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SEARCH WARRANTS: A VIEW OF THE PROCESS

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INTRODUCTION

The constitutional decisions of the Warren and Burger courts have produced an inordinate number of cases in the last twenty-five years that have revolutionized criminal procedure. Gone are the days when the course in criminal procedure was a study of a state's rules and case law. Criminal procedure, which is a required part of the curriculum at most law schools, is now a comprehensive examination of the fourth, fifth and sixth amendments of the United States Constitution. The constitutional decisions covering searches, confessions and right to counsel are so numerous that there is an insufficient opportunity to cover other important topics.

The steady changeover to a constitutionally-based curriculum in criminal procedure has not been without its share of oversights and mistakes. There is no doubt that a major mistake has been the decline of emphasis on the search warrant process. Virtually every prosecutor and criminal defense attor-

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ney will attest to the importance of mastering that area of the law in order to perform their functions adequately.

Given this state of affairs, the study of the law governing search warrants has continued to decline. The procedural rules controlling the issuance of search warrants have been relegated to obscure state statutes¹ that have rarely been the subject of the legislative amendment process. Few, if any, continuing legal education programs have been offered in the area over the past ten years. Law schools share the responsibility because of their emphasis on the more intriguing law governing warrantless arrests and searches.² Truly disturbing is that the vast majority of attorneys who have graduated from law school in the past decade have been subjected to almost no instruction regarding search warrants.

The express purpose of this article is to provide a comprehensive guide to the warrant process. Each section has been designed to illustrate the legal issues inherent in each stage of the proceeding. Oklahoma cases have been used where they illustrate the issues and resolutions commonly encountered by courts. Recourse is made to other jurisdictions when those courts better exemplify preferred solutions to the various legal issues discussed below.

I. WHEN SEARCH WARRANTS SHOULD BE EMPLOYED

A. *The Historical Significance of Warrant Preference*

The use of the general search power under King George II was responsible for one of the most important grievances of the colonists against the despotic use of power.³ The most notable of the abusive practices was the infamous writ of assistance.⁴ The use of this writ was responsible for the colonial

1. In Oklahoma, the general provisions governing search warrants may be found at OKLA. STAT. ANN. tit. 22, §§ 1221-41 (West 1986).

2. As an example, the Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* (6th ed. 1986) is the most widely adopted textbook in the area and devotes 214 pages to the study of various aspects of arrest, search and seizure and 11 pages to search warrants.

3. See generally N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT* 75 (1937); Yackle, *The Burger Court and the Fourth Amendment*, 26 U. KAN. L. REV. 335, 337-44 (1978).

4. J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 31 (1966).

resentment toward the King that ultimately resulted in the revolutionary war, and later, the Bill of Rights.⁵ That the genesis of the fourth amendment warrant clause can be traced back to specific incidents in our heritage is an important interpretative fact. These historical occurrences provide an important framework for understanding the requirements of the clause. As Justice Frankfurter eloquently wrote in 1950:

It is true . . . of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.⁶

This background forms the important link between the warrant clause's development and the "warrant preference" articulated by the United States Supreme Court. That preference has been repeatedly expressed as follows:

[A] search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'" [W]e have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall."⁷

Thus, the "warrant preference" is much more than theoretical. Its logic and reasoning are historically based in our culture and are directly responsible for the inclusion of the clause in the fourth amendment. An attorney would be well advised to emphasize the critical importance of this prefer-

5. *Id.* at 39-44; see also Grayson, *The Warrant Clause in Historical Context*, 14 AM. J. CRIM. L. 107, 110-20 (1987).

6. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

7. *United States v. Leon*, 468 U.S. 897, 913-14 (1984) (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1971) (*Chadwick* quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948), and *United States v. Ventresca*, 380 U.S. 102, 106 (1965))).

ence in any search issue — especially warrantless ones. This emphasis serves the dual purposes of focusing the court's attention on the police officer's adherence to each step of the warrant process, and in warrantless situations, of reminding the court of the constitutional command of obtaining a warrant rather than judging the search solely on whatever exigency supposedly excused the failure to obtain a warrant.

B. Grounds for Issuance

Most state statutes commonly provide for four separate permissible grounds for the issuance of search warrants.⁸ The most frequently utilized section is the one that reflects the decision in *Warden v. Hayden*⁹ and permits a search for property that constitutes mere evidence of the commission of a crime or the participation of a particular person in criminal activity.¹⁰ The range of property subject to the search warrant provisions even extends to property that is held as a means of committing an offense in the future.¹¹ Although the existence

8. OKLA. STAT. ANN. tit. 22, § 1222 (West 1986) provides:

Grounds for issuance of search warrant — Seizure of property

A search warrant may be issued and property seized upon any of the following grounds:

First: When the property was stolen or embezzled, in which case it may be taken on the warrant, from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be.

Second: When it was used as the means of committing a felony, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or of any other person in whose possession it may be.

Third: When it is in the possession of any person, with the intent to use it as the means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered, in which case it may be taken on the warrant from such person, or from a house or other place occupied by him, or under his control, or from the possession of the person to whom he may have so delivered it.

Fourth: When the property constitutes evidence that an offense was committed or that a particular person participated in the commission of an offense.

9. 387 U.S. 294 (1967).

10. OKLA. STAT. ANN. tit., 22 § 1222(4) (West 1986).

11. *Id.* at § 1222(3).

and location of criminal evidence may be known to law enforcement officers, there exist certain situations that require the issuing magistrate to impose a stricter standard of review before issuing a warrant. The occurrences are not frequent, but they are sufficiently important to merit discussion.

1. Bodily Intrusions

Some types of bodily extractions or intrusions may violate the fourteenth amendment's guarantee of due process. A fourteenth amendment violation may result even if the police officers secured a search warrant beforehand. The reason is that this branch of due process analysis focuses on the outrageousness of the police behavior, which is reflected in the *execution* phase of the warrant process.

The prime example of such behavior is found in the case of *Rochin v. California*.¹² In that case, police officers forced open the door to the defendant's room and attempted to forcefully open his mouth after observing him place two suspicious-looking capsules in his mouth. Unsuccessful in this attempt, the officers transported him to a hospital and had his stomach "pumped" by forcing an emetic solution through a tube into his stomach. The Court stated that "[t]his is conduct that shocks the conscience It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained."¹³ This principle of due process has been limited to situations that involve "coercion, violence or brutality to the person."¹⁴ Thus, *Rochin's* "shock the conscience" standard is relegated to the most egregious instances of police conduct and does not include trespass to property or eavesdropping.¹⁵

Generally, the police conduct falls somewhere below the outrageous actions in *Rochin*. The leading case in such instances is *Schmerber v. California*.¹⁶ That case involved the

12. 342 U.S. 165 (1952).

13. *Id.* at 172.

14. *Irvine v. California*, 347 U.S. 128, 133 (1954) (illegal wiretap of defendant's home did not constitute due process violation and police officers could properly testify as to what they heard as a result of wiretap).

15. *Id.*

16. 384 U.S. 757 (1966).

warrantless taking of a blood sample from the defendant despite his objection. The case involved the operating of a vehicle while under the influence of an intoxicant. The Court held that such action by the police was reasonable because the following conditions were present:

- A. Probable cause was plainly apparent;
- B. The officer might reasonably have believed an emergency existed in order to prevent the destruction of evidence;
- C. The test administered to measure the blood-alcohol level was reasonable and administered in a reasonable manner.¹⁷

The *Schmerber* approach was utilized when the Supreme Court rendered a decision that determined when a judge may order surgery in order to obtain evidence of a crime. In *Winston v. Lee*,¹⁸ the Court held that an adversary hearing was required wherein the judge must balance "the extent of the intrusion on [the defendant's] privacy interests and on the State's need for the evidence."¹⁹ In disallowing the state's request to authorize surgery, the opinion emphasized the two major factors that tipped the scales for the defendant.

- 1. The surgery required a general anesthetic and was an extensive intrusion on the accused's personal privacy and bodily integrity.²⁰
- 2. The state's need to remove the bullet to establish the identity of the robber was not high because of the presence of substantial additional evidence indicating the accused as the robber.²¹

Winston added two important factors to the traditional warrant process. First, the warrant (or court order) may not be obtained through an *ex parte* hearing, but should be

17. *Id.* at 770-71.

18. 470 U.S. 753 (1985). For commentaries on *Winston v. Lee* see Tolley & Hull, *Court Ordered Surgery to Retrieve Evidence in Georgia in Light of the United States Supreme Court Decision in Winston v. Lee*, 37 MERCER L. REV. 1005 (1986); Supreme Court Review, *Fourth Amendment — Reasonableness of Surgical Intrusions*, 76 J. CRIM. L. & CRIMINOLOGY 972 (1985).

19. *Winston*, 740 U.S. at 763.

20. *Id.* at 764.

21. *Id.* at 765.

granted only after a full adversary hearing where the defendant has the right to present his own medical testimony in an effort to establish the high degree of intrusion and risk inherent in the procedure. Second, the hearing must afford the defense counsel the opportunity to test the state's case much as is done in the preliminary hearing. Questions concerning the victim's perception of events and actions can be propounded and properly preserved in transcript form for future impeachment.

2. Obscene Materials

The seizure of films, magazines or other possible obscene materials implicate strong first amendment considerations.²² A fundamental precept is that a search warrant may not be based solely on the conclusory allegations of a police officer that the materials are obscene.²³ An affidavit must accompany such a warrant and specifically set forth facts that permit the magistrate to "focus searchingly on the question of obscenity."²⁴ If a large-scale seizure is contemplated by law enforcement officers, the warrant normally should not be issued. Rather, such a massive seizure constitutes a "prior restraint" in violation of the first amendment. Such an undertaking must be preceded by an adversary hearing on the issue of obscenity.²⁵

In most cases a police officer purchases only a single copy of an allegedly obscene film or magazine and incorporates it into his affidavit. The issuing magistrate will then evaluate the affidavit and incorporated evidence and decide whether to issue a warrant for the balance of the materials. Although this method avoids the problem of prior restraint, the party sub-

22. *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986).

23. *Lee Art Theater, Inc. v. Virginia*, 392 U.S. 636 (1968) (per curiam) (failure of magistrate to inquire into factual basis of police officer's conclusions regarding obscene films violated first amendment); *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961) (without adequate safeguards, state procedure delegated too much discretion to police officers in seizing obscene materials).

24. *Marcus*, 367 U.S. at 732.

25. *Quantity of Books v. Kansas*, 378 U.S. 205, 210-11 (1964).

jected to the search is entitled to an opportunity for a prompt post-seizure judicial determination of the obscenity issue.²⁶

In a recent case, the United States Supreme Court reaffirmed its commitment to the foregoing safeguards as adequately protecting any first amendment interests.²⁷ In so doing the Court emphasized that warrant applications for presumptively protected first amendment materials "should be evaluated under the same standard of probable cause used to review warrant applications generally."²⁸ Because of the presence of these protections no higher degree of probable cause is constitutionally required even though first amendment interests are implicated.

3. Law Office Searches

There exists no general immunity from the warrant process for third parties who are not considered culpable in a criminal offense. The paramount issue is whether probable cause exists with respect to criminal evidence located on the third party's premises.²⁹ Since law offices are properly classified as third party premises, this principle is applicable to warrants issued for evidentiary materials located in a client's file. The dangers of such searches are obvious: (1) the police officers expose confidential records including statements and work product of the attorney;³⁰ and, (2) such action "chills" and possibly damages the attorney-client privilege.

26. *Heller v. New York*, 413 U.S. 483, 492 (1973) (seizure of film pursuant to a search warrant based on probable cause permissible if prompt judicial determination of obscenity is available at request of interested party). See also Burnett, *Obscenity: Search and Seizure and the First Amendment*, 51 DEN. U.L. REV. 41 (1974).

27. *P.J. Video*, 475 U.S. at 873-74.

28. *Id.* at 875.

29. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) (subpoena duces tecum not required in search of newspaper offices where normal search warrant process is applied with particular exactitude). See generally Cantrell, *Zurcher, Third Party Searches and Freedom of the Press*, 62 MARQ. L. REV. 35 (1978); *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 200 (1978); Comment, *The Theory of Probable Cause and Searches of Innocent Persons: The Fourth Amendment and Stanford Daily*, 25 U.C.L.A. L. REV. 1445 (1978).

30. For commentaries on searches for private business records see Note, *Private Papers Now Subject to Reasonable Search and Seizure*, 26 DE PAUL L. REV. 848 (1977); Comment, *A Paper Chase: The Search and Seizure of Personal Business Records*, 43 BROOKLYN L. REV. 489 (1977); Comment, *Constitutional Law: Search and*

Appellate courts have typically required such warrants to be narrowly tailored for the items sought³¹ and to be capable of reasonable execution.³² Warrants that authorize general seizures of all the firm's records,³³ or the unnecessary seizure of the entire file of the client³⁴ have been held unconstitutional. In addition, at least one state court has prohibited the issuance of search warrants for the client's business records because of the lack of safeguards for the attorney-client privilege and of the breach of the confidentiality necessary in such relationships.³⁵

II. PROBLEMS WITH MAGISTRATES

A. *Identity and Jurisdiction of Magistrates*

Statutory law commonly mandates that the person who issues a search warrant be a judge or magistrate.³⁶ The issuing judge or magistrate is further defined by applicable state law as a person who holds a certain judicial office.³⁷ In the absence of statutory law to the contrary, the authority of a magistrate to issue a search warrant is thereby limited by the scope of

Seizure of Private Business Records No Longer Supplies Compulsion Necessary to Invoke the Fifth Amendment, 29 U. FLA. L. REV. 376 (1977).

31. *Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955, 959 (3d Cir. 1984) ("We therefore believe that the correct approach . . . is . . . to scrutinize carefully the particularity and breadth of the warrant . . . [and the] nature and scope of the search . . .").

32. *In re Gartley*, 341 Pa. Super. 350, 491 A.2d 851 (1985) (search warrant was precise enough to allow officer to ascertain and identify the place sought with reasonable effort).

33. *Klitzman*, 744 F.2d at 960.

34. *People v. Hearty*, 644 P.2d 302, 313-14 (Colo. 1980) (seizure of entire client file held unconstitutional where face of warrant prohibited violation of attorney-client privilege and state failed to prove nexus of file to criminal behavior).

35. *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979).

36. OKLA. STAT. ANN. tit. 22, § 1221 (West 1986). Municipal criminal courts of record (cities over 200,000 population) also have the power "to issue arrest warrants and search and seizure warrants . . ." *Id.* at tit. 11, §§ 28-121 (West 1978).

37. *Id.* at tit. 22, § 162 (West 1986). The United States Supreme Court has held that an arrest warrant may be issued by someone who is not either a judge or lawyer. In *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), the Court upheld a city charter that permitted a court clerk to issue a warrant. The crucial factors were that the individual be "neutral and detached" and "capable of determining whether probable cause exists." *Id.* at 350. See also *People v. Mack*, 66 Cal. App. 3d 839, 844, 136 Cal. Rptr. 283, 288 (1977) (nonattorney may issue search warrant because of lack of correlation between legal training and ability to determine existence of probable cause).

the jurisdiction of his office.³⁸ Statewide jurisdiction is exercised by judges or justices of the highest appellate courts, but the functioning warrant process usually is carried out at the trial court judge level.

The only apparent problem that could arise in the jurisdictional area is where the issuing magistrate exceeded his authority by issuing a warrant outside his jurisdiction. In *Cunningham v. State*³⁹ the Oklahoma Court of Criminal Appeals confronted the issue of whether the statutory language requiring a magistrate to issue the search warrant "to a peace officer in his county"⁴⁰ restricted a judge who issued a warrant in his county of residence that was to be served in the county over which he presided. In finding that the judge's issuing authority was coextensive with his entire judicial district, the court held:

We opt for that construction allowing any District Judge, Associate District Judge, or Special Judge, to issue search warrants to be served any place in the judicial district where such judge may be presiding at the time. This construction is consistent with the fact that a District Judge's authority to act as a magistrate is coextensive with the boundaries of the Judicial District in which he sits, whereas the jurisdiction of a justice of the peace was only co-extensive with the county.⁴¹

It is consistent with this interpretation to require a judge whose judicial district encompasses more than one county to issue the warrant only to the police officers of that county where the search has been authorized.

B. Rubber Stamp Magistrates

There exists a widely held belief that some magistrates do not independently review the application for a search warrant. Instead, there has formed a type of symbiotic relationship

38. "[T]he magistrate . . . must issue a search warrant . . . to a peace officer in his county . . ." OKLA. STAT. ANN. tit. 22, § 1225(A) (West 1986). *See, e.g.*, FLA. STAT. ANN. § 933.01 (West 1985); MINN. STAT. ANN. § 626.06 (West 1983); N.J. STAT. ANN. § 2A:8-15 (West 1987).

39. 600 P.2d 337 (Okla. Crim. 1979).

40. OKLA. STAT. ANN. tit. 22, § 1225(A) (West 1986) (emphasis added).

41. *Cunningham*, 600 P.2d at 339.

where the magistrate is not neutral, but proceeds from a position of presuming the truth of every police allegation and detail. Magistrates who perform with that type of unquestioning bias simply can not fulfill the detached judicial functions required by the fourth amendment.⁴² It is one thing to believe that a reviewing magistrate is not neutral and detached, but quite another matter to be able to demonstrate to the trial or appellate court that he functioned that way in a particular case. Case precedent is sparse but illuminates some specific aspects which should be emphasized.

The defense counsel's first obstacle in the suppression hearing is to distinguish this issue from that of the more common one of "piercing" the affidavit. In *Franks v. Delaware*,⁴³ the United States Supreme Court addressed the latter situation when the defendant attempted to prove that some of the allegations in the affidavit were false. That issue is sometimes confused with the "rubber stamp" magistrate because state courts have consistently held that one may not go behind the affidavit to attack the truthfulness of its contents.⁴⁴ The *Franks* test⁴⁵ is extremely difficult to satisfy and is not applicable to the magisterial issue.

The most direct and profitable method of producing evidence on this issue is to focus on what the magistrate did at the warrant hearing. Unless a transcript⁴⁶ of the process is

42. *Aguilar v. Texas*, 378 U.S. 108, 111 (1964) ("the court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police"). For a thorough discussion of the area see R. VAN DUZEND, L. SUTTON & C. CARTER, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS AND PRACTICES* (1985).

43. 438 U.S. 154 (1978).

44. *Cavaness v. State*, 581 P.2d 475, 478 (Okla. Crim. 1978), *cert. denied*, 439 U.S. 1117 (1979); *Brown v. State*, 565 P.2d 697, 698-701 (Okla. Crim. 1977); *Crossland v. State*, 266 P.2d 649, 653 (Okla. Crim. 1954).

45. See *infra* text accompanying notes 193-211 for a more complete discussion of the *Franks* test.

46. Oklahoma law provides for transcribing both an oral affidavit that is used as the sole basis for probable cause and one which is used to supplement a written affidavit.

§ 1223.1 Electronically recorded oral statement — Transcription

A magistrate may take an oral statement under oath which shall at that time be recorded electronically and thereafter transcribed by an official court reporter. The original recording and transcription thereof shall become a part of and kept with the official records of the case. The tran-

available, the only witnesses will be the police officer and the issuing magistrate. Most attorneys would choose to examine the magistrate under such circumstances because of the suspected partiality of the police officer. It may be important to determine if an information or an indictment has been filed in the case before the warrant is sought. If formal charges have been filed and the affidavit for the warrant makes reference to them, the magistrate may have committed error. A search warrant must be based upon an *independent* determination of probable cause by the issuing magistrate. The causation factors involved in charging someone with a criminal offense have no logical connection to determining probable cause to search a particular place. Thus, it has been held that a warrant was defective when it was based substantially on supporting affidavits that stated formal charges had been returned⁴⁷ or where an affidavit noted that the accused had been charged with a similar crime.⁴⁸ Along similar lines, a warrant has been held defective by a statement in the affidavit that other magistrates had issued warrants for the identical items sought.⁴⁹

The independent determination of the magistrate is the critical focus of the constitutional protections embodied in the warrant process; consequently, reviewing courts are unwilling

scribed statement shall be deemed to be an affidavit for the purposes of this section and Section 1223 of Title 22 of the Oklahoma Statutes.

In such cases, the magistrate and the official court reporter shall sign the transcription of the recording of the sworn statement. Thereafter, the transcript shall be filed with the clerk of the district court along with the original recording.

§ 1224.1 Oral testimony supplemental to affidavit.

Before issuing a search warrant the judge may take oral testimony, sworn to under oath, supplemental to any affidavits. Provided, however, that such oral testimony shall be recorded, such record transcribed forthwith, and filed with the affidavits to support the search warrant.

OKLA. STAT. ANN. tit. 22, §§ 1223.1, 1224.1 (West 1986).

47. *United States v. Defalco*, 509 F. Supp. 127, 139 (S.D. Fla. 1981) (magistrate may not rely on return of indictment by grand jury to safeguard rights of defendant under fourth amendment).

48. *State v. Kellenbeck*, 474 A.2d 1388, 1390-92 (N.H. 1984) (grand jury indictment for similar crime cannot substitute for independent judgment of magistrate).

