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Search Warrant Applications

By ANDREW GROSSO, J.D.

Not all search warrants are equal. Using a warrant to locate and seize a single piece of evidence, such as a firearm or crack cocaine, may be a fairly simple matter. Using a warrant to obtain the business records of a corporation or an executive suspected of fraud is quite another.

Although the same body of law applies in both instances, the techniques used to draft the applications for these warrants and to carry out the searches differ significantly. This article addresses some of these differences and suggests ways investigators can accelerate the process of obtaining search warrants in

fraud cases, while minimizing the possibility that errors will be found by a court after the search has been completed.

SEARCH WARRANTS

Search warrants are very powerful investigatory tools, as well as very restricted ones. They permit agents of the government to invade a person's home, personal papers, and privacy, in order to search for and remove particular items of evidence. In short, warrants are intrusive, and for this reason, they must be specific. In this regard, a search warrant differs from a subpoena *duces tecum*,¹ which permits

subjects to conduct their own searches for requested items while permitting the government to embark on a fairly wide-ranging and speculative inquiry for possible evidence.

By contrast, in order to obtain a search warrant, investigators must demonstrate two things. First, they need to show probable cause that a specific crime was committed. Second, they must demonstrate probable cause that some type of physical evidence currently can be found in a particular place. Both of these requirements have their own nuances when applied in the context of fraud, as opposed to reactive crimes.

Identifying the Crime

Fraud is a crime of deception. Someone attempts, whether successfully or not, to deceive another party, usually for the purpose of obtaining money or something else of value. Obtaining the item of value is not the crime. Likewise, in a case where someone trades a worthless item for cash, the exchange is not the crime. In both scenarios, the act of deception, the "telling of the lie," is the crime.

An example may clarify this basic, but important, point.² The U.S. Air Force contracts "Aerospace, Inc.," to supply parts for military aircraft. Unknown to the Air Force, the company intentionally uses substandard metals in the manufacture of these parts. Investigators wish to obtain a search warrant to seize company plant documents that they believe will prove that Aerospace, Inc., is using substandard materials.

Because a search warrant will be issued only if probable cause exists that a crime has been committed, the investigators should first ask themselves, "What is the crime?" The answer may come as a bit of a surprise, for the crime is *not* the use of substandard metals, nor is it the fact that the suspected firm supplied parts made with the substandard metals to the Air Force. While both of these actions are clearly "unethical," simply acting in an unethical manner is not a crime. Investigators must search the criminal law in order to find a specific statute violation.

In fact, several Federal statutes may be available. All of them, however, have one thing in common. They are all fraud statutes. That is, they all require the company to have lied for the purpose of deceiving the Government into paying for, and accepting delivery of, substandard parts. This brings investigators to

the first rule for drafting white-collar crime search warrants: They must identify "the lie."

More accurately, they must identify *a* lie. Typically, several may be available from which to choose. Although lies may be verbal in nature, in white-collar crime cases, they usually can be found in the documents used in the transaction. In this example, Aerospace, Inc., would have supplied some type of certification to the Air Force stating, directly or indirectly, that the parts had been manufactured with the correct materials. Such agreements are standard requirements in military contracts.

The lie may be straightforward. A document may state explicitly that "Aerospace, Inc., certifies that the metals used to manufacture these parts is 100 percent virgin alloy, consisting of 95 percent iron, 4.9 percent nickel, and 0.1 percent carbon." If the metals actually used some other mixture, then the certification is false. This certification of a false statement constitutes the lie.

In some cases, however, investigators may have to work a bit harder to find the lie. A document may state simply that "Aerospace, Inc., certifies that the parts meet all contract requirements."

Identifying deception now becomes a two-step process. Locating the company's certification merely represents the first step. The second step requires investigators to identify the contract, pursuant to which the parts are being provided, and the "requirements or specifications" contained in that contract. The specification for the metals to be used in



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the manufacture of the parts usually will be found in this contract. Taken together, a company's contract specifications and certification will constitute the lie.

