evidence which, if found, would incriminate the people who own or control the home or business that was searched, affiants will almost always seek permission to search for and seize documents and other things that tend to identify these people. Authorization to search for such things—commonly known as "indicia" or "evidence of dominion and control"—is especially apt to be granted when the primary objective of the warrant is to search for drugs, weapons, child pornography, stolen property, or other fruits or instrumentalities of the crime under investigation.

It is true, of course, that authorization to search for indicia may significantly expand the scope of the search.[148] Nevertheless, the additional intrusion is almost always deemed justified by the overriding need for proof of control.[149]

The problem with indicia is that, while officers can be reasonably certain that it will be found on the premises,[150] they can never know for sure what form it will take. Consequently, the courts permit a description of the *types* of things that tend to establish dominion and control, such as the following:

- Delivered mail
- Bills and receipts
- Bail contracts and other legal documents
- Keys to cars, safe deposit boxes, and post office boxes
- Photographs
- Answering machine tapes[151]

Note, however, that a description must not be so broad as to permit the seizure of documents that do not establish ownership or control; e.g., "All papers bearing the [suspect's] name."

POV

In the next Point of View, we will continue our discussion of search warrants by examining the various special procedures that may be employed if approved by the issuing judge. These include night and no-knock entry, the sealing of warrants, contingent and out-of-county warrant service, and searches by special masters.

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[147] (1976) 427 U.S. 463, 482, fn.10. Edited. ALSO SEE *U.S.* v. *Phillips* (4th Cir. 2009) 588 F.3d 218, 226 ["We thus decline to allow Phillips to create a safe harbor from the complexity of his schemes."].

[148] See *People* v. *Balint* (2006) 138 Cal.App.4th 200, 209 [search of an open laptop computer was authorized by a dominion and control clause]; *U.S.* v. *Bruce* (6th Cir. 2005) 396 F.3d 697, 710 ["To be sure, this authorization necessarily entailed a cursory review of any papers found in the hotel rooms to determine whether they reflected ownership or control of illegal drugs."].

[149] See *People* v. *Varghese* (2008) 162 Cal.App.4th 1084, 1102 ["establishing dominion and control of a place where incriminating evidence is found is reasonable and appropriate"]; *People* v. *Rogers* (1986) 187 Cal.App.3d 1001, 1009 ["We cannot believe the Fourth Amendment prohibits officers with ample probable cause to believe those in a residence have committed a felony from searching the residence to discover ordinary indicia of the identities of the perpetrators."]; *People* v. *Balint* (2006) 138 Cal.App.4th 200, 206 ["The dominion and control clause at issue here is a standard feature in search warrant practice."].

[150] See *People* v. *Rogers* (1986) 187 Cal.App.3d 1001, 1009 ["[C]ommon experience tells us that houses and vehicles ordinarily contain evidence establishing the identities of those occupying or using them."].

[151] *People* v. *Balint* (2006) 138 Cal.App.4th 200, 204, fn.1. ALSO SEE *People* v. *Alcala* (1992) 4 Cal.4th 742, 799 ["rent receipts, cancelled mail envelopes, and keys"]; *People* v. *Nicolaus* (1991) 54 Cal.3d 551, 574-75 ["letters, papers, bills tending to show the occupants of [address of house to be searched"]; *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1030 [indicia "usually refers to such items as 'utility company receipts, rent receipts, cancelled mail envelopes, and keys"]; *U.S.* v. *Riley* (2nd Cir. 1990) 906 F.2d 841, 844 [in discussing warrants to search for indicia, the court noted that "[i]n upholding broadly worded categories of items available for seizure, we have noted that the language of a warrant is to be construed in light of an illustrative list of seizable items."]. **NOTE**: The court in *People* v. *Frank* (1985) 38 Cal.3d 711, 726 summarily invalidated a warrant to search for indicia consisting of "credit card receipts, records of telephone toll calls, cancelled checks, and personal diary notations," claiming these categories were "impermissibly general." Because the court neglected to provide any analysis of its position, *Frank* seems to have been relegated to the pile of "misguided" opinions that the court had been issuing at the time. See *People* v. *Rogers* (1986) 187 Cal.App.3d 1001, 1006 ["It is difficult to discern from *Frank* a principled basis to distinguish between the generic categories found insufficiently particular and those not declared so."].