49. *People v. Potwora*, 48 N.Y.2d 91, 397 N.E.2d 361, 421 N.Y.S. 2d 850, 852-53 (1979) (magistrate may not delegate or share his duty to make an independent determination).

to hold harmless such an omission. Where an issuing justice of the peace confirmed that he left "the determination of probable cause to the determination of the agent involved," the warrant was held to be fatally defective.⁵⁰ This principle is made stronger by the case of *Rooker v. Commonwealth*⁵¹ wherein the court found the warrant invalid because the magistrate failed to read the affidavit. Although the affidavit actually showed probable cause, the magistrate's failure to independently assess its sufficiency was fatal.⁵² An identical error was condemned by another court because the influence of certain law enforcement officers caused the magistrate to become "a mere agent of the prosecution."⁵³

Another avenue of investigation by the defense counsel in doubtful cases is to determine whether the magistrate merely accepted the statements of the affiant regarding events he has not personally witnessed. A 1971 statutory amendment gave magistrates in Oklahoma the express power to require oral testimony to be given to supplement the allegations in the affidavit.⁵⁴ This particular statute makes it easier for the magistrate to make his independent determination. Therefore, his unexplained failure to use this convenient method to remove any doubts about the factual allegations could be considered unreasonable in a case where the warrant was substantially based on statements by a non-affiant. Such instances most commonly occur when another officer or informant makes certain observations and subsequently recounts them to the affiant. In either case, the magistrate should have a duty to reasonably investigate areas of the affidavit that are couched in conclusory terms or that may admit an alternative and innocent construction.

The same principle of supplemental investigation of probable cause applies if there are no third party allegations. Sworn oral testimony of the affiant may be taken on the spot

50. *Page v. State*, 136 Ga. App. 807, 808, 222 S.E.2d 661, 662 (1975) (magistrate may not wholly rely on probable cause determination of experienced revenue agents).

51. 508 S.W.2d 570 (Ky. 1974).

52. *Id.* at 571.

53. *State v. Dudick*, 158 W. Va. 629, 643, 213 S.E.2d 458, 466 (1975) (warrant defective when magistrate merely stamped prepared warrant and admitted that he made no independent determination).

54. OKLA. STAT. ANN. tit. 22, § 1224.1 (West 1986).

to assuage magisterial doubts. This procedure is so simple and straightforward that it should be preferred over the option of allowing the police officer to leave and prepare another affidavit. If the facts are known to the officer or the third party is available, the supplementing of the affidavit by oral testimony is to be favored. A failure to abide by this course of action should, at the very least, place the burden on the magistrate to explain why his act was not unreasonable.

C. Partiality of the Magistrate

In addition to the passive "rubber stamp" partiality problem, the magistrate can also demonstrate impermissible partiality toward the police by taking a more active role in the entire process. A state statutory scheme that rewarded a magistrate for issuing a search warrant was declared unconstitutional in *Connally v. Georgia*.⁵⁵ In so holding, the Court found that a process that paid five dollars for each warrant issued, but paid nothing for refusing issuance, impermissibly mixed the "neutral" magisterial function and pecuniary rewards.

The situation . . . is one which offers "a possible temptation to the average man as a judge . . . or which might lead him not to hold the balance nice, clear and true between the State and the accused." It is . . . another situation where the defendant is subjected to what surely is judicial action by an officer of a court who "has a direct, personal, substantial, pecuniary interest" in his conclusion to issue or to deny the warrant.⁵⁶

Another example of partiality on the part of an issuing magistrate is found in *Coolidge v. New Hampshire*.⁵⁷ In *Coolidge*, the state attorney general issued a search warrant in a case in which he also served as the chief investigator. Ruling that the attorney general was disqualified *per se* the Court refused to engage in a "case-by-case evaluation of all the circumstances" because "prosecutors and policemen simply can-

55. 429 U.S. 245 (1977).

56. *Id.* at 250 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 59-60 (1972)).

57. 403 U.S. 443 (1971).

not be asked to maintain the requisite neutrality” over their own investigations.⁵⁸ The *per se* disqualification rule would then apply to any member of the prosecutorial team who served as issuing magistrate in a case in which he was actively involved in any phase of the prosecutorial function. There is authority for the proposition that the *per se* disqualification rule should be applied in a situation where the issuing magistrate had employment with the police but had no involvement with the case for which the search warrant was issued.⁵⁹

Further problems arise if the magistrate chooses not to end his connection with the case by simply issuing the warrant, but seeks an additional and wider role by assisting with the physical search of the premises. A court understandably should be concerned with such activity because it may signal an attitude that ranges from an innocent post-issuance curiosity to an invidious bias in favor of law enforcement authorities. Merely visiting the premises after the police officers have begun the search in order to observe its execution will not cause the magistrate to forfeit his required neutrality.⁶⁰ However, a different situation arises if the magistrate actually assists in the execution of the search.

An illustration of a magistrate that lost his “neutrality” by actively assisting law enforcement can be found in *Lo-Ji Sales, Inc. v. New York*.⁶¹ In that case the Town Justice issued a general search warrant for obscene materials. He accompanied the police officers executing the warrant and proceeded to make on-the-spot determinations of probable cause at the scene. In finding that this process was untenable, the Court held:

58. *Id.* at 450.

59. *Baggett v. State*, 132 Ga. App. 266, 208 S.E.2d 23 (1974) (justice of peace could not issue warrant where he was employed by police on weekends); *see also* *Vaughn v. State*, 160 Ga. App. 283, 287 S.E.2d 277 (1981) (justice of peace could not issue warrant where he held appointment as deputy sheriff).

60. *McAllister v. State*, 157 Ga. App. 158, 276 S.E.2d 669 (1981) (permissible for issuing magistrate to visit premises if he does not join in search); *see also* *Heller v. New York*, 413 U.S. 483 (1973) (issuing magistrate may properly view allegedly obscene film in theater before determining probable cause); *Johnson v. State*, 617 P.2d 1117 (Alaska 1980) (magistrate may leave office to meet police at airport to receive affidavit when exigent circumstances present).

61. 442 U.S. 319 (1979).

The Town Justice did not manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure [T]he objective facts of record manifest an erosion of whatever neutral and detached posture existed at the outset. He allowed himself to become a member, if not the leader, of the search party which was essentially a police operation [H]e was not acting as a judicial officer but as an adjunct law enforcement officer.⁶²

The possibility of demonstrating partiality remains even if the magistrate's conduct does not rise to the level of the Town Justice's portable chambers. A repetition of incidents on the part of the magistrate that show him consistently accompanying the officers executing the warrant may combine to form a pattern of non-neutrality.⁶³ Even in the absence of an active search by the magistrate, such a pattern may demonstrate that the required neutral and detached conditions are lacking, thereby causing a violation of the fourth amendment.⁶⁴

There are several other factors that may cause the impartiality that infringes the safeguards of the warrant process. A magistrate's previous advice to the district attorney's office on the investigation or strategy before the grand jury,⁶⁵ strongly held personal opinions about the search target,⁶⁶ friendship with the alleged victim of the search target⁶⁷ and socializing with the police officers applying for the warrant⁶⁸ are among the most common. Moreover, in addition to holding a warrant invalid for specific, proven acts of partiality, courts are apparently prepared to make similar holdings when there exists an

62. *Id.* at 326-27.

63. *Thomason v. State*, 148 Ga. App. 513, 251 S.E.2d 598 (1978) (magistrate lost neutrality when he typically accompanied executing officers to premises and proceeded to move about and converse with officers and defendant).

64. 251 S.E.2d at 599.

65. *State v. Guhl*, 140 Ga. App. 23, 230 S.E.2d 22 (1976).

66. 230 S.E.2d at 24-25.

67. *State v. Burnam*, 66 Or. App. 132, 672 P.2d 1366, 1368-69 (1983) (magistrate not neutral where alleged victim of crime was employed as clerk for magistrate).

68. *State v. Holloway*, 311 S.E.2d 707, 709 (N.C. Ct. App. 1984) (defendant entitled to hearing over magistrate's alleged social dating of one or two of the officers applying for warrant), *rev'd on other grounds*, 319 S.E.2d 261 (N.C. 1984).

appearance of partiality — regardless of the presence of probable cause.⁶⁹

D. Prior Refusal To Issue Warrant

A somewhat similar problem to partiality is the practice of “magistrate shopping” by law enforcement officers.⁷⁰ This occurs when the police officers who are applying for a warrant go from one magistrate to another until one is found who will grant the warrant application. Such conduct presents a different issue than the one raised in the previous section because the police officer can not attempt to supplement the factually inadequate affidavit. The affidavit in question accurately represents all of the facts that the police officer has at his disposal. Thus, making recourse to oral testimony, producing an informant or redrafting the affidavit are not feasible avenues for obtaining the warrant. The officer simply applies before another magistrate in hopes that he will grant the warrant.

This practice has not been held to be unconstitutional, but may be condemned as demonstrating reproachable police conduct. Once a neutral and detached magistrate has determined that probable cause to search is lacking, the burden should be placed on the applying officers to supplement the allegations in the affidavit until the requisite standard is met. This is undoubtedly the practice in the majority of cases.

The resubmission of the identical affidavit to a different magistrate reflects an attitude of gamesmanship that serves to lessen the integrity of both the police and the judicial system. The magistrate’s refusal arguably should have more “legal” effect than it presently does. In the case of *United States v. Davis*⁷¹ a federal district court held that federal agents should not present their warrant application to a second magistrate after it had been refused by a prior magistrate. The court based its holding on the principle that the second magistrate was “equitably estopped” by the prior judicial decision.⁷² Although the use of collateral estoppel by the court is highly

69. See *supra* text accompanying notes 51-52.

70. See L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *DETECTION OF CRIME* 120 (1st ed. 1967).

71. 346 F. Supp. 435 (S.D. Ill. 1972).

72. *Id.* at 442.

questionable, the result is to be applauded. The police practice of disregarding the decision of a neutral judge and seeking out a more partial one to review the identical application serves to undercut the constitutional safeguards erected by the fourth amendment. The warrant process is founded on the neutral judging of the probable cause standard. The disregard of such a decision places the law enforcement authorities in a seemingly superior position to continue the application process until they locate a magistrate more agreeable to the search.

Even assuming that such police conduct may be held constitutional, those acts demonstrate a lack of good faith on their part with respect to the presence of probable cause. Simply put, two "noes" and a "yes" on the question of probable cause should not result in a presumption that the search was reasonable. Moreover, on a motion to suppress such actions would likely constitute a form of recklessness or bad faith by the police and cause the court to "pierce" the affidavit and examine the circumstances surrounding its issuance.⁷³

E. Failure To Sign Warrant

Statutory law requires a magistrate to sign a search warrant that he issues.⁷⁴ The signature requirement serves several purposes. First, it indicates formal judicial approval of the application and actually transforms the warrant form into a legal process. Second, it constitutes the *sine qua non* safeguard against the illegal preparation of blank warrants. Finally, it serves as dual protection for the executing officer and the search target. The signed warrant is conclusive proof of the officer's duty to search the described premises, but also is evi-

73. See *infra* text accompanying notes 193-211 and 508-536.

74. E.g., OKLA. STAT. ANN. tit. 22, § 1225(A) (West 1986) provides:

[I]f the magistrate be thereupon satisfied of the existence of grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him, with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate, and also to arrest the person in whose possession the same may be found, to be dealt with according to law.

Id.

dence to the individual owner or possessor that the constitutional safeguards of the warrant process were observed.

Jurisdictions have split over whether the absence of the magistrate's signature invalidates the warrant.⁷⁵ The better view seems to favor holding the warrant invalid. The rationale is based on an appreciation of the risks associated with the intrusion on an individual's privacy — especially where the warrant's validity is questionable.⁷⁶ The state's interest in searching with an unsigned warrant is balanced against the individual's interest in the certainty that the intrusion is done under an approved legal process. The weight clearly falls on the side of individual's privacy rights in a situation with an unsigned warrant.

The most commonly litigated issue in these cases is whether the signature should be regarded as a technicality since the magistrate actually performed his neutral function and determined the existence of probable cause.⁷⁷ Jurisdictions decide this issue as a matter of law, but it seems clear that the above principles should militate in favor of the target of the search. At any rate, the law enforcement authorities could easily cure the defect by leaving some officers at the scene while others returned for a valid signature.

Another simple method for obtaining the magistrate's signature is to telephone him for permission to affix it to the copy of the warrant the police officer is serving. For example, Oklahoma law provides:

The magistrate may orally authorize a peace officer to sign the name of the magistrate on a copy made to conform with the original warrant if the peace officer applying for the warrant is not in the actual physical presence of the magistrate.

75. Compare *Martin v. State*, 344 So.2d 248 (Fla. Ct. App. 1976) (warrant defective under state law if magistrate's signature omitted); and *Kelley v. State*, 316 So.2d 233 (Ala. Crim. App. 1975) (search warrant void if it fails to contain signature of magistrate) with *Sternberg v. Superior Ct.*, 41 Cal. App. 3d 281, 115 Cal. Rptr. 893 (1974) (omission of signature was cured by magistrate affixing his signature at the earliest opportunity after discovery).

76. *Martin*, 344 So.2d at 248; *Kelley*, 316 So.2d at 233; *Commonwealth v. Chandler*, 477 A.2d 851 (Pa. 1984); *State v. Cochrane*, 173 N.W.2d 495 (S.D. 1970).

77. *Sternberg*, 41 Cal. App. 3d 281, 115 Cal. Rptr. 893. Cf. *State v. Surowiecki*, 184 Conn. 95, 440 A.2d 798 (1981) (absent signature, a search warrant has not been officially issued under state law).

Such copy shall be deemed to be a search warrant for the purposes of this act⁷⁸

Whether this provision encompasses the curing of the signature defect or the necessity of procuring a second warrant by telephone to cure the problem is questionable. In either case, the statute seems sufficiently broad to include both interpretations. If a "second" warrant is required by the statute, the issuing magistrate has the prior affidavit on file and could easily authorize a second warrant.⁷⁹ Since either one of these methods corrects the problem, the officers' insistence to conduct the search without a signed warrant is strong evidence of their bad faith and should result in suppression of the evidence.⁸⁰

III. OATH OR AFFIRMATION

The fourth amendment of the United States Constitution requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."⁸¹ This constitutional requirement embodies several issues which have been the subject of litigation. The following sections discuss the most important issues that have arisen.

A. *Sworn Oath*

The requirement of swearing an oath before the issuing magistrate is a fundamental requirement of the warrant pro-

78. The magistrate may orally authorize a peace officer to sign the name of the magistrate on a copy made to conform with the original warrant if the peace officer applying for the warrant is not in the actual physical presence of the magistrate.

Such copy shall be deemed to be a search warrant for the purposes of this act and it shall be returned to the magistrate as provided for in Section 1233 of this title. In such cases, the magistrate shall enter on the face of the original warrant the exact time of the issuance of the warrant and shall sign and file the original warrant and the copy made to conform with the original warrant . . . with the clerk of the district court as provided for in Section 1224.2 of this title.

OKLA. STAT. ANN. tit. 22, § 1225(B) (West 1986).

79. *Commonwealth v. Jordan* (No. 2), 397 Mass. 494, 492 N.E.2d 351 (1986) (factual defects in second warrant deemed cured by reference to first warrant issued only two hours before second).

80. See *infra* text accompanying notes 508-536.

81. U.S. CONST. amend. IV.

cess. The failure to swear to the allegations in the affidavit renders the warrant unconstitutional because "probable cause" has been based on unsworn allegations.⁸² The guiding principle in these cases has been to discount the lack of formality and simply insist that "[n]o particular ceremony is necessary to constitute the act of swearing It is only necessary that something be done in the presence of the magistrate issuing the search warrant which is understood by both the magistrate and the affiant to constitute the act of swearing."⁸³ The oath must bind the affiant and establish legal liability for lying. The "true test of sufficiency of . . . [the] affidavit . . . is whether it has been drawn in such a manner that perjury could be charged thereon if any material allegation contained therein is false."⁸⁴

An affidavit is defective if the issuing magistrate fails to sign the jurat at the bottom of the affidavit.⁸⁵ If no other evidence is presented regarding the giving and witnessing of the oath, the warrant is rendered constitutionally defective. However, the state may present oral testimony at the pretrial hearing to establish that the oath was administered.⁸⁶ The moral of this rehabilitation process may well be that the defense counsel should not elicit testimony from the affiant at a suppression hearing in which he, in fact, was sworn. There are at least two reported cases in Oklahoma where the defense counsel unwittingly asked questions of the affiant⁸⁷ or the issuing magistrate⁸⁸ that corrected the defective warrant.

82. *Frazier v. Roberts*, 441 F.2d 1224, 1227 (8th Cir. 1971); *People v. Dinger*, 106 Ill. App. 3d 662, 664, 435 N.E.2d 1348, 1350 (Ill. App. Ct. 1982).

83. *Simon v. State*, 515 P.2d 1161, 1165 (Okla. Crim. 1973) (citing *Loudermilk v. State*, 83 Okla. Crim. 374, 177 P.2d 129 (1947)).

84. *Burns v. State*, 92 Okla. Crim. 24, 28, 220 P.2d 473, 475 (1950); *Mason v. State*, 60 Okla. Crim. 392, 396, 64 P.2d 1238, 1240 (1937).

85. *Wilson v. State*, 81 Okla. Crim. 108, 110-11, 161 P.2d 86, 87 (1945); *Bowdry v. State*, 60 Okla. Crim. 46, 49, 61 P.2d 31, 32 (1936).

86. *White v. State*, 702 P.2d 1058, 1060 (Okla. Crim. 1985); *Powell v. State*, 355 So.2d 1378 (Miss. 1978) (state may, upon motion, physically amend affidavit by adding signature of magistrate); *Huff v. Commonwealth*, 213 Va. 710, 194 S.E.2d 690 (1973) (jurat not part of affidavit and mistake over date of certification can be corrected).

87. *White*, 702 P.2d at 1060.

88. *Blair v. State*, 55 Okla. Crim. 280, 282, 29 P.2d 998, 999 (1934).

Some arguable technical errors are not correctable and result in voiding the warrant. In *Morrison v. State*,⁸⁹ a warrant and affidavit were prepared for a specific deputy sheriff, but was sworn to and signed by another law officer.⁹⁰ The court held the warrant defective and stated that a "search warrant must conform strictly to the constitutional and statutory provisions for its issuance, and no presumptions of regularity are to be invoked in aid of process under which an officer obeying its command undertakes to justify."⁹¹

B. Supplemental Oral Statements

Approximately one-half of all state jurisdictions follow the "Four Corners Doctrine" which requires that the magistrate assess only those facts and allegations within the four corners of the affidavit.⁹² The remainder of state jurisdictions expressly allow supplementary oral testimony before a magistrate.⁹³ This law is considered valuable in those situations where the magistrate finds the affidavit to be lacking in probable cause. It simply allows the affiant to bolster his probable cause facts by reciting a narrative or answering questions propounded by the magistrate.

In order to legally supplement the written affidavit the oral testimony must be sworn.⁹⁴ The magistrate must take care to separately swear the affiant before he makes his oral statement. Otherwise, the question arises whether the oath taken for the affidavit is legally sufficient for the oral testimony. It is clearly the better view that the latter unsworn statement should play no part in the probable cause determination.⁹⁵ Moreover, the argument that the signature of the affiant, which applies only to the facts appearing in the affida-

89. 88 Okla. Crim. 445, 204 P.2d 544 (1949).

90. *Id.* at 446, 204 P.2d at 545.

91. *Id.* at 449, 204 P.2d at 546 (quoting *Kuhn v. State*, 70 Okla. Crim. 119, 124, 104 P.2d 1010, 1013 (1940)).

92. McGinley, *The "Four Corners" Requirement: A Constitutional Prerequisite To Search Warrant Validity*, 31 OKLA. L. REV. 289 (1978).

93. *E.g.*, OKLA. STAT. ANN. tit. 22, § 1224.1 (West 1986); *State v. Dudgeon*, 13 Ariz. App. 464, 477 P.2d 750 (1970); *Hester v. State*, 463 So.2d 1087 (Miss. 1985).

94. OKLA. STAT. ANN. tit. 22, § 1224.1 (West 1986).

95. *Tabasko v. Barton*, 472 F.2d 871 (6th Cir. 1972) (supplemental information presented to magistrate to establish probable cause must be supported by oath); *Fra-*

vit, somehow applies to subsequently developed facts is both illogical and incorrect.

The Oklahoma statute also requires that the oral testimony be "recorded, such record transcribed forthwith, and filed with the affidavits to support the search warrant."⁹⁶ This part of the statute is obviously to assure that an accurate and permanent record is preserved in order to resolve disputes over the presence of probable cause or the oath requirements. In *Phelps v. State*,⁹⁷ the Oklahoma Court of Criminal Appeals had occasion to interpret the "transcribed forthwith" language of the statute. The court held that a delay of 28 days in the preparation and filing of the transcript of the oral testimony had no effect on the validity of the warrant.⁹⁸ Such a delay certainly has no effect on the warrant, but defense counsel should be prepared to move for a continuance at the suppression hearing, or in a proper case, raise the argument that the delay has prejudiced an otherwise valid defense in the case.