Ensuring the Lie is Material

In any case, though, this information is not enough. To constitute a crime, a lie must be material. In other words, the lie must be important to the party being deceived. This is not a trivial requirement. More than one criminal investigation has ended after many months of effort because the lie relied on by the prosecution turned out to be immaterial to the deceived party.

In the fictitious Aerospace, Inc., example, the contract between the company and the Air Force further states that the turbine blades must be forged at a temperature of 2000° F. The certification states that the forging took place at this temperature, but in fact, the forging took place at 2500° F, technically making Aerospace's certification false. However, the Air Force may not care about the temperature at which the forging took place, as long as the forging temperature did not drop below 2000° F. In such cases, the lie is not important. Therefore, it is not legally material and will not support a charge of criminal conduct.

A different example may further clarify this point. An investigation is initiated to determine whether "BigBank" has been defrauded by a brokerage agency that specializes in preparing and submitting loan applications to banks on behalf of clients in need of financial assistance. The loan applications used by

BigBank require applicants to list their credit cards.

Among other deceits, the brokerage agency has stated falsely on the applications that each client holds two major credit cards. For several reasons, the lie may not be material. One reason may be that the application forms are outdated, and the bank no longer relies on credit

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card information when deciding whether to issue personal loans. Another reason may be that the loan amounts requested are small enough that the bank does not care whether these applicants possess credit cards. The significant point is that investigators must not take the importance of any false statement for granted. They must be sure that the lie upon which they are focusing is material.

The procedure used to ensure this point is fairly straightforward. Investigators should interview the party who has been deceived and ask explicit questions about the importance of each lie. When the defrauded party is a company or a government agency, then the person who is responsible for

reviewing the relevant document on behalf of that organization should be interviewed. Alternatively, investigators should interview the person responsible for handling a specific matter tied directly to the lie. These two people may not be one and the same, and investigators will have to decide which one to interview.

For instance, in the Aerospace, Inc., example, a Government inspector may review each certification submitted by the company to ensure that on the face of each document, all requirements of the contract are met. This inspector may believe that it is important that the certification states that forging occurred at 2000° F. The inspector may tell investigators that if he had known that the certification was false and that the forging temperature was 2500° F and not 2000° F, he would have rejected the shipment of blades. However, the engineer responsible for designing the engine in which these blades are used may know that regardless of the contract requirements, a false forging temperature is not important as long as the actual temperature is above 2000° F.

Although interviewing either of these persons should be adequate for the purpose of proving probable cause for a search warrant, investigators must remember that at trial, the proof must be "beyond a reasonable doubt." Therefore, it will do the prosecution little good if a search warrant is obtained and executed based on the inspector's belief that the lie was important, only to discover later, perhaps on the eve of trial, that an Air Force engineer is

prepared to testify for the defense that the lie investigators consider a crime is not material. To avoid such a scenario, investigators may have to interview both persons to ensure the right answer to this crucial question.

When drafting the application for white-collar crime search warrants, investigators must describe in detail what documents and statements they are relying on to prove that a lie exists and explain why the lie is a material one. To avert later complications, investigators always should include their sources for this information.

WRITING FOR PROSECUTORS AND MAGISTRATES

Investigators commonly complain that prosecutors take too long to approve search warrant applications in white-collar crime cases. Among prosecutors, there is a common complaint that the applications submitted by investigators for such warrants require too much additional work before they can be approved. To a significant extent, these divergent complaints stem from the same root cause. Any search warrant application *must* explain clearly, precisely, and completely to a third person (a judge or a magistrate) what the crime is, what evidence establishes the crime, and what evidence the government wishes to seize during the proposed search.

A prosecutor reviewing a warrant application is acutely aware of two factors. First, any application submitted to a court must survive close scrutiny by the reviewing

magistrate. Second, after the search has been executed, the application must survive the inevitable attack that will be brought by defense counsel. For these reasons, conscientious prosecutors take their time when reviewing warrant applications.