The statutory provision permitting oral testimony supplementing the affidavit seems to unequivocally require that the additional testimony "*be recorded*" and "*transcribed forthwith*."⁹⁹ In *Woodard v. State*,¹⁰⁰ this provision was interpreted in an erroneous manner that did not construe these directives as mandatory. The court held that recording and transcribing should be done immediately upon presentation to the magistrate, but "exigent circumstances may exist . . . when [the] reporter cannot be present" and that "*recording*, transcription and filing of oral testimony . . . [may] take place after the fact . . . to meet the ends of justice and only when no other method is possible."¹⁰¹ The opinion continues to recount the testimony of the assistant district attorney, law enforcement officer and *issuing magistrate*. The presence of testimony from the magistrate indicates that the testimony was taken

zier v. Roberts, 441 F.2d 1224 (8th Cir. 1971) (where oath not given to officer supplying supplemental information, probable cause issue restricted to affidavit).

96. OKLA. STAT. ANN. tit. 22, § 1224.1 (West 1986).

97. 598 P.2d 254 (Okla. Crim. 1979).

98. *Id.* at 257.

99. OKLA. STAT. ANN. tit. 22, § 1224.1 (West 1986).

100. 567 P.2d 512 (Okla. Crim. 1977).

101. *Id.* at 514 (emphasis added).

during a suppression hearing. In other words, the oral testimony was never recorded or transcribed in the manner required by statute.

In addition to the fact that the statute requires and clearly contemplates recording the testimony given *before the issuing magistrate*, the court failed to appreciate the danger of fading memories over critical facts. Even more serious is the opportunity for the state's witnesses to embellish their version of the initial facts. This interpretation of the statute is erroneous and permits a trial or appellate court to justify the probable cause determination by facts and evidence discovered while executing the warrant.¹⁰²

C. Telephone Warrants

A few state jurisdictions have established a modern trend in allowing a magistrate to issue a search warrant over the telephone.¹⁰³ Pursuant to this procedure in Oklahoma, the magistrate may take an oral statement from an affiant who is not in his presence. The statute requires that the affiant be under oath, and that his statement be contemporaneously recorded by electronic means.¹⁰⁴ The transcript and the original recording are filed with the official records in the case.¹⁰⁵ The transcribed statement substitutes for the constitutional and statutory requirement of presenting a sworn "affidavit" to the magistrate.

In addition to the "affidavit by telephone," another statute provides the operative procedure to secure a warrant when the affiant is not in the presence of the magistrate.¹⁰⁶ Upon approving the issuance of a warrant, the magistrate prepares an original warrant and records the "exact time" of issuance.¹⁰⁷ He then authorizes the officer applying for the war-

102. For an excellent articulation of a similar position, see *Boyer v. Arizona*, 455 F.2d 804, 807-09 (9th Cir. 1972) (Ely, J., dissenting).

103. ARIZ. REV. STAT. ANN. § 13-3914.C (1978); *id.* at § 13-3915.C (Supp. 1988); CAL. PENAL CODE § 1526(b) (West 1982); OKLA. STAT. ANN. tit. 22, § 1225(B) (West 1986); UTAH CODE ANN. § 77-23-4(2) (1982).

104. OKLA. STAT. ANN. tit. 22, § 1225(B) (West 1986).

105. *Id.*

106. *Id.*

107. *Id.*

rant to prepare a duplicate warrant and to sign the magistrate's name on the copy.¹⁰⁸ The copy is regarded as the operative search warrant for all other pertinent purposes of law.

There have been several arguments advanced against the constitutionality of telephone warrants.¹⁰⁹ Most are interesting in theory; however, none are compelling. *United States v. Turner*¹¹⁰ is an instructive case and serves as an example of current judicial reasoning. The court rejected the argument that the fourth amendment framers never contemplated telephone warrants and considered the face-to-face oath and testimony as critical components of the warrant process. In rejecting the proposition, the court held that the fourth amendment is flexible enough for modern technological developments and that an oath over the telephone retains the same "moral, religious and legal significance" of the more common face-to-face one.¹¹¹

D. Multiple Affidavits or Documents

A magistrate is not limited to considering a single affidavit in determining probable cause. In addition to considering supplemental oral testimony, he may also consider two or more affidavits or documents in his assessment.¹¹² The question in such cases is whether all of the documents, considered together, establish probable cause. The practice of using multiple affidavits is common and far superior to having all of the affiants sign a single one that "pools" their knowledge. The latter procedure allows a successful objection by the defend-

108. *Id.*

109. See Comment, *Oral Search Warrants: A New Standard of Warrant Availability*, 21 U.C.L.A. L. REV. 691, 701-05 (1973).

110. 558 F.2d 46 (2d Cir. 1977).

111. *Id.* at 50-51.

112. *United States v. McCoy*, 781 F.2d 168 (10th Cir. 1985) (Federal Rules of Evidence do not prohibit federal warrant from incorporating affidavit of city police); *State v. Boushee*, 284 N.W.2d 423 (N.D. 1979) (warrant upheld where it refers by name to only one of two affidavits where both were attached to warrant).

ant that no single affiant possesses all of the relevant facts set out in the affidavit.¹¹³

Most of the litigation in this area concerns the procedure of incorporating by reference other unsworn statements or documents. A typical argument of the defendant is that these materials should not be considered because they have not been sworn to separately. Courts have rejected this position and held that the incorporation procedure is consistent with the commands of the fourth amendment.¹¹⁴

The defense counsel's main line of inquiry in these situations is to establish exactly which documents had been presented to the magistrate. Any document that was originally not shown to the magistrate, but was used by the prosecution in an attempt to show probable cause, constitutes improper bolstering and cannot be considered by the reviewing court. In this regard, a search warrant occasionally may refer to a single sworn affidavit and not incorporate any facts from a second, unsworn affidavit. Absent testimony that the magistrate actually considered both, the warrant may prove defective if the single, sworn affidavit was insufficient to establish probable cause.¹¹⁵

IV. PROBABLE CAUSE

A. In General

The fourth amendment requires that "no Warrants shall issue, but upon probable cause."¹¹⁶ Therefore, a search warrant may not be constitutionally issued by a magistrate unless the facts and allegations presented to him rise to the level of "probable cause."¹¹⁷ The showing required by the fourth amendment is not one of proof so much as probability. To find probable cause it is unnecessary that the proof implicate

113. *Masiello v. United States*, 304 F.2d 399 (D.C. Cir. 1962) (affidavit of two police officers deemed sufficient where it was possible to tell what was sworn to as personal knowledge of at least one of the officers).

114. *People v. Campbell*, 678 P.2d 1035 (Colo. Ct. App. 1983); *Terry v. State*, 666 P.2d 1305 (Okla. Crim. 1983).

115. *Boushee*, 284 N.W.2d at 429.

116. U.S. CONST. amend. IV.

117. *United States v. Harris*, 403 U.S. 573, 579-80 (1971).

a certain person,¹¹⁸ or meet the standard for a guilty verdict at trial.¹¹⁹ The accepted standard holds that “[a] search warrant . . . is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place.”¹²⁰ In other words, there is a two-step process in deciding whether to issue the warrant: (1) Is there probable cause to believe the objects would be useful in a criminal prosecution; and, (2) is there probable cause to believe that the items sought are to be found at a particular place?

Probable cause must be viewed from the perspective of a reasonable police officer.¹²¹ Such a person has the benefits of training and expertise that distinguish his ability to perceive criminal evidence from that of a layman.¹²² It is undoubtedly true that a police officer’s ability to perceive suspicious conditions increases with his experience. Although this determination is certainly influenced by what acts are suspicious to a police officer, the test is one of objective reasonableness. Imputing the perspective of the police officer to a person of “reasonable” caution, the facts before the magistrate must warrant the belief of probable cause on both prongs of the test.¹²³

The United States Supreme Court has emphasized that the measurement of probable cause is neither legalistic nor technical.¹²⁴ The standard to be utilized encompasses “the factual and practical considerations of everyday life on which reasonable and prudent men . . . act The standard of proof is accordingly correlative to what must be proved.”¹²⁵ In a more recent decision the Court stated that the guideline for a magistrate was “simply to make a practical, common-sense decision whether, given all the circumstances set forth in the

118. *United States v. McNally*, 473 F.2d 934 (3d Cir. 1973), *aff’d*, 491 F.2d 751, *cert. denied*, 417 U.S. 948 (1974).

119. *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

120. *Stegald v. United States*, 451 U.S. 204, 213 (1981).

121. *United States v. Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972) (probable cause found where experienced police officer observed suspicious cash transaction and nervous behavior).

122. *Id.* See also *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

123. *Beck v. Ohio*, 379 U.S. 89, 96-97 (1964).

124. *Brinegar*, 338 U.S. at 175.

125. *Id.*

affidavit . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place."¹²⁶

Probable cause may be based upon evidence that will not be admissible at trial. Hearsay,¹²⁷ including a person's prior criminal record¹²⁸ and bad reputation¹²⁹ are customarily included in the application for a search warrant. Such normally inadmissible matters may properly pertain to probabilities, but are excludable at trial because of logical irrelevance and the possibility of prejudice.

This type of evidence should be distinguished from evidence that is gained through a constitutional violation. In *Michaud v. State*,¹³⁰ the Oklahoma Court of Criminal Appeals held that a search warrant was unlawful because probable cause was based on the executing officer's prior illegal search of the identical premises.¹³¹ The opinion went on to state that the tainted evidence was not only inadmissible at trial but could not be considered for any purpose.¹³² In a similar case, the court applied the same principle to a prior illegal arrest:

The search warrant, which relies in part on the identifiable money found in the possession of the defendant, James David McLemore, after his arrest, cannot be valid nor can it cure the initial illegal arrest. Based on the facts known to the arresting officers, there was no probable cause to justify an arrest.¹³³

Although the magistrate may properly consider a variety of factors from diverse sources, ultimately a search warrant's validity depends on the presence of facts. A warrant is invalid if it is based on an affidavit that is premised on speculation and suspicion.¹³⁴ The officer may possess facts that amount to

126. *Illinois v. Gates*, 462 U.S. 213, 214 (1983); *Foster v. State*, 742 P.2d 1131, 1133 (Okla. Crim. 1987) ("probable cause is a fluid concept turning on the assessment of probabilities in particular factual contexts, not readily, or even usefully, reduced to a neat set of legal rules") (quoting *Gates*, 462 U.S. at 232).

127. *Draper v. United States*, 358 U.S. 307, 311-12 (1959).

128. *Brinegar*, 338 U.S. at 173.

129. *Jones v. United States*, 362 U.S. 257 (1960).

130. 505 P.2d 1399 (Okla. Crim. 1973).

131. *Id.* at 1402.

132. *Id.* (citing *Wong Sun v. United States*, 371 U.S. 471, 485 (1963)).

133. *State v. McLemore*, 561 P.2d 1367, 1369 (Okla. Crim. 1977).

134. *Hagler v. State*, 663 P.2d 1235 (Okla. Crim. 1983).

probable cause, but he must divulge them to the magistrate at the time he applies for the warrant. The failure to present a factually sufficient basis precludes a subsequent attempt to rehabilitate the deficient probable cause.¹³⁵

The requirement of providing a factual basis for the warrant may be satisfied infrequently by the limited use of inference. In *Fritz v. State*,¹³⁶ the court addressed the propriety of using an inference to bolster the factual basis of an affidavit. The affidavit stated that certain evidence "is now located" at the defendant's residence.¹³⁷ The defendant challenged that provision as being "both conclusory and speculative, since the affiant did not actually observe the evidence at the [defendant's] residence."¹³⁸ The court utilized an inference approved in a prior case:

[T]he logical inference is that a criminal, who believes his identity has been concealed, would return clothing and property to his home. Such an inference is not certainty, but a certainty is not required. And, we are of the opinion that, at the least, a *probability existed* that the property sought was indeed at the residence of the defendant. The trial court did not err in finding that probable cause existed to believe that the listed articles were on the described premises.¹³⁹

Another method that occasionally exposes deficient warrants focuses on the requirement that the affidavit must present some basis for believing that evidence useful in prosecuting a *crime* will be found at a certain location. Some criminal activities do not possess an inherent, visible culpability. In anticipating those crimes, one can easily mistake an innocent act for the expected culpable one. This situation can be reflected in the affidavit by omitting the factual basis for suspicion. In *McCann v. State*,¹⁴⁰ an affidavit alleged that a fireman had observed three telephones and a racing form in a certain hotel

135. *Id.* at 1236-37.

136. 730 P.2d 530 (Okla. Crim. 1986).

137. *Id.* at 532.

138. *Id.*

139. *Id.* (citing *Bollinger v. State*, 556 P.2d 1035, 1039 (Okla. Crim. 1976) (emphasis in original)).

140. 504 P.2d 432 (Okla. Crim. 1972).

room.¹⁴¹ The affidavit further stated that the defendant had moved to another room and that he had a record as a bookmaker and gambler.¹⁴² The court held the warrant defective and explained in detail why the allegations were wholly insufficient to cast suspicion that criminal activity was occurring at the location.

There were no allegations in the affidavit as to how it was determined that C.L. Lewis was the defendant. Nor were there allegations as to what constituted the "record" of defendant as a gambler and bookmaker. There was nothing in the affidavit . . . which would indicate that the defendant had ever been convicted of gambling or bookmaking.

. . . .

The racing form seen by the fireman was . . . the normal newspaper-type. The affiant-officer related that this type racing form could legally be purchased at newsstands. The racing form itself was not an illegal item. This observation by the fireman in Room 805 of these lawful items, without more, does not provide probable cause to believe a crime was being committed. This is quite different from a situation where contraband such as firearms or narcotics are observed.

Even if the items in Room 805 indicated possible criminal activity, they do not provide reasonable cause to believe that there was likewise criminal activity in Room 600. The affidavit did not allege that the telephones had been moved from Room 805 to Room 600, only that the occupant moved. Cause to search one place is not necessarily cause to search another place.¹⁴³

One of the most important concepts in the area of search warrant probable cause is that of "severability." The *McCann* case serves as an example of how a court can view an affidavit as a puzzle of many pieces. The more certain parts of the affidavit do not incriminate a location or person, the less significance that the particular allegation will have in the ultimate decision on probable cause. Moreover, the degree of culpability or factual nexus a part of the affidavit has to certain items

141. *Id.* at 433.

142. *Id.* at 434.

143. *Id.* at 435.

may be determinative of the legality of the search with respect to those objects.

In *Norris v. State*,¹⁴⁴ a search warrant was issued to seize both films and business records of a theater exhibiting obscene motion pictures. The court upheld the warrant with respect to the films but separated that portion from the conclusory statement alleging that business and personal records were present on the premises.

After carefully reviewing the affidavit, we find it to be inadequate to establish probable cause for the search and seizure of "the records pertaining to the operation of the 23rd Street Cinema X" or "items of personal property which tend to establish" its ownership. The affidavit is devoid of any factual allegations or possible inferences that records or personal property tending to establish ownership were present at the 23rd Street Cinema X.¹⁴⁵

The court went on to hold that the "records" provision of the warrant was defective, but was severable from the "films" part.¹⁴⁶

The strategy of a defense attorney in these situations is to test each item sought in the warrant for probable cause. The unavailability of a part of the prosecution's case may well prove to be decisive in either the plea bargaining stage or trial stage of the case. Moreover, the court clearly indicated that the state would not be allowed the privilege of serving certain portions when the warrant could be fairly construed as general in nature. Such an abuse of the warrant clause should be suspected when the affidavit is particular only to minor items, but the executing officers make a wholesale seizure of numerous articles under the warrant.¹⁴⁷

B. Informants

1. Confidential Informants

Many search warrants are based in whole, or part, on information supplied by an informant. An informant is usually

144. 640 P.2d 1374 (Okla. Crim. 1982).

145. *Id.* at 1375.

146. *Id.* at 1376.

147. *Id.* See also *Kinsey v. State*, 602 P.2d 240 (Okla. Crim. 1979).

classified as a fellow police officer,¹⁴⁸ a citizen¹⁴⁹ or a confidential informant. The confidential informant is regarded as the least trustworthy of the group and is the focus of an entire branch of procedural law. These individuals routinely supply information to the police for favors and money. The vast majority of them move freely within the criminal element and usually have done so over a period of time. It is because of these factors that information supplied by them and used as the basis of a warrant has been tested more strictly than that gained from other more reliable sources.

In 1983, the United States Supreme Court abandoned the traditional *Aguilar-Spinelli* standard that guided magistrates and courts for twenty years in assessing the information provided by confidential informants. In *Aguilar v. Texas*,¹⁵⁰ the Court developed a two-pronged test to analyze the sufficiency of probable cause. First, the "magistrate must be informed of some of the underlying circumstances" regarding how the informant retained his information.¹⁵¹ Second, facts should be presented to the magistrate that disclose "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'"¹⁵² These two prongs simply guaranteed that sufficient facts are disclosed to the magistrate to allow a neutral and reliable determination of the probable cause issue.

In *Illinois v. Gates*,¹⁵³ the United States Supreme Court formally cast aside this standard in exchange for one that emphasized the totality of circumstances. In explaining the change of analysis, the Court stated that:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contra-

148. See *infra* text accompanying notes 171-76.

149. See *infra* text accompanying notes 177-86.

150. *Aguilar*, 378 U.S. 108 (1964).

151. *Id.* at 114.

152. *Id.*

153. 462 U.S. 213 (1983).

band or evidence of a crime will be found in a particular place.¹⁵⁴

The Court further stated that “probable cause is a fluid concept — turning on the assessment of probabilities . . . not readily, or even usefully, reduced to a neat set of legal rules.”¹⁵⁵ The dual prongs of the *Aguilar* test were deemed “highly relevant” and useful to “illuminate the common sense, practical question whether probable cause existed.”¹⁵⁶ Thus, the use of the *Aguilar* inquiries has been changed from the formal two-step process into one where they simply make up part of the mass of facts and allegations in the affidavit.

The “veracity” and “basis of knowledge” prongs may be used alternatively to bolster the other’s factual insufficiency in an attempt to find probable cause. Justice Rehnquist explained that “a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.”¹⁵⁷ This appears to be founded on the assumption that some facts are presented on each prong’s inquiry. For instance, it would be untenable to suggest that a warrant should be issued when an informant was shown to be credible, but asserted absolutely none of the underlying circumstances as to how he obtained his information.¹⁵⁸

The *Gates* case also puts a premium on the “corroboration of details of an informant’s tip by independent police work.”¹⁵⁹ This corroboration may be of innocent activity that is not inherently suspicious. In reversing the Illinois Supreme Court, the majority opinion in *Gates* emphasized how the verification of innocent behavior may justify a finding of probable cause:

154. *Id.* at 238.

155. *Id.* at 232.

156. *Id.* at 230.

157. *Id.* at 233.

158. The Court obviously recognizes this exception when it later adds that a “wholly conclusory statement” remains insufficient to establish a substantial basis for believing that probable cause exists. *Id.* at 239 (citing *Nathanson v. United States*, 290 U.S. 41, 46 (1933)).

159. 462 U.S. at 241.

[T]herefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens' demands [T]he relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of non criminal acts.¹⁶⁰

The final step in the reorganization of the informant's place in the probable cause calculus was to discourage appellate review of the magistrate's decision. The *Aguilar* test at least had the advantage of being capable of review at the appellate court level. Not only has that test been struck down, but the Court has instructed lower courts that their duty on review is simply to ensure that "the magistrate had a 'substantial basis for . . . conclud[ing]' "¹⁶¹ that probable cause existed.

A state court is required to follow the *Gates* rationale only with respect to the federal constitution's requirement of probable cause. It remains free to interpret its own state constitution in a manner consistent with the prior *Aguilar* standard. As long as a state affords more, and not less, protection to the rights of a criminal defendant under its state constitution, it will not violate any federal constitutional standards.

In *Commonwealth v. Upton*,¹⁶² the Supreme Judicial Court of Massachusetts reconsidered, on remand, its earlier decision in *Massachusetts v. Upton*.¹⁶³ The United States Supreme Court had reversed the first *Upton* decision on the basis that the *Gates* standard of probable cause had been satisfied under the "totality of circumstances" test.¹⁶⁴ On remand, the court rejected the *Gates* test on the basis that it was unac-

160. *Id.* at 242 n.13 (citations omitted).

161. *Id.* at 236. See also Kamisar, *Gates*, "Probable Cause," "Good Faith," and Beyond, 69 IOWA L. REV. 551 (1984); LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171 (1983); Moylan, *Illinois v. Gates: What It Did and What It Did Not Do*, 20 CRIM. L. BULL. 93 (1984).

162. 394 Mass. 363, 476 N.E.2d 548 (1985).

163. 466 U.S. 727 (1984).

164. *Id.* at 734.

ceptably meaningless and permissive.¹⁶⁵ The court pointed out that the "totality of circumstances" test was widely accepted in constitutional jurisprudence, but was never applied when a "more definite, universal standard could reasonably be developed."¹⁶⁶

The Massachusetts court went on to hold that principles established in *Aguilar* and *Spinelli v. United States*¹⁶⁷ would provide the appropriate framework for probable cause determinations under the state constitution.¹⁶⁸ In view of the twenty-years of successful reliance by all parties on the *Aguilar* standard, the court refused to extend the *Gates* analysis to the state constitution.¹⁶⁹ Thus, the *Upton* decision formulates the critical strategy for challenging the validity of probable cause in search warrants — suppression arguments should be grounded in both the federal and state constitutions. As *Upton* points out, *Gates* controls only the federal fourth amendment issue.¹⁷⁰

2. Information from Police

Fewer problems are presented when the information relied on in the warrant was based on the statements or observations of police officers. The United States Supreme Court has sanctioned the use of this information by proclaiming, "Observations of fellow officers . . . engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."¹⁷¹ In practice, this approach relieves the state from being forced to demonstrate the reliability or credibility of a person named on the face of the war-

165. 476 N.E.2d at 556.

166. *Id.*

167. 393 U.S. 410 (1969) (explicating the *Aguilar* prongs and rejecting the "totality of circumstances" approach).

168. *Upton*, 476 N.E.2d at 556.

169. *Id.* at 557.

170. For commentaries on the use of state constitutional law, see Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); Williams, *In The Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353 (1984); Symposium: *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985).

171. *United States v. Ventresca*, 380 U.S. 102, 111 (1965).

rant.¹⁷² In *Caffey v. State*,¹⁷³ the defendant alleged that the police officer-informant had no inherent credibility and had to satisfy the traditional *Aguilar* two-pronged test. The Oklahoma Court of Criminal Appeals did not agree:

[W]hen the affidavit is based upon specific factual information given by a named and known informant, and not the tip of an undisclosed informant, details reflecting his reliability and the credibility of his information are unnecessary Not only is Officer Johnson's name clearly evident on the face of the affidavit, but the affidavit is also supported by information received from the Kansas police officer, Robert Garten.¹⁷⁴

There exists one area that can give rise to errors when the affidavit is based on information supplied by other police officers. This situation occurs when the source or informant does not have the knowledge or facts that the affiant swears that he does. This problem was analyzed in the case of *Whiteley v. Warden*,¹⁷⁵ where a police officer made an arrest based on a police bulletin that an arrest warrant had been issued. The United States Supreme Court held that the police officer was entitled to act upon the bulletin in good faith, but that the original warrant had to be valid. Upon finding the warrant to be defective, the Court reasoned that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest."¹⁷⁶ Thus, the affiant may be relying in good faith on his fellow officer, but the prosecution must satisfy all the requirements of the fourth amendment with respect to the search warrant — including probable cause.

3. Citizens as Victims, Witnesses or Participants

The final category of informant is that of the layman or citizen. The use of the term "citizen" does not exclude aliens, but refers to that vast class of persons who are neither confi-

172. *Wright v. State*, 552 P.2d 1157 (Okla. Crim. 1976).

173. 661 P.2d 897 (Okla. Crim. 1983).

174. *Id.* at 900.

175. 401 U.S. 560 (1971).

176. *Id.* at 568.

dential informers nor police officers. A person in this class gains information relevant to a search warrant by either being the victim of a crime or witness to a crime or criminal evidence. In *Jaben v. United States*,¹⁷⁷ the United States Supreme Court declared that witnesses who had knowledge of the defendant's activities were presumed credible because they "are much less likely to produce false or untrustworthy information."¹⁷⁸

Oklahoma has developed an approach consistent to *Jaben* by routinely holding that when a citizen-informant is identified by name in the affidavit, it is not necessary to set forth details about his reliability or credibility.¹⁷⁹ Both a victim of a crime¹⁸⁰ and a citizen-informant¹⁸¹ carry sufficient indicia of reliability and credibility of information.

The final class of citizen-informant is the person who makes a declaration against his penal interests. These admissions by an informant "carry their own indicia of credibility."¹⁸² In these cases some nexus is normally required between the admission and the activity or property mentioned in the search warrant affidavit. For example, in *McGee v. State*,¹⁸³ the affidavit contained a named informant who "was also an admitted participant in the theft and transportation of the stolen property."¹⁸⁴ The factual nexus is critical because an admission to an *unrelated* crime has no logical connection to the allegations in the affidavit and carries no presumption of credibility.

One area that the defense counsel should explore is the citizen-informant's motivation in coming forth with the information. Occasionally, an informant may admit that he or she has a grudge against the defendant. It seems obvious that, at

177. 381 U.S. 214 (1965).

178. *Id.* at 224. *See also* *State v. Paszek*, 50 Wis.2d 619, 184 N.W.2d 619 (1971).

179. *Caffey v. State*, 661 P.2d 897, 900 (Okla. Crim. 1983).

180. *Bollinger v. State*, 556 P.2d 1035 (Okla. Crim. 1976) (victim of crime is not confidential informant and underlying circumstances of credibility and reliability need not be recited in warrant).

181. *Wright v. State*, 552 P.2d 1157 (Okla. Crim. 1976) (where citizen informant gives specific factual information, affidavit need not comply with *Aguilar-Spinelli* standards).

182. *United States v. Harris*, 403 U.S. 573, 583 (1971).

183. 645 P.2d 529 (Okla. Crim. 1982).

184. *Id.* at 530.

least in some cases, there should be no presumption of the informant's credibility when he is not simply reporting what he saw, but doing so because of his motivation to seek revenge against the accused. Moreover, the informant is not susceptible to a perjury charge because he is not the affiant before the magistrate. Further, he does not fit within a declaration against penal interests because there is not a nexus established with the facts in the affidavit. It is in precisely this type of case that the *Gates*¹⁸⁵ case may prove crucial. If the facts given by the informant were detailed and accurate, the "basis of knowledge" prong may be used to compensate for the lack of credibility established by his ulterior motive.¹⁸⁶

C. *Informer's Privilege*

In order to establish that a confidential informer has some credibility the affiant will sometimes allege that he has given the police past information that has led to convictions. This allegation has been held sufficient to establish an informer's credibility, and has become commonplace in search warrants. On occasion, defense counsel may have doubts about the accuracy of these allegations — or even the existence of the alleged informer.

In *McCray v. Illinois*,¹⁸⁷ the United States Supreme Court held that a defendant has no "right" to force the prosecution to disclose the identity of the confidential informer. The reasoning of the Court was that the informer's testimony related only to probable cause and had no bearing on guilt or innocence.¹⁸⁸ The *McCray* decision obviously prevents, in most cases, a defendant from forcing the state to disclose the informant's identity.

There are situations when the defendant may wish to "go behind" the affidavit¹⁸⁹ in an attempt to force the prosecution to produce the informant. The *McCray* decision does not bar the trial court from ordering the state to produce the informant — it merely confirms that the defendant has no right to

185. 462 U.S. 213 (1983).

186. See *supra* text accompanying notes 156-58.

187. 386 U.S. 300 (1967).

188. *Id.* at 305.

189. See *infra* text accompanying notes 193-211.

force disclosure in each case. One tactical advantage in obtaining disclosure may be to force the state to dismiss the case because the informant's identity is too crucial to other pending investigations or cases.

In addition to this possible advantage, the defense may be able to force the state to admit that there was no informant in the first place. Many experienced attorneys believe that the "phantom" informant is employed when the police have a suspicion that a particular place harbors criminal evidence, but do not have the requisite proof for probable cause. The "phantom's" statement to the affiant is then recited in the affidavit along with his usual excellent history of providing good tips. This technique bootstraps the officer's initial suspicion into probable cause by running it through the invisible informant. One method that may disclose such a situation is to ask the defendant if anyone has been in his home or viewed the objects. At least in a few cases, the accused may possess sufficient credibility or proof¹⁹⁰ to convince the judge that the state should be required to prove the existence of the informant.

The most plausible method of proceeding is to move the court to order that the information be produced *in camera*. In *People v. Darden*,¹⁹¹ such a procedure was approved in New York.

The prosecution should be required to make the informer available for interrogation before the Judge. The prosecutor may be present but not the defendant or his counsel. Opportunity should be afforded counsel for defendant to submit in writing any questions The Judge should take testimony, . . . and make a summary report . . . [which] should be made available to the defendant . . . and the transcript

190. For example, the existence and possession of a single door key may prove to be persuasive evidence that the informant never had access to the premises. Such testimony by the defendant at the suppression hearing is not admissible against him for guilt or innocence purposes. *Simmons v. United States*, 390 U.S. 377 (1968). Such testimony may be used against the defendant for impeachment purposes if he chooses to testify. *Harris v. New York*, 401 U.S. 222 (1971); *United States v. Salvucci*, 448 U.S. 83 (1980).

191. 34 N.Y.2d 177, 313 N.E.2d 49 (1974).

of testimony . . . sealed [for] . . . the appellate courts
¹⁹²

This method allows the trial court to exercise its discretion in a proper case, but emphasizes the court's right to make an appropriate inquiry. In addition, the *in camera* proceeding protects the anonymity of the informant thus satisfying the prosecution's main concern.

D. Challenging Probable Cause Affidavits

The accepted method of challenging the magistrate's decision on probable cause is to attack the sufficiency of the affidavit on its face. Assuming that the court upholds its facial sufficiency, the defendant may seek to "go behind" the affidavit to challenge the truth or accuracy of the statements contained therein. The United States Supreme Court ruled in *Franks v. Delaware*,¹⁹³ that such challenges were permissible on occasion because the initial probable cause hearing was conducted *ex parte* and in great haste.¹⁹⁴ The Court cited other reasons, but it was clear that the most important purpose was the recognition that the defendant should have one meaningful opportunity to test the probable cause decision.¹⁹⁵

In outlining the requirements necessary to make such a challenge, the Court stated that the attack "must be more than conclusory" and "must be allegations of deliberate falsehood or of reckless disregard for the truth."¹⁹⁶ The allegations "must be accompanied by an offer of proof" that "point[s] out specifically the portion of the . . . affidavit that is claimed to be false" along with a statement supporting the assertion.¹⁹⁷ The defendant's statement should be accompanied by "[a]ffidavits or sworn or otherwise reliable statements of wit-

192. 34 N.Y.2d at 181, 313 N.E.2d at 52. For similar procedures in other jurisdictions, see *Commonwealth v. Bonasorte*, 337 Pa. Super. 332, 486 A.2d 1361 (1984) (defendant may obtain production of informant where it is material to defense, reasonable, and in the interest of justice); *People v. Dailey*, 639 P.2d 1068 (Colo. 1981) (disclosure of informant's identity proper where relevant or helpful to the defense and essential to a fair determination of the case).

193. 438 U.S. 154 (1978).

194. *Id.* at 169.

195. *Id.* at 168.

196. *Id.* at 171.

197. *Id.*

nesses . . . or their absence satisfactorily explained.”¹⁹⁸ Mere allegations of “negligence or innocent mistake” should be regarded as insufficient to meet this threshold inquiry.¹⁹⁹ Impeachment is allowed only to the extent that it is “of the affiant, [and] not of any nongovernmental informant.”²⁰⁰

If the defendant satisfies these requirements, a hearing is necessary only when the alleged false statement is necessary to the finding of probable cause.²⁰¹ The evidence will be suppressed only when the defendant proves perjury or reckless disregard, and when the affidavit’s false material is set to one side, the remaining content is insufficient to establish probable cause.²⁰²

The Oklahoma Court of Criminal Appeals has typically upheld the trial courts’ decisions in refusing to grant hearings under the *Franks* doctrine. In so doing, it has provided few clues as to what constitutes the substantial preliminary showing required. In *Bishop v. State*,²⁰³ the court noted that a proffered statement of one of the informants was both undated and unsworn.²⁰⁴ It went on to comment that although the statement of the informant indicated that he had admitted lying to the police it was “witnessed by the defendant’s mother, step-brother, and girlfriend.”²⁰⁵ Therefore, it seems that the defendant should present sworn statements before neutral witnesses or convincingly explain to the court why this was not possible. *Franks* presented a most difficult hurdle and the defense counsel would be advised to follow each requirement to the letter — including an explanation as to how the false testimony was crucial to a finding of probable cause by the magistrate.²⁰⁶

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 171-72.

202. *Id.*

203. 605 P.2d 260 (Okla. Crim. 1979).

204. *Id.* at 263.

205. *Id.*

206. See *Hines v. State*, 684 P.2d 1202, 1204 (Okla. Crim. 1984) (defendant failed to establish falsity or reckless disregard by a preponderance of evidence); *Lee v. State*, 661 P.2d 1345, 1353 (Okla. Crim. 1983) (misstatement not within knowledge of affiant and does not affect integrity of warrant).

Other jurisdictions have considered the *Franks* doctrine and recourse may be made to those in an effort to supplement the sparse Oklahoma decisions.²⁰⁷ For instance, the *Bishop* decision could be contrasted with *United States v. Cortina*,²⁰⁸ which struck down the search warrant when neutral evidence verified that the informant did not make the allegations represented by the affiant in the affidavit. Further, there exists sufficient case authority under *Franks* that the affiant may not: (1) take language from another affidavit to make it appear that informant was speaking to him,²⁰⁹ (2) assert facts that are reputed to be within his personal knowledge, but are not,²¹⁰ or (3) mischaracterize material statements.²¹¹

E. Facial Challenges to Staleness and Anticipation

Facial challenges to the validity of a warrant assert that probable cause is not demonstrated from a reading of the warrant and affidavit. A substantial number of these challenges arise because the concept of "probable cause to search" requires attention to a temporal element. The justification for issuing a search warrant and invading the privacy of someone's residence or business is the notion that evidence of a crime may be *presently* found at the particular situs. Since the element of timeliness enters into the question, the type of criminal activity and the kind of evidence sought become acutely important.

These factors were summarized quite succinctly by a state court in *Andresen v. State*:²¹²

The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (change encounter in the night or regenerating conspiracy?),

207. For commentaries on impeaching a facially sufficient affidavit, see Herman, *Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit*, 36 OHIO ST. L.J. 721 (1975); Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839 (1974).

208. 630 F.2d 1207, 1213 (7th Cir. 1980).

209. *United States v. Davis*, 714 F.2d 896, 899 (9th Cir. 1983).

210. *State v. Claxton*, 122 Ariz. 246, 594 P.2d 112 (Ariz. Ct. App. 1979).

211. *United States v. Namer*, 680 F.2d 1088, 1092-94 (5th Cir. 1982).

212. 24 Md. App. 128, 331 A.2d 78 (Md. Ct. Spec. App. 1975), *aff'd sub nom.*, *Andresen v. Maryland*, 427 U.S. 463 (1976).

of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. . . . The hare and the tortoise do not disappear at the same rate of speed.²¹³

Identical considerations have proven crucial when the defendant has alleged that probable cause was not present due to the staleness of the information. For example, most courts have consistently required an affidavit to reflect when certain observations were made or information obtained. For example, in *Warthen v. State*²¹⁴ the court held that an affidavit which failed to state the time that the defendant allegedly possessed marijuana rendered the warrant defective.²¹⁵

Another important consideration is whether the criminal activity is a continuing enterprise or simply an isolated incident that occurred one time. If the crime was part of an ongoing enterprise, a court is more likely to recognize that the contraband or evidence will probably continue to be on the premises in question.²¹⁶ Perhaps the central concern of the appellate courts has been the presence of a recitation of facts in the affidavit that allows the magistrate to make a correct determination that probable cause presently exists. Loansharking, drug dealing and prostitution are all continuing criminal enterprises, but the naked, conclusory allegation that a defendant is involved in such an activity amounts to nothing.

213. *Id.* at 172, 331 A.2d at 106.

214. 557 P.2d 466 (Okla. Crim. 1976).

215. *Id.* at 467. *See, e.g.*, *Simon v. State*, 515 P.2d 1161 (Okla. Crim. 1973); *Jarvis v. State*, 507 P.2d 918 (Okla. Crim. 1973); *Guthrey v. State*, 507 P.2d 556 (Okla. Crim. 1973); *Griffin v. State*, 503 P.2d 567 (Okla. Crim. 1972).

216. *See generally* *United States v. Bruner*, 657 F.2d 1278 (D.C. Cir. 1981) (information several months old did not render probable cause stale where defendant admitted to informant that he had sold drugs for six years and would always use premises for that purpose); *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980) (three month old information from informant did render warrant defective where defendant was observed in activity six days before issuance); *State v. Cavegn*, 356 N.W.2d 671 (Minn. 1984) (information not stale where drug sales were ongoing and police had to delay execution in order not to compromise the informant); Comment, *A Fresh Look at Stale Probable Cause: Examining the Timeliness Requirement of the Fourth Amendment*, 59 IOWA L. REV. 1308, 1311 (1974).

Facts must be put forth, together with relevant dates of occurrences, for the warrant to have a factual basis.

An example of this problem is seen in *Roberts v. State*,²¹⁷ which involved the crime of concealing stolen property. The court considered the timeliness of a search warrant issued some twenty-three days after the defendant allegedly used a stolen credit card at a local business. The question in this case was whether the crime of concealing stolen property is one which has a continuing character. In other words, does there exist an inherent quality to the crime that would lead one to believe that the accused remains in possession of the property? That issue cannot be answered without recourse to the type of property being concealed. This was not the possession of a rare painting by a wealthy collector, but concealment of a common credit card by one who actively used it. The court recognized this distinction when it held:

There is no positive statement in the Affidavit that Officer Tash, or any other person, observed the stolen credit card on the described premises, but assuming that the card had been observed on the premises on the date of the commission of the crime, we are of the opinion the lapse of twenty-three (23) days would be too remote in time to expect Larry David Roberts to retain possession of the credit card on the premises. In this age of rapid communication, it is not logical to assume that a person using a stolen credit card would retain it in his possession, or attempt to use it, after the lapse of this period of time.²¹⁸

In addition to finding that the crime was not inherently continuing, the opinion noted that there had been no observation of the stolen card on the premises. This comment, although negative in substance, points out the correct method to establish timeliness. If there had been an assertion that the card had been seen on the premises a few days, or a week, before the application, the warrant would probably have been held valid. The requisite temporal nexus to the time of the application for the warrant would have been established. This demonstrates how the entire issue has shifted from the inherent

217. 506 P.2d 613 (Okla. Crim. 1973).

218. *Id.* at 615.

nature of the criminal activity to the logical or common sense question of whether that *particular type* of property would remain on the premises from the date of the first account of its connection to either the premises or the defendant.

Therefore, when a court tests the affidavit for staleness, it applies a sliding scale list of inquiries. Even though the crime or evidence sought may not have continuing characteristics, recent observations by a police officer or an informant may extend the viability of probable cause beyond that which it ordinarily would have been. As an illustration, in *Bishop v. State*²¹⁹ two individuals observed marijuana in the defendant's residence seven days before the warrant was executed.²²⁰ Such an observation would not positively determine the existence of present probable cause unless the quantity of marijuana was so large a person could not consume it within a week.²²¹ The important additional factor in *Bishop* was that one of the informants purchased a quantity of marijuana from the defendant at his residence only one day before the warrant was issued.²²² Thus, the pertinent time period was reduced to a mere day and the issue of staleness was mooted.

In summation, the problems presented by staleness should merit special precaution by both the prosecution and defense counsel. The determination of probable cause remains a judgment of the totality of circumstances, but the issue of staleness concerns the relevant timeliness of the belief that such property remains on the premises. Recognized as such, it constitutes an additional dimension to the probable cause calculus.

Another problem infrequently encountered is the question of "anticipatory" warrants or "prospective" probable cause. This arises most often in searches for drugs when there exists information that a delivery will be made to a specific address at a certain time. The issue is that there exists no

219. 605 P.2d 260 (Okla. Crim. 1979).

220. *Id.* at 263.

221. *People v. David*, 119 Mich. App. 289, 326 N.W. 2d 485 (1982) (controlled buy of drugs at premises is insufficient to establish probable cause for warrant three days later); *State v. Boneventure*, 374 So.2d 1238 (La. 1979) (no probable cause shown where affiant merely stated a quantity of marijuana was offered for consumption at defendant's residence).

222. *Bishop*, 605 P.2d at 263.

probable cause to believe that the contraband is presently located at the place named in the affidavit. This situation presents the opposite problem as staleness.

Lower courts uniformly have held that anticipatory warrants do not violate the strictures of the fourth amendment.²²³ The preferred rationale that serves to validate these warrants is the policy underlying the exclusionary rule. "The entire thrust of the exclusionary rule . . . is to encourage the use of search warrants."²²⁴ The argument goes that it is far better to encourage the use of the warrant process by law enforcement than to litigate a *post hoc* judgment of a police officer at the scene.²²⁵ The traditional explanation advanced is that present possession is not determinative because "present possession is only probative of the likelihood of future possession."²²⁶ Thus, when an anticipatory warrant is issued, "the certainty of future possession is greater or is often greater than that based on information of past . . . possession."²²⁷

The foremost consideration in issuing anticipatory warrants is the probable contingency of the future event that has not transpired. For example, a delivery of drugs may be completed by the United States mail, United Parcel Service, informant, etc. — the possibilities are seemingly endless. In each of these situations, the magistrate must find that there exists an actual probability that the items will be present on the premises. Mere speculation that the property will be present on the premises should render the warrant defective.²²⁸

223. *State v. Gutman*, 670 P.2d 1166, 1170-74 (Alaska 1983) (warrant upheld where drug deal with informant occurred on same day); *Commonwealth v. Soares*, 384 Mass. 149, 424 N.E.2d 221 (1981) (warrant upheld after package known to contain drugs arrived at scene as predicted).

224. *Alvidres v. Superior Ct.*, 12 Cal. App.3d 575, 581, 90 Cal. Rptr. 682, 685 (1970).

225. *Id.* at 581, 90 Cal. Rptr. at 686.

226. *People v. Glen*, 30 N.Y.2d 252, 258, 282 N.E.2d 614, 617, 331 N.Y.S.2d 656, 661 (1972) (statutory requirement of "forthwith" execution did not bar anticipatory warrants).