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Speeding the Process

Investigators can take steps to help speed the process. First, they should remember that applications must be understandable. This is a deceptively simple statement. It is also the bane of most prosecutors.

A magistrate is not aware of the history of the investigation, the nature of the crime (the lie), or the regulations that the subjects attempted to evade through fraud. In a complex scheme, such as many Medicare frauds, the background necessary to convince a magistrate that the subjects' actions constitute a crime must be drafted carefully.

As stated above, the description must be clear, detailed, and complete. Putting these three elements together is not particularly easy. It takes time and effort, as well as a

command of the written language and the intricacies of the investigation. To accomplish this goal, investigators must know what they plan to say in the application. They should put together an outline of what they need to establish and organize this in the same order that they intend to use in the application.

Having done this, investigators then should meet with prosecutors and discuss the outline. Together, they should decide the statute(s) with which to charge the suspects. This is a significant point, because many white-collar criminals violate more than one criminal statute.

For example, a scheme to defraud a federally insured financial institution may involve false statements to that institution, false statements to a Federal agency supervising that institution, mail fraud, bank fraud, and conspiracy. Given the status of the investigation, investigators may find it easier to establish probable cause for certain violations over others. Alternatively, the choice of a particular violation may permit investigators to search for and to seize valuable evidence, when choosing a different violation would not permit such search and seizure.

Once the statute is chosen, investigators should request that the prosecutor provide a list of the “essential elements” of that statute. Essential elements are generic facts that must occur to establish the violation of a particular statute.

Appellate courts often list these elements in their judicial opinions, and trial courts must describe them to juries in criminal cases before permitting deliberations to begin.

Therefore, these elements are readily available. In the warrant application, investigators should note the information they have to support each element, as well as the source of that information.

Next, investigators must decide what documents they need to seize during the search. As stated previously, a search warrant is not a subpoena. Investigators simply cannot request authority to search for all documents pertaining to the investigation. On the contrary, they must be very specific. Therefore, investigators should ask themselves and their cooperating witnesses the following questions:

- What documents does the company use that are relevant to this investigation?
- Why are these documents relevant? Or, in other words, how might these documents be used to prove this case against the company and its officers and employees?
- Where does the company maintain these records?
- For how long does the company maintain these records?

The first two points should be discussed with the prosecutor. Being familiar with the laws governing fraud, the prosecutor may recognize that a particular document is not worth the effort of conducting a search, or the prosecutor may suggest that additional documents are necessary to prove the case at trial.

Investigators often overlook the last two questions. They should remember that the warrant application must establish probable cause not only that a crime was committed but

also that the documents that investigators wish to seize as evidence of the crime *currently* exist on the company's premises.

Usually two methods accomplish this task. The first involves the use of cooperating employees (current and former), who could provide investigators this information through firsthand knowledge. However, where former employees are the source of such information, their knowledge may not be current, and the information they provide may have to be updated through additional sources.

The second method is based on the required business practices of a company or profession. For example, Federal and State regulations require that medical doctors maintain the records of their patients for a specified number of years. If a physician bills insurance carriers on behalf of patients, the physician also is

required to maintain the patients' financial records for another specified period of time. These regulations can be used in a search warrant application to establish probable cause that the physician under investigation maintains medical and financial files of current patients.

Investigators reasonably can assume that those files can be found at the physician's place of business. It should be noted, however, that doctors may maintain records of former patients at off-site locations. If investigators wish to seize these records, additional information as to where the files are maintained may be necessary.

Similarly, defense contractors, financial institutions, accountants, and numerous other businesses and professionals are required by statutes, regulations, or ethical rules to maintain records for varying periods of time. For this reason, it is



Photo © Peter Hendrie, Tribune

important that investigators learn under what requirements the suspect(s) may be operating and then put this information in their search warrant application.

Descriptions of the documents to be seized should be included in the warrant application in two places. First, they should appear in the general body. As investigators describe each portion of the fraudulent scheme, they should mention the pertinent documents that provide evidence of the scheme, along with the information they possess demonstrating how the company creates, uses, and maintains these documents. Again, investigators should include their sources for this information. In this way, the application will make clear that probable cause exists to seize the requested documents.

The end of the application includes a list of each type of document to be seized. Investigators should be specific when compiling this list. For example, if investigators only have probable cause to seize loan applications for home mortgages made from 1989 through 1991 for houses located in a particular community, then they should state this in the list. It would be counterproductive, for example, to seize all loan applications from 1985 for several communities.

In trying to do so, one of two things may happen. If investigators are fortunate, the prosecutor or the magistrate will refuse to approve the warrant application as written. Or worse, the warrant will be approved; investigators will seize the additional loan applications; the warrant will

be attacked by defense counsel; the additional evidence may be suppressed; and the court may rule that the evidence has "tainted" the investigation and the government's prosecution.³ Put simply, stretching probable cause in this way is not worth the potential cost.

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Telling the Story Clearly

White-collar crimes can be intricate, and the investigation leading to a warrant application may be complex. Therefore, investigators should not expect a magistrate to read a tangled or technical treatise of the investigation and then spend time trying to decide if the warrant should be approved. Similarly, investigators should not expect a prosecutor to permit such an application to reach the magistrate.

An application must be written *simply*, describing everything clearly. Again, it is critical for investigators to assume that the prosecutor and the magistrate know nothing about the investigation. Hence, *everything* must be

explained. Because fraud schemes often can be complex, investigators should first break down schemes into parts and then string the parts together to tell a story.

After completing the first draft, investigators should give a copy to a fellow investigator who has not been involved significantly in the matter. The reviewer should identify portions that are unclear or confusing and make suggestions for improving the application. Investigators should then revise those portions of the application.

CONCLUSION

Search warrants are important investigatory tools. Investigators should not avoid securing warrants in white-collar crime cases merely because the process necessary to obtain them appears difficult and time-consuming.

By following a series of step-by-step procedures, investigators and prosecutors can reduce significantly the time necessary to draft warrant applications. As a result, both groups may consider the use of warrants more often. The ultimate result will be stronger prosecutions. ♦

Endnotes

¹ Writ requiring that a party summoned to appear in court bring a document or other pieces(s) of evidence for examination by the court.

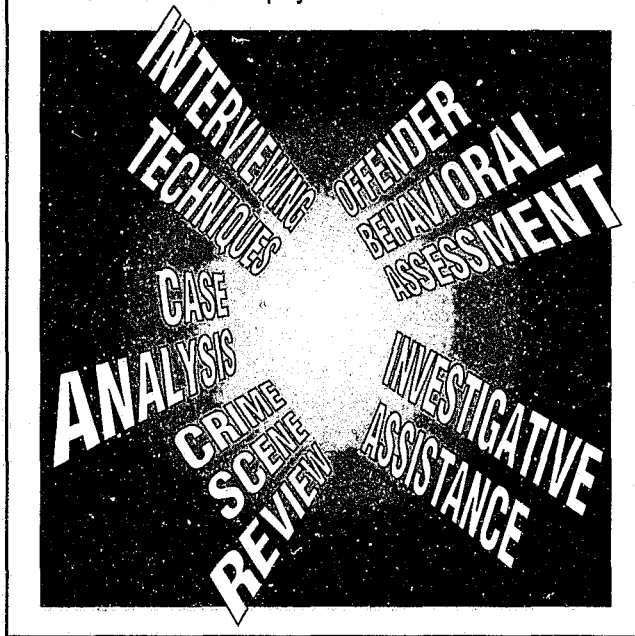
² This example examines only Federal criminal law. Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor.

³ *State v. Novembrino*, 105 New Jersey, 519 A. 2d 820 (1987); but see *United States v. Leon*, 468 U.S. 897 (1984) (establishing good faith exception in Federal courts).