227. *Id.*

228. *See, e.g., United States ex rel. Campbell v. Rundle*, 327 F.2d 153, 162-63 (3d Cir. 1964) (possession of lawful instruments that may be used to procure abortion does not establish probable cause); *United States v. Roberts*, 333 F. Supp. 786, 787 (E.D. Tenn. 1971) (probable cause established where informant's tip later corroborated by officer); *State v. Berge*, 130 Ariz. 135, 634 P.2d 947 (1981) (no probable cause

The magistrate must examine the affidavit for facts that reveal how the affiant knows that the property will be located at the place described. Common examples that have proved sufficient are that the property is currently in the possession of the Postal Service,²²⁹ a police informant will conclude a transaction for drugs on a certain day at the defendant's house,²³⁰ and where the defendant was known to be picking up specified documents on a certain day.²³¹ Under normal circumstances, the defense counsel should carefully check the probability of the contingent even for its speculative nature. If the event in question did take place, the focus should be on the question of whether any significant deviation occurred from that outlined in the affidavit. The delivery of an arguably different looking package, or perhaps the occurrence of an intervening event may work to defeat a reasonable person's perception that the contingency actually took place. If so, the warrant should prove to be fatally defective.

V. PARTICULARITY REQUIREMENTS

A. *In General*

The fourth amendment provides that no warrants shall issue except those "particularly describing the place to be searched, and the persons or things to be seized."²³² A "search conducted pursuant to a warrant that fails to conform to the particularity requirement . . . is unconstitutional."²³³ The purposes of this requirement are to guard against the issuance of "general" warrants and to prevent the officers executing the warrant from searching the wrong premises.

The traditional view regarding the effect of an error in the particularity requirement sometimes required that the

present where package of marijuana was in possession of police when affidavit was sworn out).

229. *United States v. Outland*, 476 F.2d 581 (6th Cir. 1973) (probable cause exists as to delivery of package where magistrate told that it was presently in hands of United States Postal Service).

230. *Gutman*, 670 P.2d 1166, 1170-74.

231. *Mehrens v. State*, 138 Ariz. 458, 675 P.2d 718 (Ct. App. 1983), *cert. denied*, 469 U.S. 870 (1984).

232. U.S. CONST. amend. IV.

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

warrant be held unconstitutional and the evidence suppressed.²³⁴ A few years ago, the United States Supreme Court adopted a good faith exception²³⁵ to the exclusionary rule in search warrant cases.²³⁶ Thus, the question of suppression in the violations discussed below will be controlled by the newer standard that recognizes that "a warrant may be so facially deficient — i.e., in failing to particularize the place to be searched or the things to be seized — that the executing officers cannot reasonably presume it to be valid."²³⁷ It will take more litigation on this issue before definitive answers can be given to most of these problems dealing with particularity. It seems clear, though, that police officers are much more thoroughly trained in modern times, and the concept of a "reasonable" police officer certainly encompasses a passable education of the warrant requirements. In Oklahoma, the publication of the Search Warrant handbook for Oklahoma Police Officers²³⁸ places a premium on educating police officers solely on search warrants.²³⁹ As a consequence, a reviewing court should expect a higher standard on the part of law en-

234. *E.g.*, *United States v. Ventresca*, 380 U.S. 102, 105-09 (1965).

235. *United States v. Leon*, 468 U.S. 897 (1984).

236. For a more complete discussion of *Leon* see *infra* text and accompanying notes 508-36.

237. 468 U.S. at 923.

238. J. WORRELL, *SEARCH WARRANT HANDBOOK FOR OKLAHOMA PEACE OFFICERS* (1st ed. 1981).

239. The thoroughness of the educational materials is shown by the following excerpt:

3. APARTMENTS

Apartments pose more problems than do single family homes. Apartments are grouped together and many times have an identical appearance. In order to keep the officer from entering the wrong apartment, an adequate description is necessary.

It is insufficient to give just the street address of the apartment. The number of the particular apartment is necessary, such as,

"The apartment number 3G at the Colonial Arms Apartments, 2226 North Meridian, Oklahoma City, Oklahoma."

This is fine, but large apartment complexes may have many apartment buildings with individual units bearing the same numbers or letters on the doors in each building. In this event, it is recommended that a map or diagram be attached to the affidavit and warrant indicating the exact building containing the apartment to be searched. When time permits, the officers may put on civilian clothes and make a dry run in locating the apartment to be searched.

Id. at 56.

forcement officers when they prepare search warrant affidavits. Much of this law is traditional and has been available for police education for a number of years.

B. Places to be Searched

1. Premises

The most commonly litigated issue in particularity is whether there exists a variance between the description in the warrant and the actual premises in question. The majority of these cases deal with the sufficiency of the description of a single-family home. There is no particular requirement that must be included in the description of a home. The most widely employed is the street address, combined with any descriptive particulars that the affiant includes. In all cases, the constitutional guideline is that "[i]t is enough if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place identified."²⁴⁰

The Oklahoma Court of Criminal Appeals has considered several challenges to the sufficiency of search warrants in a wide variety of contexts. The longstanding guideline fashioned by the Court is "that the search warrant must so particularly describe the place to be searched that the officer can find the place without the aid of any other information save that contained in the warrant."²⁴¹ This state rule appears to be much stricter than the United States Supreme Court's standard of allowing the officer sufficient flexibility to use reasonable effort in locating the premises. Although the Oklahoma court has retained the formula of strictly construing the description in the warrant, it has routinely allowed certain types of evidence extrinsic to the warrant's face to be used in locating property.

In *Woodard v. State*,²⁴² the court rejected a challenge where the warrant and affidavit described a house located at

240. *Steele v. United States*, 267 U.S. 498, 503 (1925).

241. *McCormick v. State*, 388 P.2d 875, 874 (Okla. Crim. 1964); *Burns v. State*, 92 Okla. Crim. 24, 27, 220 P.2d 473, 475 (1950).

242. 567 P.2d 512 (Okla. Crim. 1977).

"1008-10 West 10th."²⁴³ Testimony revealed that there were two houses located at 1008 and 1010 West 10th. The police allegedly searched both houses, but found contraband only in the latter.²⁴⁴ The opinion of the court ignored the critical fact that only *one* house was the target of the search and stated that "it [was] apparent the officers had no difficulty finding the location in that they had it under surveillance throughout the night"²⁴⁵ This result is in accord with the principle that the description in the warrant can be supplemented by information contained in the affidavit²⁴⁶ or possessed by the executing officer.²⁴⁷

The court has been equally forgiving of an assortment of deficiencies in the description of premises in a search warrant. For instance, the court has stated that the owner of the premises should be named in the warrant,²⁴⁸ but consistently has held that the failure to do so is not error.²⁴⁹ In similar fashion, the use of "John Doe"²⁵⁰ or "unknown"²⁵¹ has been upheld in lieu of naming the owner. So long as the premises is described with the required particularity, the name of the owner is not necessary and even inserting the wrong name in the warrant will not render it void.²⁵²

While descriptions of homes have caused no general source of concern, there is at least one area that has been the basis of more frequent errors. This is when the home is located in a rural, rather than urban setting. The rural descrip-

243. *Id.* at 515.

244. *Id.*

245. *Id.*

246. *Gumina v. State*, 166 Ga. App. 592, 305 S.E.2d 37 (1983) (officer properly relied on address in affidavit instead of incorrect one in warrant).

247. *United States v. Clement*, 747 F.2d 460, 461 (8th Cir. 1984) (incorrect address of apartment on warrant not error where officers had been to premises previously). *E.g.*, *People v. Kilfoy*, 122 Ill. App. 3d 276, 466 N.E.2d 250 (Ill. App. Ct. 1984) (warrant upheld where address was incorrect, but there existed only one roadway in county with same name).

248. *Bowman v. State*, 73 Okla. Crim. 248, 251, 120 P.2d 373, 375 (1941).

249. *Id.* at 251-52, 120 P.2d at 375; *Hughes v. State*, 78 Okla. Crim. 240, 244, 147 P.2d 176, 178 (1944).

250. *Sanders v. State*, 76 Okla. Crim. 6, 8, 133 P.2d 562, 563 (1943).

251. *Bowman*, 73 Okla. Crim. at 252, 120 P.2d at 375.

252. *Bauwens v. State*, 657 P.2d 176, 178 (Okla. Crim. 1983).

tion is usually not susceptible to an accurate street address and requires much more detail in describing the premises.

An illustrative case is *Thomas v. State*,²⁵³ where the description simply said that “[t]he premises occupied by Geo. Thomas and known as the old Charlie Spear home and located in the south part of Lehigh, Coal County, Oklahoma, on State Highway No. 19”²⁵⁴ The court held that the error in that case was the generality of the description. The addition of details such as color, trees, roof design or other building are often used by the affiant to give particularity to the description. These details, in turn, sometimes lead to such a confusing description that a court will hold the warrant void.

In *Davis v. State*,²⁵⁵ a warrant described a certain premises as follows: “E ½ of 40 acres Quarter of Section First yellow three room house west of the railroad track No. 26 Township 2S, Range II W.I.M. or lots Nos. Block No. — in the — Addition to the City of Cotton County, Oklahoma.”²⁵⁶ In holding that the description was too confusing the Court of Criminal Appeals stated, “[w]e have read and reread this description and we are unable to state just what premises the officers were directed to search.”²⁵⁷

Perhaps the most significant trend discovered in these rural description cases is the court’s strict adherence to the face of the warrant in deciding the sufficiency issue. In other words, in both *Thomas* and *Davis* the officers searched the property that was the target of the search. However, in neither case did the court allow the warrant description to be rehabilitated by the executing officer’s personal information.²⁵⁸

This approach of strictly construing the face of the warrant is closer to the traditional approach required under the fourth amendment. It is based on two separate aspects: (1) a warrant’s authority to search is geographically limited to *that*

253. 54 Okla. Crim. 36, 14 P.2d 430 (1932).

254. *Id.*

255. 77 Okla. Crim. 129, 139 P.2d 610 (1943).

256. *Id.* at 130, 139 P.2d at 610.

257. *Id.* at 131, 139 P.2d at 610; *e.g.*, *Harvey v. State*, 676 P.2d 865 (Okla. Crim. 1984).

258. *Compare Woodard*, 567 P.2d at 515 (“apparent that officers had no difficulty finding the location . . .” due to prior surveillance).

place described on its face,²⁵⁹ and (2) a warrant is addressed to "Any Sheriff, Policeman or Law Officer in the County" and not solely to the affiant who may have personal knowledge of the location not generally shared by others.²⁶⁰ The defense counsel should be prepared to argue that this traditional approach should be adopted under state constitutional law because there is clearly sufficient authority for the court to do so.²⁶¹

2. Vehicles

Vehicles are capable of being described by a number of factors such as color, make, license tag number or name of owner. Several combinations of these have been held to satisfy the particularity requirement. The make of a car combined with the license tag has been determined to meet the particularity requirement.²⁶² Similarly, a combination of the foregoing two elements and the name of the owner is deemed to be a valid description.²⁶³ There also exists some authority that the license tag number alone satisfies the particularity requirement.²⁶⁴

While the vast majority of the above descriptions contain no constitutional defect, careful scrutiny should be paid to any part of a description that is so general as to match other vehicles. A "late-model blue sedan" is obviously deficient because of its generality. A court will review a description more closely with each error present in the affidavit or warrant. At some point a line is crossed and the vehicle's description becomes too general. It appears that a majority of jurisdictions will test the sufficiency of a description that is shown to contain errors *absent* the erroneous details in order to determine the particularity requirement.²⁶⁵

259. *State v. Bybee*, 66 Okla. Crim. 234, 90 P.2d 1077 (1939).

260. *Anderson v. State*, 657 P.2d 659, 661 (Okla. Crim. 1983).

261. *See supra* notes 168-70 and accompanying text.

262. *Miller v. State*, 94 Okla. Crim. 411, 237 P.2d 166 (1951).

263. *Hatley v. State*, 72 Okla. Crim. 69, 113 P.2d 396 (1941).

264. *Hines v. State*, 275 P.2d 355 (Okla. Crim. 1954).

265. *Wangrow v. United States*, 399 F.2d 106, 114-15 (8th Cir. 1968), *cert. denied*, 393 U.S. 933 (1968); *People v. Del Alamo*, 624 P.2d 1304, 1306 (Colo. 1981); *Willard v. State*, 272 Ind. 589, 400 N.E.2d 151 (1980); *State v. Cohen*, 19 Wash. App. 600, 576 P.2d 933 (1978).

The Indiana case of *Willard v. State*²⁶⁶ serves as an example of testing the remainder of the warrant. The model year of the car had been mistaken for "1975" instead of "1977," and the license tag was entered as "FX 1395" rather than "EX 13955."²⁶⁷ The court upheld the description where the car's general description, location and vehicle identification number were sufficient to locate the car.²⁶⁸ This method may overlook exactly what the officer relied on in executing the warrant. If the officer did not make recourse to those non-deficient factors remaining in the warrant, then it may be unreasonable to conduct a search when the description relied upon is obviously incorrect.

The most general and non-probative factor is usually a vehicle's location. The mobility of a car or truck is so great that one cannot accurately predict that a vehicle located in a certain place will remain there until the warrant is executed. Along the same lines, the case of *Garrett v. State*²⁶⁹ held a warrant to be deficient that authorized the search of "all automobiles" located on a certain premises because it constituted a general "blanket" search.²⁷⁰

Garrett must be distinguished from a situation where the vehicle is identified as contraband and has been under police surveillance. In *Lister v. State*,²⁷¹ the affidavit contained the affiant's personal observations along with an informant's statement that "stripping and reassembling . . . stolen parts was a routine business transaction . . ." at the location.²⁷² Because the defendant was late in including the affidavit in the record on appeal, the court had to rely on prior case law to reform the issue in terms of the lack of probable cause.²⁷³

The moral of *Lister* is twofold: (1) the defendant must include the affidavit in the record on appeal, or the defendant will probably waive any claim of error in the requirement of particularity; and (2) a challenge to most search warrants

266. 272 Ind. 589, 400 N.E.2d 151 (1980).

267. *Id.* at 594, 400 N.E.2d at 155.

268. *Id.*

269. 270 P.2d 1101 (Okla. Crim. 1954).

270. *Id.* at 1102-03.

271. 758 P.2d 831 (Okla. Crim. 1988).

272. *Id.* at 833.

273. *Id.* at 832-33.

should be based both on the lack of probable cause *and* lack of particularity. The issues are completely different and merit separate attention.²⁷⁴

3. Multiple-Occupancy Units

A search warrant that simply describes an apartment house, hotel or any other multiple-occupancy structure without specifying the sub-unit will be held invalid for a lack of particularity in the description.²⁷⁵ The failure to include a designation of the particular sub-unit violates the principle that the executing officers should exercise no discretion as to the place to be searched, but are to be limited to the premises described in the warrant.²⁷⁶

The primary exception to the above rule is when the multiple unit structure appears to be a single family residence from the outside appearance.²⁷⁷ This line of reasoning proceeds from the important premise that neither the affiant nor executing officer has knowledge that the dwelling is actually a multiple occupancy structure until the warrant is being executed.²⁷⁸ An illustrative example of this situation is found in *Thomas v. State*²⁷⁹ wherein the defendant contended that his brother-in-law rented a room in his house. The challenge was centered on the assertion that a rented room transformed one house into two homes for fourth amendment purposes. The appellate court did not reject this contention out-of-hand, but carefully reviewed who was paying for the utilities and where

274. Regardless of the validity of the warrant, most vehicle searches can be conducted without a warrant upon a showing of probable cause. *E.g.*, *California v. Carney*, 471 U.S. 386 (1985); *United States v. Ross*, 456 U.S. 798 (1982).

275. *United States v. Higgins*, 428 F.2d 232 (7th Cir. 1970); *see also Layman v. State*, 90 Okla. Crim. 260, 213 P.2d 300 (1949); *Wallace v. State*, 89 Okla. Crim. 365, 208 P.2d 190 (1949); *Sparks v. State*, 77 Okla. Crim. 431, 142 P.2d 379 (1943); *Aldridge v. State*, 72 Okla. Crim. 298, 115 P.2d 275 (1941).

276. *Flowers v. State*, 88 Okla. Crim. 252, 202 P.2d 233 (1949); *Hill v. State*, 80 Okla. Crim. 39, 156 P.2d 631 (1945); *Herrion v. State*, 79 Okla. Crim. 48, 150 P.2d 865 (1944).

277. *United States v. Santore*, 290 F.2d 51 (2d Cir. 1960); *Gill v. State*, 71 Okla. Crim. 247, 110 P.2d 926 (1941).

278. *United States v. Davis*, 557 F.2d 1239 (8th Cir. 1977), *cert. denied*, 434 U.S. 971 (1977).

279. 64 Okla. Crim. 265, 79 P.2d 625 (1938).

the contraband was found before denying the defendant's claim.²⁸⁰

It seems that the better approach is to initially reject such an argument on its face because the police had no notice of the dwelling's character or an opportunity to describe the premises more accurately.²⁸¹ Any additional fourth amendment safeguard should begin when the executing officers know, or should know, that the separate room is occupied by a different individual who has a separate and protectable expectation of privacy.²⁸² This, of course, would only benefit the owner in the event that the contraband was found in the tenant's room.

4. Multiple Buildings

A similar, but distinct, issue is presented when one warrant is utilized to search multiple structures. There is no constitutional defect if a warrant accurately describes more than one structure that is to be searched.²⁸³ The majority of issues arise when the warrant fails to describe a separate building on the premises to be searched.

This defect of "generality" was highlighted in *Story v. State*.²⁸⁴ In that case the description of the structure was "a one story frame building located in the rear of 129 West Chickasaw Street"²⁸⁵ Testimony revealed that there were three separate buildings occupied by different tenants that fit the description.²⁸⁶ The opinion of the court showed a rare, but healthy, air of skepticism holding:

[T]he officers could have searched the premises of the three other buildings which are in the rear of "129 West Chickasaw Street," and which were occupied by other parties, and if liquor had been found therein, a return could have been

280. *Id.* at 268-70, 79 P.2d at 627-28.

281. *United States v. Santore*, 290 F.2d 51 (2d Cir. 1960).

282. *See infra* text accompanying notes 442-461 for a discussion of the permissible scope of a search.

283. *Beeler v. State*, 677 P.2d 653, 656 (Okla. Crim. 1984); *Williams v. State*, 95 Okla. Crim. 131, 240 P.2d 1132 (1952) (requiring a separate warrant for each place occasions useless delay).

284. 74 Okla. Crim. 337, 126 P.2d 103 (1942).

285. *Id.* at 338, 126 P.2d at 103.

286. *Id.*

made and those parties charged the same as was the defendant. No doubt this was the reason for procuring the "John Doe" warrant in this case The evidence revealed that none of the four houses in the rear of "129 West Chickasaw Street" was numbered, but all were occupied by different parties. It would have been very easy to have added to the description in this affidavit the name of the party whose premises were to be searched, or to have particularly described this house as being on the alley, and in such other manner that there could have been no doubt as to what premises were to be searched.²⁸⁷

The issue of whether a garage apartment should be considered to be part of the curtilage of the home being searched was analyzed in *Littke v. State*.²⁸⁸ The warrant in question authorized a search of the premises that included the primary dwelling of the defendant and a garage apartment that she leased to a tenant. Although the search was limited to the house, the defendant claimed that the warrant was general in nature because the garage apartment was within the curtilage of the home searched. The reviewing court disagreed and held that the warrant was not defective since the apartment was not part of the curtilage because it was not used for "domestic purposes in the conduct of family affairs."²⁸⁹

5. Persons

A search warrant may lawfully issue against a person if probable cause exists.²⁹⁰ The issuance of such a warrant is rather uncommon because probable cause to arrest is usually present when the person is thought to possess contraband or an instrumentality of the crime. Consequently, the police will

287. *Id.* at 339-40, 126 P.2d at 104.

288. 97 Okla. Crim. 78, 258 P.2d 211 (1953).

289. *Id.* at 80, 258 P.2d at 214. The United States Supreme Court has identified four factors that are to be determinative of issues covering the curtilage: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 107 S. Ct. 1134, 1139 (1987).

290. *See, e.g., Cook v. State*, 75 Okla. Crim. 402, 132 P.2d 349 (1942); *Chronister v. State*, 73 Okla. Crim. 367, 121 P.2d 616 (1942); *Bowman v. State*, 73 Okla. Crim. 248, 120 P.2d 373 (1941).

search the individual incident to the lawful arrest.²⁹¹ The person who is the target of the search warrant must be described with particularity so as to enable the executing officer to identify him with reasonable certainty.²⁹²

The particularity requirement of a person's description can be met in a variety of ways. The name of the person is helpful but unnecessary. Many warrants are upheld when directed at a pseudonymous "John Doe."²⁹³ Other items of description commonly employed are the person's physical description,²⁹⁴ alias,²⁹⁵ location²⁹⁶ or family relationship.²⁹⁷ Minor errors in an individual's description will not void the warrant, but will cause the court to test its particularity by looking elsewhere in the warrant or affidavit to see if the description is separately sustainable.

An issue which has caused considerably more difficulty is when a warrant attempts to justify the search of all persons at a certain location. While probable cause exists with respect to the particular premises in question, the affiant has no way of particularly describing the persons found thereon. In most cases, this procedure has been employed when the premises was the site of an ongoing criminal enterprise such as an illicit drug laboratory.