Focus on Investigations

Criminal Investigation Assessment Unit

By Glenn A. Walp
and Malcolm L. Murphy



While a young woman slept, two intruders forced their way into the basement of her home in a small Pennsylvania community. They cut off the telephone and electricity. Then, for the next several hours, the subjects sexually assaulted the victim. They finally gagged and bound her in a chair and fled the scene with her vehicle and a small amount of cash. When interviewed by police, the victim was unable to furnish descriptions of her assailants, other than to say that one was taller than the other.

Considering the limited descriptions, the likelihood of apprehending the offenders seemed remote. However, the Pennsylvania State Police had recently established a new unit designed to help solve such cases. Investigators from the Criminal Investigation Assessment (CIA) Unit assisted in the investigation and carefully reviewed the incident and the crime

scene. They also reinterviewed the victim with an emphasis on developing behavioral assessments of the offenders.

As a result of their analysis, CIA Unit personnel concluded that one or both of the subjects must have been in the victim's home at some point in the past. Investigators then asked the victim to provide a list of every person known to have entered her home within the past 3 years.

Meanwhile, investigators received a tip that placed an individual in a vehicle similar to the victim's shortly after the assault occurred. An investigation revealed that the driver had a friend whose last name matched the last name of an individual on the victim's list. The name was that of a handyman who had worked at the victim's residence. The investigation focused on the man seen in the vehicle and the handyman's son. Investigators determined that at some point in the past, the handyman must have taken his son with him to work at the victim's house.

The two subjects were arrested. When confronted with the physical and circumstantial evidence that investigators had collected, both offenders pled guilty and were sentenced to lengthy prison terms.

The investigative initiatives employed by the Criminal Investigation Assessment Unit contributed significantly to the apprehension and conviction of these offenders. CIA Unit methods did not supplant the efforts of the assigned case investigators. Rather, they furthered the investigation by providing an assessment of offender behavior during the crime, thus allowing case investigators to limit and focus their search for the assailants.

THE CIA UNIT

Background and Composition

In 1987, the first State criminal investigation assessment program in the United States was developed through the mutual efforts of the Pennsylvania State Police and the FBI. Via a special FBI fellowship grant, a Pennsylvania State trooper was assigned temporarily to the FBI Academy where he received training in criminal profiling and other innovative investigative assessment techniques.

Components of a Criminal Investigation Assessment

- Comprehensive study of the nature of the criminal act and the type of subject who commits similar offenses
- Thorough review of available crime scene data
- In-depth examination of the victim's background and activities
- Formulation of the suspect's probable motivating factors
- Behavioral and general physical description of the suspect.

Agencies that desire additional information regarding the CIA Unit may contact the Pennsylvania State Police, Bureau of Criminal Investigation, 1800 Elmerton Avenue, Harrisburg, Pennsylvania 17110.

On his return to the Pennsylvania State Police, the trooper became the supervisor of the CIA Unit, which at that time consisted of 25 officers. Located within the Bureau of Criminal Investigation, the unit provided specialized service to the 15 county troops of the State police.

In 1992, the unit's primary objective changed from investigative support of troop operations to active involvement in all facets of the investigative process. This included participation in the major crime task forces that had been established in each county troop. CIA Unit officers and troop criminal investigators began working together, thereby expanding the level of knowledge and expertise available to solve each crime.

To accomplish its expanded mission, the CIA Unit significantly augmented its staff. Currently, the unit is comprised of a supervisor, 3 regional coordinators, and 41 criminal investigative assessment officers located throughout the State. The supervisor directs statewide criminal assessment activities and assists in developing and implementing investigative strategies. The regional coordinators oversee and report on unit activities and also help to develop and implement case strategies.

Criminal investigative assessment officers must be proficient in several different areas. They plan case strategies and assist with major case analysis, behavior-based interviewing techniques, and search warrant preparation.

Officer Selection

To qualify for assignment in the CIA Unit, troopers must have served a minimum of 3 years with the State police. The selection process includes a

formal interview and a written test. In addition, a certified psychologist evaluates each candidate's psychological and emotional stability, maturity level, and ability to cope with the stress of dealing with violent crimes. The candidates' levels of formal education, investigative experience, and ability to write and speak clearly also factor into the selection process.

Investigative Services and Techniques

The CIA Unit provides free assessment services to Federal, State, and local law enforcement agencies. The techniques used by the CIA Unit can be applied to single, multiple, or serial offenses. However, because fewer indicators of mood and behavioral traits can be determined from single-event crimes, the effectiveness of the assessment in these types of cases generally is reduced. Additionally, in order to conduct a useful assessment, a significant psychopathology—a behavioral or personality imprint—must be evident in the verbal statements or behavior exhibited by the offender during the crime.

Various types of investigations may benefit from offender assessment. These include homicides, stranger-to-stranger rape investigations, extortion, threats, kidnappings, child molestations, suspicious deaths, serial arsons, ritualistic crimes, and false allegations.

Benefits

CIA Unit administrators stress that the services provided by the unit should not be considered a substitute for a thorough, well-planned investigation; rather, their services augment traditional investigative crime-solving methods. CIA Unit officers provide a profile that describes the behavioral characteristics of

the unknown offender. These profiles characterize offenders in a manner that distinguishes them from other members of the population. In this way, case investigators gain valuable information that may allow them to narrow the scope of their investigation.

In addition to offender assessment, CIA Unit investigation offers another important advantage. Case investigators benefit from an independent review, both of the crime scene and of the initial investigatory steps, unbridled from the stress and fatigue often associated with the original police response.

CIA Unit members also may conduct an additional *personality* assessment of offenders. However, this process requires a detailed submission of data regarding the subject and demands extensive review and consultation by the assessor. During this process, CIA Unit officers identify personality characteristics of offenders based on a detailed analysis of the crime(s) they have committed. Only those cases that yield considerable evidence delineating an offender's behavioral activity are accepted for personality assessment.

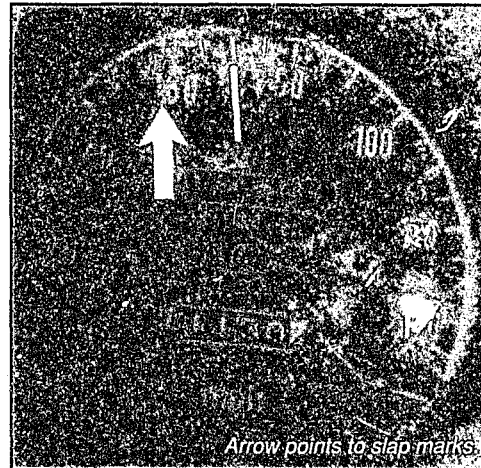
CONCLUSION

Investigators often find themselves confronted by cases that offer few physical clues. And as with the case of the young Pennsylvania woman, even assault victims who are left alive may be unable to provide the police with detailed information regarding their attackers.

However, just as advances in forensic science have made once-insignificant physical evidence valuable, advances in behavioral science have made offender assessment a useful component of many investigations. The Criminal Investigation Assessment Unit of the Pennsylvania State Police enhances traditional investigations by providing unique insights into the minds of offenders. For, as any investigator knows, a clue that distinguishes an offender from the general population brings law enforcement one step closer to solving the case. ♦

Colonel Walp is the commissioner of the Pennsylvania State Police. Corporal Murphy supervises the Criminal Investigation Assessment Unit of the Pennsylvania State Police in Harrisburg.

Laser Sheds New Light on Case



Arrow points to slap marks.

Investigators from the Raritan Borough, New Jersey, Police Department believed that speed played a major factor in a fatal accident involving a motorcycle and a passenger vehicle. However, although witnesses in the residential area "heard the motorcycle going fast," no one actually saw it exceeding the posted 25mph speed limit. The motorcycle's speedometer was removed and, with assistance from the Somerset County Prosecutor's Office, photographed using laser light. The photograph showed "slap marks" made by the speedometer's needle on impact, indicating that the motorcycle was traveling at 58-59 mph at the time of the collision. This evidence proved invaluable during the investigation. ♦

Submitted by Det. Joseph Stansley of the Raritan Borough, New Jersey, Police Department.