In *Crossland v. State*,²⁹⁸ the Oklahoma Court of Criminal Appeals considered the validity of such a warrant provision. The warrant had been directed at a certain described premises and included the command to search "each and every person in said building" ²⁹⁹ In condemning this practice the court held that:

291. *Chimel v. California*, 395 U.S. 752 (1969) (arrestee's person and area within his immediate control may be searched for weapons or evidence that he might conceal or destroy).

292. *United States v. Rellie*, 39 F. Supp. 21 (E.D.N.Y. 1941).

293. *United States v. Ferrone*, 438 F.2d 381, 389 (3d Cir. 1971), *cert. denied*, 402 U.S. 1008 (1971).

294. *State v. Malave*, 127 N.J. Super. 151, 316 A.2d 706 (1974) ("Puerto Rican male in his forties about 5'6" in height medium build . . ." who lived at specific address held sufficient where executing officer had seen him before).

295. *Webster v. State*, 6 Md. App. 163, 250 A.2d 279 (1969).

296. *United States v. Muckenthaler*, 584 F.2d 240, 245-46 (8th Cir. 1978).

297. *People v. Johnson*, 49 Misc.2d 244, 267 N.Y.S.2d 301 (Nassau. Co. Ct. 1966).

298. 266 P.2d 649 (Okla. Crim. 1954).

299. *Id.* at 651.

[T]he conclusion is inescapable that the warrant is a general or "blanket" search warrant, which would authorize the indiscriminate search of a large number of people without naming or describing any of them. We think the issuance of a search warrant to search a large number of persons without naming them is subject to the same objections that are made to a general warrant which authorizes the search of premises occupied by two or more families.³⁰⁰

This holding is based exclusively on the state constitution³⁰¹ and constitutes binding authority independent of any United States Supreme Court decision that may be rendered on the identical point.³⁰²

The inclusion of an "all persons" provision invalidates the entire warrant because of its general nature. A slightly different directive to search certain persons on the premises has been upheld in Oklahoma. In *Beeler v. State*,³⁰³ the court authorized the insertion of a harmless statement that directed the search of "other persons in whose possession he has placed [illicit drugs] for the purpose of concealment"³⁰⁴ The court correctly noted that this language was merely surplusage because the executing officer had the duty to make an on-the-spot determination as to the presence of probable cause among these persons.³⁰⁵ Thus, the question of the validity of the search of any persons will hinge on the existence of probable cause with respect to his or her connection with the criminal offense or evidence found on the premises. The magistrate cannot make this determination prior to the executing officer's observations at the scene.

300. *Id.* at 652. See also *Garrett v. State*, 270 P.2d 1101 (Okla. Crim. 1954).

301. OKLA. CONST. art. II, § 30 provides in part: "the right of the people to be secure in their persons . . . against unreasonable searches or seizures shall not be violated"

302. *Ybarra v. Illinois*, 444 U.S. 85, 92 n.4 (1979) ("[W]e need not consider situations where the warrant itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs.").

303. 677 P.2d 653 (Okla. Crim. 1984).

304. *Id.* at 655.

305. *Id.*

C. Things to be Seized

1. In General

The fourth amendment requires that a valid search warrant must particularly describe the “things to be seized.”³⁰⁶ The United States Supreme Court has interpreted this provision and has described the underlying premise as making “general searches . . . impossible and prevent[ing] the seizure of one thing under a warrant describing another.”³⁰⁷ The thrust of this reasoning is that general searches will be prevented if the executing officer is authorized to seize only those things described in the warrant.³⁰⁸

Traditionally, courts have been extremely flexible in assessing the particularity requirement. The overarching principle is that the warrant will be satisfactory when the description is as specific as the affiant can provide — taking into account the nature of the crime and the surrounding circumstances of the investigation.³⁰⁹ Therefore, in testing the particularity requirement in court, the crucial factor will be the law enforcement agency’s knowledge of the items sought. The agency has a duty to make the description as specific as possible to avoid the issuance of a “general warrant.”

An example of this principle can be found in *United States v. Fuccillo*³¹⁰ where certain search warrants authorized the seizure of “cartons of women’s clothing, the contents of those cartons, lists identifying the contents of the cartons, and control slips identifying the stores intended to receive these cartons, such items being contraband”³¹¹ The court held that the warrants were defective because they “contained no explanation . . . how the executing agents were to differentiate [the contraband] from the legitimate goods.”³¹² In finding

306. U.S. CONST. amend. IV.

307. *Marron v. United States*, 275 U.S. 192, 196 (1927).

308. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). This proposition does not include those seizures properly made under the plain view doctrine. See *infra* text accompanying notes 484-505.

309. *State v. Hughes*, 433 So.2d 88 (La. 1983) (particularity requirement satisfied where warrant specified which business documents were sought for fraud claim).

310. 808 F.2d 173 (1st Cir. 1987).

311. *Id.* at 174.

312. *Id.* at 176.

that this error was properly the responsibility of the government, the court stated:

In the instant case the FBI clearly could have obtained specific information for presentment to the magistrate and placement in the warrant which would have enabled the agents executing the . . . warehouse searches to differentiate contraband cartons from legitimate ones. Although the affidavit stated that attached to the stolen cartons was "information identifying the store that was receiving the goods, including the store number, name and address", apparently no effort was made by the agents to obtain this information . . . and include it in the warrant [T]he executing agents in the instant case had no "physical criteria or detailed description in the warrant to enable them to determine what they might lawfully seize" ³¹³

The *Fuccillo* decision is an excellent example of three principles that Professor LaFave has found to exist in similar cases: (1) "A more particular description than otherwise . . . necessary is required when other objects of the same general classification are likely to be found at the particular place to be searched," ³¹⁴ (2) "Greater care in description is ordinarily called for when the type of property sought is generally in lawful use in substantial quantities," ³¹⁵ and (3) "Failure to provide all of the available descriptive facts is not a basis for questioning . . . the description when the omitted facts could not have been expected to be of assistance to the executing officer." ³¹⁶

2. Contraband and Stolen Property

The majority of reported cases deal with the much easier issue of describing contraband. When the nature of the property sought is illicit or contraband, it may be described in a general fashion without regard to its specific characteristics.

313. *Id.* at 176-77 (quoting *Montilla Records of Puerto Rico v. Morales*, 575 F.2d 324, 326-27 (1st Cir. 1978)).

314. 1 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 3.4 at 228 (1st ed. 1984) (citing *People v. Einhorn*, 75 Misc.2d 183, 346 N.Y.S.2d 986 (1973)).

315. *Id.* (citing *In re 1969 Plymouth Roadrunner*, 455 S.W.2d 466 (Mo. 1970)).

316. *Id.* (citing *United States v. Scharfman*, 448 F.2d 1352 (2d Cir. 1971)).

Therefore, descriptions of "narcotics,"³¹⁷ "controlled substances"³¹⁸ and "gambling paraphernalia"³¹⁹ have been upheld in various jurisdictions.

The fruits of a crime must be distinguished from contraband under the particularity requirement. Unlike contraband, fruits of criminal activity are not readily identifiable by their general character. A more specific description is required when a warrant authorizes seizure of stolen property. In *Kinsey v. State*,³²⁰ the inclusion of a statement allowing the seizure of "other stolen property" was held to be error. The court found that the warrant "did not limit the discretion of the officer" and allowed a "general rummaging search of the appellant's home."³²¹ The opinion emphasized that this type of error "tainted all items seized without regard to whether or not the items were named in the warrant."³²²

It appears that the principle established in describing stolen property is that the affiant must describe the items as specifically as possible under the circumstances. The courts generally have regarded a warrant as inadequate where the description is of a common article. Descriptions which merely refer to a "ring"³²³ or "antique jewelry"³²⁴ offer inadequate guidance to the executing officer.

The general guideline requires that the warrant must describe the items as specifically as possible. In *Caffey v. State*,³²⁵ a warrant was challenged on the basis that the description of the items lacked the constitutional particularity required. The court summarily held that the description was sufficient where it listed "\$15,000.00 to \$20,000.00 in currency and checks, papers, money bags, receipts from Taco Bueno or

317. *People v. Henry*, 173 Colo. 523, 482 P.2d 357 (1971).

318. *State v. Clark*, 281 N.W.2d 412, 416-17 (S.D. 1979); *Carlton v. State*, 449 So.2d 250, 251-52 (Fla. 1984).

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

320. 602 P.2d 240, 242 (Okla. Crim. 1979).

321. *Id.* at 243.

322. *Id.*

323. *Spencer v. State*, 672 S.W.2d 451, 454 (Tex. Crim. App. 1984).

324. *Commonwealth v. Taylor*, 383 Mass. 272, 418 N.E.2d 1226 (1981).

325. 661 P.2d 897 (Okla. Crim. 1983).

Crystals business in Tulsa, Oklahoma”³²⁶ The case merits attention for two important reasons.

The first issue is whether the description of “currency” is sufficient. Although this description allows for the seizure of *all* cash located on the premises, the generality of the term was cured because of the following items which link the currency to two specific businesses. Currency subsequently found with the papers or receipts of a business would prove especially suspicious. The second principle in *Caffey* is that the police could not be expected to describe the currency with any greater specificity. Unless the serial numbers had been recorded, it would be impossible to tell one dollar bill from another. Since these two issues are resolved in this manner, the policy becomes apparent. It is far better to list these fungible items in the warrant and have the magistrate pass on them rather than seize them without express authority. Moreover, the *Leon* good faith exception would probably allow the admission of the evidence at trial.³²⁷ A seizure outside the scope of the warrant would have to be justified separately under the plain view doctrine.³²⁸

In *Corley v. State*,³²⁹ a description of stolen property was approved where it simply described the articles as “1 Automatic Washer, 1 Automatic Dryer, 1 Color Console T.V.”³³⁰ The court did not discuss the defendant’s challenge to these descriptions, and leaves the holding in some doubt. The defendant had been charged with concealing stolen property, and the search warrant had been issued against his residence.³³¹

It is possible that the executing officers may have had a better and more complete description from the theft victims. If so, why not list the washer or television as a “Maytag” or “Zenith?” The officers apparently had gained all of their information from a confidential informant. From all appearances, the sheriff recited the informant’s description accu-

326. *Id.* at 901.

327. For a discussion of *Leon* see *infra* text accompanying notes 508-536.

328. See *infra* text accompanying notes 486-507.

329. 713 P.2d 12 (Okla. Crim. 1985).

330. *Id.* at 13 n.1.

331. *Id.* at 13.

rately. However, there is no evidence that the sheriff corroborated the tip or had any other evidence of probable cause. Aside from the dubious finding of probable cause, it is problematic whether the warrant was general in nature. It seems highly likely that a majority of private homes contain a washer, dryer and television. Without further description, the presence of two of these innocent articles would not be highly suspicious. If there were two of each of the listed items, the warrant gave no guidance to the officer on which *one* he should seize. Therefore, the officer would probably execute the warrant generally and seize all of the washers, dryers and televisions.

The only permissible method of upholding such a warrant is to maintain that the officers gave the best description that could be expected under the circumstances. This case serves as a gentle reminder of the interrelation between probable cause and particularity. Unfortunately, the court did not address the particularity issue in a sufficient manner, and allowed the probable cause determination to control both issues.

3. Evidence of Criminal Conduct

Relevant evidence of criminal conduct may take any number of forms. In addition to an instrumentality of a crime, evidence may be properly classified as documentary or non-documentary in its character. These divisions are artificially created for convenience, but do reflect slightly different judicial approaches to each category. In each category courts tend to be flexible and to require only that the items are described to the extent possible under the circumstances.³³²

Instrumentalities are described by either a particularization of their characteristics or by reference to the criminal conduct in question. The former method poses few problems and usually focuses on the adequacy of the description under the circumstances. For example, a warrant authorizing a seizure of "all . . . chemical substances possibly containing ar-

³³² United States v. Wuagneux, 683 F.2d 1343, 1349 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).

senic”³³³ is sufficient; whereas, a description which merely lists a “weapon”³³⁴ is far too imprecise and could apply to anything.

The description method that refers to a type of criminal conduct in order to satisfy the particularity requirement usually depends on whether the items listed have a sufficiently strong nexus to the crime. A sufficient nexus was shown in *United States v. Timpani*³³⁵ where the warrant listed “any and all records relating to extortionate credit transactions . . . including lists of . . . telephone numbers, address books . . . line sheets . . . bank statements, deposits, cash and checks”³³⁶ The court held that each category is “plausibly related” to the specific crimes charged.³³⁷

The majority of courts have allowed the state a great measure of flexibility in establishing the required nexus. Such vague descriptions as “notes, documents and papers *and other evidence* of a conspiracy to distribute” illegal drugs have been held sufficient.³³⁸ The distinction in these cases is that the criminal activity has been sufficiently identified by specifying the object of the conspiracy.³³⁹ Even if the crime is sufficiently specific, this method of describing evidence may be defective if the items are wholly innocent in their appearance and can not be distinguished from other identical items.³⁴⁰

Nondocumentary items that are not properly classified as contraband, fruits or instrumentalities follow the same basic guidelines set forth above.³⁴¹ The warrant will be deemed sufficient if it names the items sought with sufficient preciseness

333. *State v. Flood*, 301 So. 2d 637, 643 (La. 1974).

334. *State v. Pennington*, 642 S.W.2d 646, 648 (Mo. 1982).

335. 665 F.2d 1 (1st Cir. 1981).

336. *Id.* at 4-5.

337. *Id.* at 5.

338. *United States v. Young*, 745 F.2d 733, 758 (2d Cir. 1984) (emphasis in original).

339. *See also United States v. Vanichromanee*, 742 F.2d 340 (7th Cir. 1984); *United States v. Bithoney*, 631 F.2d 1 (1st Cir. 1980).

340. *Compare In re 1969 Plymouth Roadrunner*, 455 S.W.2d 466 (Mo. 1970) (description of “burglary tools” held sufficient) *and Butler v. State*, 130 Ga. App. 469, 203 S.E.2d 558 (1973) (upholding the description of “burglary tools” as sufficient).

341. *United States v. Wuagneux*, 683 F.2d 1343, 1349 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).

to allow the executing officers to seize the property.³⁴² The concern of most courts is to avoid the issuance and execution of a general warrant. Thus, a description of "articles of personal property tending to establish the wealth and financial status of [the defendant]"³⁴³ is defective because it names no item to be seized, but invests the officer with power of a general warrant. A small amount of flexibility is shown when a catch-all description is used such as "other drugs,"³⁴⁴ when it is preceded by a substantial list of named items that narrows the officer's discretion.³⁴⁵

The identical principles apply with respect to the seizure of documentary evidence.³⁴⁶ The particularity requirement in these cases should be scrutinized more carefully because of the defendant's privacy interests in his documents. The United States Supreme Court stated, in *Andresen v. Maryland*,³⁴⁷ that the protection of privacy forms an important consideration in the drafting of the warrant:

[T]here are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more . . . ascertainable. In searches for papers, it is certain that some innocuous documents will be examined . . . in order to determine whether they are . . . among those . . . to be seized [R]esponsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.³⁴⁸

This heightened privacy consideration has led some courts to hold that a listing of documentary evidence transforms the search warrant to a general one. Thus, in *In re Grand Jury*

342. See, e.g., *United States v. Alexander*, 761 F.2d 1294, 1301-02 (9th Cir. 1985); *State v. Pennington*, 642 S.W.2d 646, 648 (Mo. 1982).

343. *United States v. Washington*, 782 F.2d 807, 818-19 (9th Cir. 1986).

344. *United States v. Storage Spaces Designated Nos. "8" & "9"*, 777 F.2d 1363, 1368-70 (9th Cir. 1985).

345. *United States v. Young*, 745 F.2d 733 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *State v. Emery*, 123 N.H. 630, 465 A.2d 922 (1983).

346. *United States v. Santarelli*, 778 F.2d 609, 614 (11th Cir. 1985) (descriptions are sufficient when they are "specific as the circumstances and the nature of the activity under investigation permit").

347. 427 U.S. 463 (1976).

348. *Id.* at 482 n.11.

*Proceedings*³⁴⁹ the Court of Appeals for the Eighth Circuit held that a warrant allowing the seizure of all the records of the past six years from the defendant's bail-bonding business was defective. Likewise, a warrant allowing seizure of "certain business and billing and medical records of patients . . . [showing] actual medical services performed and fraudulent services claimed to have been performed"³⁵⁰ was held unconstitutional because the officers made no attempt to distinguish the bona fide records from the fraudulent ones and simply seized all of them.³⁵¹

4. Errors and Partial Invalidity

It is generally accepted that a minor error in the description of the thing to be seized does not render the warrant defective. The search will not be general if the warrant contains otherwise sufficient information that allows the executing officers to locate and seize the items listed. The listing of an erroneous serial number on a stolen air compressor was held to be irrelevant when there was only one air conditioning unit at the location.³⁵² In a similar vein, the description of a pistol as a ".38 Smith and Wesson" rather than a ".38 Dan Wesson" was thought to raise no constitutional issue.³⁵³

When an item listed in the search warrant fails to satisfy the standard of particularity required by the fourth amendment, the issue becomes whether the entire warrant is rendered defective. Where only one of several listed items in a warrant has failed the requisite particularity, the vast majority of courts hold the warrant constitutional with respect to the other items that are sufficiently described.³⁵⁴ Moreover, incriminatory items, in plain view, may be seized by the exe-

349. 716 F.2d 493, 496-99 (8th Cir. 1983).

350. *United States v. Abrams*, 615 F.2d 541, 542 (1st Cir. 1980).

351. *Id.*

352. *United States v. Rytman*, 475 F.2d 192, 192-93 (5th Cir. 1973).

353. *Stevens v. State*, 383 So. 2d 1156, 1157 (Fla. Dist. Ct. App. 1980).

354. *See, e.g., Aday v. Super. Ct.*, 55 Cal.2d 789, 362 P.2d 47, 13 Cal. Rptr. 415 (1961); *Norris v. State*, 640 P.2d 1374 (Okla. Crim. 1982); *State v. Noll*, 116 Wis. 2d 443, 343 N.W.2d 391 (1984), *cert. denied*, 469 U.S. 837 (1984).

cuting officers if they are properly within the scope of the remaining valid part of the search warrant.³⁵⁵

The Oklahoma Court of Criminal Appeals has sometimes taken a contrary position from the majority of jurisdictions that have considered these issues. In *Kinsey v. State*,³⁵⁶ a search warrant listed the following property: ".25 cal. pistol; C.B. radios; aerals and equipment; livestock feeds; chain hoist; jewelry; two (2) wristwatches; .22 rifle with scope; portable, battery operated TV; and *other stolen property*."³⁵⁷ The court proceeded to find that the "other stolen property" language failed the particularity requirement. Even though the warrant adequately established particularity over the items listed before the defective language, the court refused to hold the descriptions severable and condemned the entire warrant as void.³⁵⁸

The court further rejected the state's contention that several of the listed items were seized in plain view when the officers had probable cause to believe they were stolen.³⁵⁹ The opinion obliquely responded to this position by asserting that the evidence clearly showed that the officers relied on the general language of the warrant to seize numerous items not listed.³⁶⁰ This case may be best explained as holding that the state was unable to prove that the officers were operating under the remaining valid portion of the warrant when they made the seizures.

A few years after the *Kinsey* decision, Oklahoma formally adopted the doctrine of partial invalidity in *Norris v. State*.³⁶¹ In so doing, the court reaffirmed the *Kinsey* exception and quoted from a California case that warned against another possible abuse:

We recognize the danger that warrants might be obtained which are essentially general in character but as to minor items meet the requirement of particularity, and that whole-

355. For a description of plain view see *infra* text accompanying notes 486-507.

356. 602 P.2d 240 (Okla. Crim. 1979).

357. *Id.* at 242 (emphasis in original).

358. *Id.* at 243.

359. *Id.* at n.3.

360. *Id.*

361. 640 P.2d 1374 (Okla. Crim. 1982).

sale seizures might be made under them, in the expectation that the seizure would in any event be upheld as to the property specified. Such an abuse of the warrant procedure, of course, could not be tolerated.³⁶²

The importance of the adoption of this doctrine is further highlighted in the *Norris* decision. The defendant was charged with the exhibition of obscene films. The items that were found deficient and excluded from evidence were the seized documents, papers and keys that the prosecution used to prove ownership of the theatre.³⁶³ The appellate court was required to reverse the conviction because it could not speculate whether the error was harmless.³⁶⁴ Thus, even if most of the seized items are admissible the excludable item well may prove critical to a successful prosecution.

VI. EXECUTION OF WARRANT

A. *Time Period for Execution*

A search warrant must be executed within the required statutory time limit from its issuance by the magistrate.³⁶⁵ In *Simmons v. State*,³⁶⁶ the Oklahoma Court of Criminal Appeals held that a magistrate may legitimately require the warrant to be executed in a shorter period of time. In that case, the magistrate set a time limit of three days for the execution of a warrant that authorized the search of a certain location for illegal whiskey.³⁶⁷ The court emphasized that it was an "integral part of our system of government that an officer . . . should execute [the warrant] promptly."³⁶⁸ In upholding the discretion of the magistrate to fix a time more brief than the statutory maximum of ten days, the court noted that important considerations could serve as a basis for such a decision:

362. *Id.* at 1376 (citation omitted).

363. *Id.*

364. *Id.*

365. *E.g.*, OKLA. STAT. ANN. tit. 22, § 1231 (West 1986) ("A search warrant must be executed and returned to the magistrate by whom it is issued within ten (10) days. After the expiration of these times respectively, the warrant, unless executed is void").

366. 286 P.2d 296 (Okla. Crim. 1955).

367. *Id.* at 297.

368. *Id.* at 298.

The [magistrate] . . . might determine from the evidence before him taken on oath that the premises described were such that the person allegedly in possession of the contraband might flee if the warrant was not promptly served or he might determine that it was in an area where there was a constant turnover of population and that a warrant which would be valid against the temporary resident of the premises would only serve to harass a subsequent occupant who might have moved to the premises shortly after the warrant was issued.³⁶⁹

The opinion concluded by holding that any execution after the date specified in the warrant rendered the resulting search and seizure unconstitutional.³⁷⁰

A more common basis for the magistrate to require an earlier time frame for execution is the possible dissipation of probable cause. The probable cause established before the magistrate at the warrant application hearing must continue to exist until the warrant has been executed.³⁷¹ Therefore, it is possible for the probable cause to become stale and render the warrant void — even though the execution was completed within the ten day time period.³⁷²

B. Nighttime Execution

Most states allow the execution of a search warrant at night only under certain conditions. Because of the increased degree of intrusion on the defendant's privacy, these jurisdictions require that the affidavit "be positive that the property is . . . in the place to be searched and [that] the judge finds that there is likelihood that the property . . . will be destroyed, moved or concealed."³⁷³ When these requirements are met, the magistrate may insert a provision that authorizes the execution of the warrant "at any time of the day or night."³⁷⁴

369. *Id.*

370. *Id.*; see also *McClary v. State*, 34 Okla. Crim. 403, 246 P. 891 (1926).

371. *United States v. Lemmons*, 527 F.2d 662 (6th Cir. 1975); *State v. Edwards*, 93 Wis. 2d 44, 286 N.W.2d 369 (Wis. Ct. App. 1980), *rev'd on other grounds*, 98 Wis. 2d 367, 297 N.W.2d 12 (1980).

372. *United States v. Nepstead*, 424 F.2d 269 (9th Cir. 1970) (six day delay held permissible where house kept under surveillance entire time and nothing happened).

373. *E.g.*, OKLA. STAT. ANN. tit. 22, § 1230 (West 1986).

374. *Id.*

Under Oklahoma state law, "nighttime" is defined as starting thirty minutes after sunset and ending thirty minutes before sunrise.³⁷⁵

*Fletcher v. State*³⁷⁶ reversed a long line of erroneous decisions concerning the necessity of the magistrate to make a specific finding that the property will be destroyed, moved or concealed. Prior to *Fletcher* the Oklahoma courts simply reviewed the warrant for the insertion of the authorization to search,³⁷⁷ independently assessed the nature of the evidence to conclude it was movable,³⁷⁸ or found that the magistrate logically concluded that the items could have been moved.³⁷⁹ In conclusion, there was no requirement that the magistrate make a specific finding regarding the property. In *Fletcher*, the court characterized the affiants' action as "almost an afterthought" in obtaining the nighttime notation on the warrant.³⁸⁰ No specific evidence was presented to the magistrate that demonstrated the need for a nighttime search, nor did the magistrate make any special findings.³⁸¹

The *Fletcher* decision was reaffirmed in *Wiggin v. State*³⁸² wherein the court condemned the state's reliance on the bare preprinted language in an affidavit that alleged the likelihood of destruction of controlled substances.³⁸³ This language was deemed insufficient where the magistrate made no specific findings, and the evidence adduced before trial showed that permission for a nighttime search was given as an accommodation to the officer who was on night duty.³⁸⁴ The court noted that there clearly was no immediate danger existing as to the property because the officers "did not find it imperative to execute the warrant until four (4) days later."³⁸⁵ On the basis of this authority, it appears that the state has

375. *Id.* at tit. 47, § 11-801 (West 1986).

376. 735 P.2d 1190 (Okla. Crim. 1987).

377. *McGowan v. State*, 662 P.2d 1389, 1390 (Okla. Crim. 1982).

378. *McGowan v. State*, 661 P.2d 66, 67 (Okla. Crim. 1983); *Kay v. State*, 668 P.2d 1150, 1152 (Okla. Crim. 1983).

379. *Campbell v. State*, 651 P.2d 696, 698 (Okla. Crim. 1982).

380. *Fletcher*, 735 P.2d at 1193.

381. *Id.*

382. 755 P.2d 115 (Okla. Crim. 1988).

383. *Id.* at 116.

384. *Id.*

385. *Id.* at 117.

the burden to satisfactorily explain any substantial delay occurring before the nighttime search warrant is finally executed.

C. Manner of Entry

Law enforcement agents serving a search warrant are under an obligation to announce their presence and purpose before entering the premises to be searched. While this rule has never been explicitly required by the United States Constitution,³⁸⁶ it is a fundamental part of our common law heritage and is required by statute in many states, including Oklahoma. In pertinent part the law provides that "[t]he officer may break open [a] . . . door or window of a house . . . to execute the warrant, if, after notice of his authority and purpose he be refused admittance."³⁸⁷

One of the leading cases construing the state requirement is *Sears v. State*.³⁸⁸ In that case one of the executing officers observed the defendant through a window in his apartment. He proceeded to knock on an unlatched door causing it to open. The evidence showed that he probably pushed it open a bit more to gain entry into the home.³⁸⁹ After entering the house he identified himself to the defendant. The opinion of the court emphasized that the "statutory restrictions surrounding the serving of a warrant . . . should be strictly observed" ³⁹⁰ The unlawful entry was effectuated by the officer's use of force and by his failure to announce his "identity and purpose and requesting permission to enter."³⁹¹

A similar method of gaining entry was disapproved in *Ericksen v. State*³⁹² wherein the executing officer knocked on the

386. The United States Supreme Court has continuously recognized its importance. "The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application." *Miller v. United States*, 357 U.S. 301, 313 (1958). See also *Ker v. California*, 374 U.S. 23 (1963).

387. OKLA. STAT. ANN. tit. 22, § 1228 (West 1986).

388. 528 P.2d 732 (Okla. Crim. 1974).

389. *Id.* at 732-33.

390. *Id.* at 733 (quoting *Kelso v. State*, 97 Okla. Crim. 215, 216, 260 P.2d 864, 866 (1953)).

391. *Id.* at 733-34.

392. 597 P.2d 344 (Okla. Crim. 1979).

door several times and received no response.³⁹³ He then opened the door and called out to see if anyone was home. After hearing a "yeah," the officer entered the home and shouted his name; however, he failed to announce his authority or purpose during this entire episode.³⁹⁴ The court distinguished the factual situation from prior cases that held if the executing officer does not know of the occupant's presence, he may proceed to enter under a theory that he was constructively denied admittance.³⁹⁵ Focusing on the critical aspect of the officer's knowledge, the court held that when he received a response from the defendant he was under a duty to demand admittance before continuing further.³⁹⁶

The officer may use force to gain entry into the premises if he has been refused admittance.³⁹⁷ In the event that there is no response from within, the officer must wait a reasonable length of time before using force to gain entry.³⁹⁸ What is "reasonable" varies with the circumstances — especially the size or design of the dwelling. A rule of thumb is that a reasonable time is that period that would encompass the occupant moving from the most remote part of the dwelling to the door. In any case, courts traditionally have held that a delay of 30 to 60 seconds is sufficient before using force.³⁹⁹

A reasonable mistake as to the presence of the occupant that causes a forcible entry will sometimes be excused and will not render the search defective. For example, prior to the execution of a search warrant, certain law officers went to both the back and front doors of a dwelling at the same time to

393. *Id.* at 345.

394. *Id.*

395. *Id.* at 346. Compare *Pennington v. State*, 302 P.2d 170 (Okla. Crim. 1956); *Thigpen v. State*, 51 Okla. Crim. 28, 299 P. 230 (1931).

396. *Id.*

397. OKLA. STAT. ANN. tit. 22, § 1228 (West 1986).

398. *Tatman v. State*, 320 A.2d 750 (Del. 1974) (delay of five seconds after knock held unreasonable and rendered search defective); *State v. Carufel*, 112 R.I. 664, 314 A.2d 144 (1974) (officer must knock and announce and wait reasonable length of time unless exigent circumstances present).

399. See, e.g., *Irwin v. State*, 415 So. 2d 1181 (Ala. Crim. App. 1982) (20 seconds), *cert. denied*, 459 U.S. 971 (1982); *Davis v. State*, 525 P.2d 541 (Alaska 1974) (30 seconds); *Carter v. State*, 418 A.2d 989 (Del. 1980) (30 seconds); *State v. Newman*, 12 Or. App. 266, 506 P.2d 523 (1973) (one minute).

demand entry.⁴⁰⁰ The defendant admitted the officers at the back door. The officers at the front door heard no response and used force to enter the premises. The court reasoned that the officers were justified in believing that they had been "refused admittance since no one came to the door."⁴⁰¹ As a consequence, this case is distinguishable from both *Sears* and *Ericksen* because the delay of the defendant was responsible for the mistaken impression that he was refusing admittance to the officer.

A widespread technique employed by law enforcement agencies is the use of a ruse or trick to gain admittance. This is often employed by police officers to substitute for the traditional practice of knocking and announcing outside the door of the premises. It is usually characterized by an unseen executing officer calling out that he has business at the premises or is in need of assistance from those persons within the dwelling. The majority of jurisdictions uniformly have approved such ruses as an officer claiming that he was a meter reader,⁴⁰² real estate agent,⁴⁰³ or narcotics customer.⁴⁰⁴

The Oklahoma Court of Criminal Appeals has not considered the legality of a police ruse. It seems obvious that the court will adopt such an exception to the traditional requirement of announcing the officer's authority and purpose. When it does adopt this exception it must do so with full appreciation that the ruse in the first place is to protect the officers' safety when announcing their purpose might lead to a violent response. A corollary principle is that the ruse should not be coupled with a forceful entry because that completely defeats the purpose of the rule.⁴⁰⁵

400. 560 P.2d 1051, 1057 (Okla. Crim. 1977).

401. *Id.*

402. *Commonwealth v. McCarthy*, 390 A.2d 236 (Pa. Super. Ct. 1978).

403. *Palmer v. State*, 426 So. 2d 950 (Ala. Crim. App. 1983).

404. *State v. Williams*, 539 S.W.2d 530 (Mo. Ct. App. 1976).

405. *See, e.g., State v. Bates*, 120 Ariz. 561, 587 P.2d 747 (1978) (use of force unreasonable where officer identified himself as "Jim" and waited 3 to 5 seconds before forceful entry); *State v. Ellis*, 21 Wash. App. 123, 584 P.2d 428 (1978) (use of force in opening door that defendant was closing held unreasonable where officers had not displayed authority until door was being closed and officers had not gained peaceable entry).

The most commonly utilized exception to the knock and announce rule is when exigent circumstances exist. Exigent circumstances include those instances where there exists a potential for either the destruction of evidence on the premises, or for danger to the health or safety of the executing officers. Appellate courts have tended to review these situations under an objective standard that requires the officers to articulate a "reasonable cause" to believe that such an exigency existed.

A few state jurisdictions have never expressly adopted the rationale that allows the officers to dispense with the notice requirement if they reasonably fear that such notice would cause the destruction of evidence within the dwelling. Because of the widespread adoption of this exception across the nation, one may assume safely that the remaining jurisdictions will ultimately adopt the doctrine at the appropriate time. Before the sanction of such an exception to the warrant requirements occurs, attorneys should be aware of the different versions of the rule. Some offer a great deal more protection to the accused's privacy rights.

The central disagreement among the proponents of the various versions of the rule concern the degree of risk that must be shown before the notice requirement is excused. One extreme rendition of the exception focuses solely on the nature of the items sought. Under this approach, the officers have met their burden of demonstrating the risk of destruction by simply showing that the objects sought are, by their very nature, easily destructible or disposable.⁴⁰⁶ There is no requirement that the officers actually possessed such a belief in the case at hand. This lenient approach would allow dispensing with the notice requirement in virtually all of the warrants listing narcotics or gambling paraphernalia.

The better approach to this issue requires the executing officers to justify their fear of destruction on case-to-case and reasonable bases. The United States Supreme Court cogently stated the overarching principle in these situations as one where "the police bear a heavy burden when attempting to

406. *State v. Loucks*, 209 N.W.2d 772 (N.D. 1973) (no-knock warrant proper where informant advised that marijuana was present on premises); *State v. Spisak*, 520 P.2d 561 (Utah 1974) (no-knock warrant proper where affiant swore that growing marijuana plants could be destroyed quickly).

demonstrate an urgent need that might justify warrantless searches”⁴⁰⁷ An excellent sample of the preferred version of the exception may be found in *United States v. Clement*.⁴⁰⁸ In that case the executing officers were able to articulate *specific* facts that “demonstrate a sufficient basis that some[one] . . . will likely destroy evidence.”⁴⁰⁹

[E]xigent circumstances were present because the agents “reasonably inferred” that occupants of room 306 were expecting their associates to return with the proceeds of the earlier sale of cocaine and that their nonappearance could be expected to warn Clement that the sale had failed. Thus, “[t]he agents faced a significant risk that any delay in obtaining a warrant would result in alarming defendants Sastre and Clement, precipitating removal or destruction of the cocaine.” The cocaine referred to was that amount Stephenson and McDade had not already delivered to the DEA agents. The essential circumstances included the lack of response at the door after knocking, seeing someone approach the door, look through the peephole and retreat, and hearing a scrambling noise.⁴¹⁰

A similar judicial approach is appropriate when the executing officers dispense with the notice requirements because they fear a violent response that will endanger them or others in the close vicinity. The Oklahoma Court of Criminal Appeals has not adopted this exception, but has indicated in *dicta* that it is prepared to do so in the proper case.⁴¹¹ The burden on the officers in these situations is to demonstrate that they harbored a reasonable belief that the normal execu-

407. *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984) (warrantless entry into dwelling improper where no hot pursuit and driving offense provided penalty only of noncriminal, civil forfeiture).

408. 854 F.2d 1116 (8th Cir. 1988) (*per curiam*).

409. *United States v. Beck*, 662 F.2d 527, 530 (8th Cir. 1981).

410. *Clement*, 854 F.2d at 1119 (footnote omitted).

411. *Sears*, 528 P.2d at 735.

Our holding today, in keeping with our statute and traditions of the common law, should not be construed that exigent circumstances might exist forming the basis for an exception to the statutory provisions, as in a situation where the officers are aware that the occupants of a house are armed and dangerous and strict compliance with the statute would expose the officers to great peril, injury, or death.

tion of the warrant would engender a dangerous response from the occupant.

There is split of authority over whether the mere possession of a firearm by the occupant is sufficient grounds for an unannounced entry. The vast majority of courts require some additional showing of reasonable apprehension by the executing officers.⁴¹² This additional component is usually easy to demonstrate. Courts have upheld unannounced entries where the police have shown that: (1) the occupant typically answers the door with a firearm;⁴¹³ or (2) the occupant had made a prior threat to use a firearm;⁴¹⁴ or (3) the premises was being used to store large quantities of narcotics.⁴¹⁵ Thus, the requirement is met when the officers provide information regarding either the violent tendencies of the individual or to the frequently violent nature of the criminal enterprise.

The final exception that allows unannounced entries occurs when the required statement of authority and purpose would amount to a "useless gesture." This doctrine was considered in *Mills v. State*⁴¹⁶ wherein the defendant was attempting to back his car out of his driveway when he was stopped by two officers.⁴¹⁷ The officers ran toward the car shouting that they were police officers and had a search warrant for his home. In reaffirming the "useless gesture" exception, the court held that the officers had no duty to comply with the formal notice requirements.⁴¹⁸ In making reference to the decision in *Gamble v. State*,⁴¹⁹ the court explained:

There the defendant was stopped by officers after leaving his residence, escorted back to the house where he was served with a warrant, and he then unlocked the door with his key. We there held the execution of the warrant to be valid because the facts showed the defendant was aware of

412. See, e.g., *Tatman v. State*, 320 A.2d 750 (Del. 1974); *State v. Jeter*, 30 Wash. App. 360, 634 P.2d 312 (Wash. Ct. App. 1981).

413. *People v. Dumas*, 9 Cal. 3d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973).

414. *Wilson v. State*, 343 A.2d 613 (Del. 1975).

415. *United States v. Kane*, 637 F.2d 974 (3d Cir. 1981); *State v. Lien*, 265 N.W.2d 833 (Minn. 1978).

416. 594 P.2d 374 (Okla. Crim. 1979).

417. *Id.* at 377.

418. *Id.*

419. 546 P.2d 1336 (Okla. Crim. 1976).

the authority and presence of the police, and it was a situation where, as here, an announcement of authority and presence would have been a *useless gesture* and subjected evidence to possible destruction.⁴²⁰

D. Detention or Search of Persons on or Near Premises

1. Detention of Persons

Police officers who are executing a search warrant may lawfully detain certain persons on the premises while the search is being carried out. This rule was established by the United States Supreme Court in the case of *Michigan v. Summers*.⁴²¹ In *Summers*, the police stopped an individual outside a residence he was leaving. The officers were on their way to that residence for the purpose of executing a valid search warrant. The officers proceeded to detain the defendant and execute the warrant against the premises. Upon finding narcotics in the house and establishing that the defendant owned the house, he was arrested and searched. A search of his pocket resulted in the discovery of heroin. The defendant asserted that his detention had not been authorized by the search warrant, and the evidence discovered in the search of his person was tainted and inadmissible.

The Court held that the detention was constitutional and established a type of standard procedure that all officers executing a search warrant may follow.

[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation. . . . [T]he orderly completion of the search may be facilitated if the occupants of the premises are present. Their self-interest may induce them to open locked doors or locked containers to avoid the use of force that is not only

420. *Mills*, 594 P.2d at 377 (emphasis added).

421. 452 U.S. 692 (1981). For useful commentaries on *Summers* see Note, *Gauging The Reasonableness of Nonarrest Seizures: The Emerging Rule of Michigan v. Summers*, 46 ALB. L. REV. 631 (1982); Comment, *Reasonable Suspicion Authorizes Detention of Occupants of Validly Searched Premises*, 59 WASH. U.L.Q. 1393 (1982).

damaging to property but may also delay the completion of the task at hand.⁴²²

Although the defendant in *Summers* was descending the front steps of the premises, the Court found that his detention was no more intrusive than the detention of those persons found inside the dwelling.⁴²³ Since a detention, by definition, is always less intrusive than an arrest, such action by the officers in *Summers* was rather easily found to be reasonable. A different situation is presented when a person is not on, or adjacent to, the premises. A so-called "detention" of a person some distance away from the premises being searched is just as intrusive as an arrest and must be justified independently of *Summers*.⁴²⁴ Moreover, such a person is in no position to facilitate the orderly completion of the search taking place some distance away.⁴²⁵

Not every person on the premises may be detained under *Summers*. The Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the *occupants* of the premises while a proper search is conducted."⁴²⁶ The opinion also referred to the permissible class of detainees as those "residents of a house."⁴²⁷ Lower courts accordingly have interpreted the language in *Summers* narrowly and held that guests or visitors are not subject to detention under *Summers*.⁴²⁸

The Court also limited *Summers* to a search for contraband.⁴²⁹ The opinion went on to emphasize that when a search warrant issues, "[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime."⁴³⁰ Thus, that type of suspicion of crimi-

422. *Summers*, 452 U.S. at 702-03 (footnote and citation omitted).

423. *Id.* at 702 n.16.

424. *United States v. Taylor*, 716 F.2d 701 (9th Cir. 1983); *United States v. Tate*, 694 F.2d 1217 (9th Cir. 1982), *rev'd on other grounds*, 468 U.S. 1206 (1984).

425. *Taylor*, 716 F.2d at 707.

426. 452 U.S. at 705 (footnotes omitted) (emphasis added).

427. *Id.* at n.21.

428. *State v. Carrasco*, 147 Ariz. 558, 711 P.2d 1231 (Ariz. Ct. App. 1985); *Lippert v. State*, 665 S.W.2d 712, 720-21 (Tex. Crim. App. 1984).

429. 452 U.S. at 701-02.

430. *Id.* at 703.

nal activity will justify a detention of the occupant.⁴³¹ This proposition by the Court is logical only in a situation where *contraband* is found at the premises. The possession of "mere evidence" by an innocent third party will constitute grounds for the issuance of a search warrant; however, it does not necessarily indicate that he has committed a crime.⁴³² Therefore, *Summers* should be understood as being applicable only to searches for contraband.

2. Searches of Persons

A search warrant does not bestow an inherent right on the executing officers to search a person who is merely on the premises. The lack of this inherent power should be distinguished from the situation when a warrant is lawfully issued for the search of a person.⁴³³ In the former case there exists no probable cause linking the person to the possession or concealment of criminal evidence. The sole connection between the individual and the search is that he was present on the premises at the time of the execution of the warrant.

The United States Supreme Court promulgated this rule in *Ybarra v. Illinois*.⁴³⁴ In *Ybarra*, the police obtained and executed a search warrant against a tavern and its bartender for heroin. During the execution of the warrant a pat-down search of each customer was conducted. A cigarette package was removed from the defendant's pocket and found to contain heroin.⁴³⁵ The search warrant did not contain any mention of criminal activity by the patrons. The Court found that there was no probable cause to search the defendant when the warrant was executed.⁴³⁶ The defendant's "mere propinquity to others independently suspected of criminal activity does not,

431. *Id.* at 696-701.

432. "[P]ersons who possess evidence that may help to identify an offender, or explain [a crime] . . . far outnumber those who have custody of weapons or plunder." *Zurcher v. Stanford Daily*, 436 U.S. 547, 579 (1978) (Stevens, J., dissenting).

433. *See supra* text accompanying notes 290-305.

434. 444 U.S. 86 (1979).

435. *Id.* at 89.

436. *Id.* at 90.

without more, give rise to probable cause to search that person."⁴³⁷

A slightly different question was presented in the case of *Beeler v. State*.⁴³⁸ The defendant was seen exiting the dwelling by approaching officers who possessed a search warrant for the premises. The warrant directed the officers to search the premises and the person of "John Doe" and "other persons in whose possession he [John Doe] has placed [controlled substances] for the purpose of concealment."⁴³⁹ In holding that the search of *Beeler* was unlawful, the Court stated:

There was no probable cause to believe that any and all persons at the premises would be involved in the drug traffic. There was no indication that the premises were frequented by drug buyers, nor that anyone had ever been seen purchasing drugs on the premises.

Persons may visit even suspect premises for valid reasons. There was no probable cause, as versus mere suspicion, to believe that appellant was engaged in drug trafficking at the time of his visit. The State's reliance upon the timing of appellant's departure from the premises, i.e., as the officers approached with the search warrant, is not persuasive. The door chosen was in line of sight as the officers walked toward the house, and there is no indication that the men made any attempt to escape the officers or discard or destroy evidence.⁴⁴⁰

Ybarra and *Beeler* both indicate that circumstances could arise when a search of a person not named in the warrant would be permissible. The critical factor is that the probable cause must arise from the observations of the executing officers. Thus probable cause to search has been found when a person is found to be engaged in furtive acts that lead to reasonable belief that he is concealing or possessing contraband or evidence of the crime.⁴⁴¹

437. *Id.* at 91 (emphasis added) (citing *Simon v. New York*, 392 U.S. 40, 62-63 (1968)).

438. 677 P.2d 653 (Okla. Crim. 1984).

439. *Id.* at 655.

440. *Id.* at 656-57.

441. See, e.g., *Patton v. State*, 148 Ga. App. 793, 252 S.E.2d 678 (1979); *People v. Guitierrez*, 109 Ill.2d 59, 485 N.E. 2d 845 (1985).

VII. SCOPE AND INTENSITY OF THE SEARCH

A. *Scope of the Search*

The lawful scope of a search conducted pursuant to a search warrant is limited by the terms of the warrant.⁴⁴² The executing officer is bound by the descriptions of the place to be searched and the things to be seized. If a warrant describes the place to be searched as a certain "premises," other places or things in the curtilage of the dwelling may be searched.⁴⁴³

In *Leslie v. State*,⁴⁴⁴ a search warrant was issued against certain described premises "together with the curtilage thereof and the appurtenances thereunto belonging."⁴⁴⁵ The defendant challenged the validity of the search of his car which was parked in the driveway. The court held that the vehicle was properly the object of the search warrant because it was located within the curtilage of the dwelling.⁴⁴⁶

The *Leslie* decision was controlling precedent in *Beeler v. State*.⁴⁴⁷ In *Beeler*, the officers searched a truck that had been parked in the front yard of the premises. The truck belonged to a third person who was arrested when contraband was discovered in the vehicle.⁴⁴⁸ Relying on *Leslie*, the court held that "[t]he fact that the vehicle did not belong to the owner of the premises cannot be regarded as significant, since it was not revealed to the officers until after the search."⁴⁴⁹

That result is highly questionable. The fact that the officers did not know the ownership of the vehicle should make no difference whether the vehicle was properly the object of the warrant. Even more confusing was the court's concurrent holding that the personal search of *Beeler* was unconstitutional. Both the defendant and his truck were within the curtilage. Why was the search of the former prohibited while al-

442. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 394 n.7 (1971); *Marron v. United States*, 275 U.S. 192, 196 (1927).

443. *Flowers v. State*, 88 Okla. Crim. 252, 255, 202 P.2d 233, 234 (1949); *Bowdry v. State*, 82 Okla. Crim. 119, 123, 166 P.2d 1018, 1019 (1946).

444. 294 P.2d 854 (Okla. Crim. 1956).

445. *Id.* at 855.

446. *Id.* at 856.

447. *Beeler*, 677 P.2d 653 (Okla. Crim. 1984).

448. *Id.* at 655.

449. *Id.* at 657.

lowing a search of the latter? Any distinction between the two surely should not depend on the officers' knowledge of ownership of the truck.

The court relied on *Ybarra* for the proposition that visitors on the premises may not be searched because there exists no probable cause as to them.⁴⁵⁰ The better view is that a search warrant would allow the search of a vehicle found on the premises if it were owned or controlled by the occupant.⁴⁵¹ The rationale for this position is that the probable cause determination of the magistrate concerned the premises and the occupant thereof — not visitors or bystanders who are on the property for a short length of time. The executing officers had no actual knowledge or suspicion of criminal activity relating to defendant's truck or his person. Thus, both should be treated alike for purposes of the warrant clause. Since the officers "easily ascertained" which person was the true occupant, they "could have just as easily" determine who owned the truck.⁴⁵² The burden should properly be placed on the state to safeguard the privacy rights of those visitors against whom there is no probable cause or suspicion of possession or concealment of evidence.⁴⁵³

Since the scope of the search is limited to the place particularly described in the warrant, adjacent areas normally may not be searched by the executing officers.⁴⁵⁴ In some instances, courts have permitted searches of an area not described in the warrant. This usually occurs when the area in question is not visible from the outside. Therefore, even though not described in the warrant, a search may extend to

450. *Id.* at 656.

451. *United States v. Percival*, 756 F.2d 600, 612 (7th Cir. 1985); *Dunn v. State*, 292 So.2d 435, 436 (Fla. Dist. Ct. App. 1974); *see also* *Haley v. State*, 7 Md. App. 18, 253 A.2d 424 (1969).

452. *Beeler*, 677 P.2d at 659 (Brett, J., dissenting).

453. We hold that in order to justify a search of cars stored in a public garage, it is necessary to have a search warrant specifically describing the cars to be searched. If this was not the law, no business man or travelers would store their car or park it in a public garage, as they would not want to be annoyed by having officers coming around and searching their cars without any authority of law.

O'Niel v. State, 65 Okla. Crim. 398, 400, 88 P.2d 380, 381-82 (1939).

454. *See United States v. Ross*, 456 U.S. 798, 800 (1982); *Flowers v. State*, 88 Okla. Crim. 252, 202 P.2d 233 (1949).

the attic,⁴⁵⁵ basement,⁴⁵⁶ or a common area adjacent to a separate premises.⁴⁵⁷

In executing a search warrant an officer may have to move through an area to gain access to the targeted premises. The right to enter and pass through these areas is usually authorized by "necessary implication" from the warrant.⁴⁵⁸ Common halls or stairways present no particular problems in this area. A more important issue is presented when the officers must violate a protected privacy interest in order to execute the warrant. In these cases, the entry of the officers will be tested under the general reasonableness standard of the fourth amendment. Thus, a state court approved a police entry through a neighboring apartment where it constituted the only alternative to the barricaded back door of the target apartment.⁴⁵⁹ The United States Supreme Court has commented upon this police practice in a case that approved a covert entry into a dwelling to install court-approved surveillance equipment.⁴⁶⁰

Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that . . . search warrants . . . must include a specification of the precise manner in which they are to be executed. [I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed . . . subject to [the reasonableness requirement].

. . . Often in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant.⁴⁶¹

455. *Commonwealth v. Scala*, 380 Mass. 500, 404 N.E.2d 83 (1980); *State v. Stevenson*, 589 S.W.2d 44 (Mo. Ct. App. 1979).

456. *United States v. Palmisano*, 386 F. Supp. 599 (E.D. Wis. 1974).

457. *Commonwealth v. Chamberlain*, 277 Pa. Super. 503, 419 A.2d 1261, 1265 (1980).

458. *State v. Brothers*, 12 Or. App. 435, 507 P.2d 398 (1973).

459. *Commonwealth v. Young*, 6 Mass. App. Ct. 953, 383 N.E.2d 515 (1978).

460. *Dalia v. United States*, 441 U.S. 238 (1979).

461. *Id.* at 257.

B. Intensity of the Search

The intensity of a search refers to the permissible area and objects that may be examined. Similar to the "scope" issue, the intensity of a search is controlled by the terms of warrant. The United States Supreme Court cogently summarized the general guideline to intensity in *United States v. Ross*:⁴⁶² "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search."⁴⁶³

After the objects named in the warrant have been located by the executing officers, the search is legally concluded.⁴⁶⁴ Once the items are found the warrant is exhausted, and any subsequent search or seizure on the premises must be justified "under the rules applying to warrantless searches."⁴⁶⁵ If only some of the items have been located the warrant is not exhausted and the search may continue for the remaining items.⁴⁶⁶ Occasionally, a warrant does not describe a specific item of property, but authorizes a search for "any contraband narcotics." In these cases a search warrant is not exhausted upon finding the first article of contraband; on the contrary, the search may continue for other items of contraband.⁴⁶⁷

There is no set time limit for the execution of a search warrant. The officers "may remain on the premises only so long as it is reasonably necessary to conduct the search."⁴⁶⁸ This reasonableness standard depends on the circumstances of each case and the prior knowledge and preparation of the law enforcement officers who are conducting the search. Thus, a court approved police officers spending the night in their cars when so much marijuana had been found that a truck was required to be brought to the location for transportation

462. 456 U.S. 798 (1982).

463. *Id.* at 820-21.

464. *Phelps v. State*, 598 P.2d 254, 257 (Okla. Crim. 1979) (seizure of eighty-eight items unlawful where officers had already located the body of deceased that was listed in warrant).

465. *Id.*

466. *Payne v. State*, 744 P.2d 196, 199 (Okla. Crim. 1987) (search could continue where only ten out of fourteen items had been found).

467. *Hagler v. State*, 726 P.2d 1181, 1183 (Okla. Crim. 1986).

468. *State v. Chaisson*, 125 N.H. 810, 486 A.2d 297, 303 (1984).

of the contraband.⁴⁶⁹ Conversely, a two day delay was held impermissible where the executing officers failed to have a chemist present to identify the items seized.⁴⁷⁰

When a search warrant is issued against a certain premises, the personal effects found therein may be opened and searched. There is no requirement that the warrant describe these personal effects. The United States Supreme Court in *Ross* commented that "a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found."⁴⁷¹

An additional problem is presented when the personal effects are those of a third party. Whether the search of a third party's effects is proper will depend, in some part, on the officers' knowledge of the ownership of the items. Without additional facts, a search warrant is not sufficient authority to search the personal effects of a third party where the officer knows or should know the true owner.⁴⁷² If the executing officer has no reason to believe that the personal items belong to a third party nonresident, the search will be held lawful.⁴⁷³ Under certain circumstances, the officers executing the warrant may search the effects of a third party when they know they belong to him. This typically occurs when the occupant has control over the items,⁴⁷⁴ or there has been some form of abandonment by the third party.⁴⁷⁵

One of the most frequently litigated contentions in search warrant cases is whether the officer exceeded his authority by

469. *United States v. Gagnon*, 635 F.2d 766, 769 (10th Cir. 1980), *cert. denied*, 451 U.S. 1018 (1981).

470. *People v. Van Note*, 63 Ill. App. 3d 53, 379 N.E.2d 834 (Ill. App. Ct. 1978).

471. 456 U.S. at 821.

472. *United States v. Branch*, 545 F.2d 177, 182 (D.C. Cir. 1976); *State v. Przeradski*, 5 Haw. App. 29, 677 P.2d 471 (1984); *Commonwealth v. Platou*, 455 Pa. 258, 312 A.2d 29 (1973).

473. *United States v. Neet*, 504 F. Supp. 1220, 1228 (D. Colo. 1981); *State v. Kurtz*, 46 Or. App. 617, 612 P.2d 749 (1980).

474. *See Commonwealth v. Wheatley*, 266 Pa. Super. 1, 402 A.2d 1047, 1050 (1979) (search of jacket held proper where living companion of defendant exercised sufficient control over it to conceal drugs inside it).

475. *State v. Biggs*, 16 Wash. App. 221, 556 P.2d 247, 249-50 (1976) (visitor enters premises during execution of warrant and abandons his jacket when he leaves the premises).

searching an article or item that was incapable of containing the objects sought. An excellent example of this situation occurred in *Miles v. State*.⁴⁷⁶ In *Miles*, law enforcement officers obtained a search warrant for two handguns.⁴⁷⁷ Ultimately, the officers seized "firearms, marijuana, controlled drugs, [and] other personal property," along with a safe, a bank statement, a utility bill and a notebook.⁴⁷⁸ The appellate court commented:

[T]here was no probable cause to believe here that the envelopes, the notebook, medicine vials, or other small containers could contain the handguns authorized to be seized by the search warrant. Just as it is patently beyond the scope of a warrant to search for an elephant in a breadbox or a shotgun in a snuff can, so also is it an unreasonable search to look for a handgun nine inches long inside an [sic] utility bill or bank statement envelope, in a flat notebook, or inside any other container too small to hold the weapon.⁴⁷⁹

In a similar fact situation, a search warrant was obtained for stolen firearms in *Jones v. State*.⁴⁸⁰ The officers unsuccessfully searched the dwelling for the guns. One officer proceeded to crawl underneath the porch and saw a "Nestea container two inches (2") wide and eight inches (8") tall."⁴⁸¹ The container was sealed with duct tape at the top, and had a clear bottom. Through the bottom, the officer observed a plastic bag which contained a brown substance.⁴⁸² He seized the container, and it was later determined that the substance was heroin.

The state claimed that the seizure should be upheld because "it might have contained the sales tags from the guns described in the warrant."⁴⁸³ The court rejected this contention,⁴⁸⁴ but erroneously used the plain view doctrine in doing so. The opinion previously had noted that the "container was

476. 742 P.2d 1150 (Okla. Crim. 1987).

477. *Id.* at 1151.

478. *Id.*

479. *Id.*

480. 632 P.2d 1249 (Okla. Crim. 1981) (Bussey, J., *mem.*).

481. *Id.*

482. *Id.*

483. *Id.*

484. *Id.*

too small to contain any of the stolen guns described in the warrant.”⁴⁸⁵ Although the correct result was reached, the preferable basis was that the officers had no right to search an article that obviously could not contain the items sought.

C. What May Be Seized

In addition to the objects particularly described in the warrant, police officers may seize criminal evidence that comes into “plain view” during the search. This doctrine simply means that a police officer may seize any item that he inadvertently views from a place that he is lawfully entitled to be, provided that the item has an incriminating character.⁴⁸⁶ Even if the item observed is in “plain view,” the officer must have a “Fourth Amendment justification”⁴⁸⁷ for his access to the object. In other words, the officer must be within the proper scope and intensity of the warrant. If a warrant were issued to search for a stolen shotgun, narcotics discovered in a bottle in a medicine cabinet would not be within plain view. The officers would exceed the intensity allowable under the warrant because there was no reason to believe that a shotgun could be stored in a small medicine cabinet.

Evidence seized under the plain view doctrine must be inadvertently discovered. This requirement was set forth in *Coolidge v. New Hampshire*⁴⁸⁸ and explained by Justice Stewart as follows:

The rationale of the exception to the warrant requirement . . . is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a “general” one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police *know* in advance the location of the evidence *and intend* to seize it, the situation is altogether different.

If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of

485. *Id.*

486. W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE 99-101 (1st ed. 1985).

487. *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

488. 403 U.S. 443 (1971) (plurality opinion).

the express constitutional requirement of "Warrants . . . particularly describing . . . [the] things to be seized."⁴⁸⁹

The inadvertence requirement of *Coolidge* is somewhat troubling because the plurality opinion never stated precisely what degree of expectation a police officer permissibly may possess and still satisfy the inadvertence requirement. It is undoubtedly best to interpret *Coolidge* to mean that an inadvertent discovery is permissible under a search warrant unless the officer has *probable cause* for that item and does not list it in the warrant.⁴⁹⁰ That would be a clear violation of the fourth amendment. "Inadvertence" should not be interpreted as requiring an expectancy ignorance on the part of the police officers with respect to certain items. For example, the police may lack probable cause but still may expect that a search of a narcotics warehouse will uncover firearms. If the firearms are found on the premises, their discovery should be held "inadvertent" for purposes of the plain view doctrine.

In *Fritz v. State*,⁴⁹¹ the Oklahoma Court of Criminal Appeals analyzed a challenge to a plain view seizure that explicated the inadvertence requirement. The executing officers had seized six stolen cards that were allegedly in plain view; however, these cards had not been listed in the affidavit or search warrant.⁴⁹² Upon cross-examination, the officers admitted that they were searching for these cards. The court correctly determined that their prior knowledge of the cards coupled with the intentional search for them violated the fourth amendment.⁴⁹³

The final requirement in the plain view doctrine is that the seizure is valid only where it is "immediately apparent to the police that they have evidence before them."⁴⁹⁴ The central issue under this requirement involves the question of how much of an incriminating nature an item must have before it

489. *Id.* at 469-71 (emphasis added).

490. See, e.g., *Sovereign News Co. v. United States*, 690 F.2d 569 (6th Cir. 1982); *People v. Stoppel*, 637 P.2d 384 (Colo. 1981); *State v. Riedinger*, 374 N.W.2d 866 (N.D. 1985).

491. 730 P.2d 530 (Okla. Crim. 1986).

492. *Id.* at 532.

493. *Id.* at 533. See also *Payne v. State*, 744 P.2d 196, 199 (Okla. Crim. 1987).

494. *Coolidge*, 403 U.S. at 466.

is seized. While there is no problem with the plain view seizure of obvious contraband, there exists a wide range of criminal evidence that may or may not have a nexus to criminal activity. Many of the decisions subsequent to *Coolidge* have dealt with whether an officer could examine an article to determine its incriminating character.⁴⁹⁵

In *Arizona v. Hicks*,⁴⁹⁶ the United States Supreme Court reversed a clear trend of lower court decisions allowing police officers to cursorily examine an item to determine its incriminating nature. In *Hicks*, an officer was lawfully executing a search warrant when he noticed some very expensive stereo equipment in the corner of the defendant's apartment. The officer moved some of the stereo components in order to record their serial numbers. He then called headquarters and was informed that the stereo equipment had been stolen. He proceeded to seize the stolen property.⁴⁹⁷ The majority concluded that the officer had acted improperly and the seizure could not be sustained on the plain view doctrine. The Court construed the moving of the stereo components as a "search" undertaken without probable cause.⁴⁹⁸ Further, the officer had no right to move the object in order to examine its incriminating nature.⁴⁹⁹ Therefore, the "immediately apparent" requirement was interpreted to mean full-blown probable cause. If an officer has only a reasonable suspicion that an object has an incriminating character, he may only observe it in its stationary position.

A closely related issue arising under the plain view doctrine is the situation raised when the executing officers seize items that are not named in the search warrant because they have an immediately apparent *nexus* to criminal activity. Assuming that the executing officers have not violated the requirements of the plain view doctrine, a seizure of items not listed in the warrant will be upheld where the property is ei-

495. See, e.g., *State v. Sagner*, 12 Or. App. 459, 506 P.2d 510 (1973); *State v. McCrea*, 22 Wash. App. 526, 590 P.2d 367 (1979).

496. 107 S. Ct. 1149 (1987).

497. *Id.* at 1152.

498. *Id.*

499. *Id.* at 1154.

ther a fruit, instrumentality or contraband of a crime.⁵⁰⁰ The required nexus is automatically established for these categories of property.

An example of the particular problem can be found in *Campbell v. State*.⁵⁰¹ In *Campbell*, the defendants challenged the seizure of twenty-five items not named in the warrant. The defendants were suspected of manufacturing amphetamines. The unnamed items seized were chemistry books and notes and laboratory equipment.⁵⁰² The court upheld the seizure of these items and stated that the "[o]fficers may seize any item which in their experienced judgment and knowledge of the circumstances is reasonably capable of being designed, intended, or used as an instrumentality of the alleged crime."⁵⁰³

In *Caffey v. State*,⁵⁰⁴ some unnamed items were held inadmissible when they were seized during a lawful search of the defendant's vehicle. The defendant was arrested for robbing a business establishment in Tulsa on January 20, 1980. The warrant listed a ".38 caliber revolver, Smith & Wesson 357 Mag., model 65"⁵⁰⁵ The officers also seized a Safeway receipt and a box of ammunition from the defendant's vehicle. The court held, without explanation or analysis, that both items were outside the scope of the warrant and inadmissible.⁵⁰⁶ This is a dubious conclusion because if the ammunition were the same caliber as either handgun, it would be considered an instrumentality of the crime.⁵⁰⁷ Likewise, the Safeway receipt would show the defendant's presence in Tulsa on the day of the armed robbery — which is clearly an element of the crime.

In conclusion, the language in *Campbell* should be interpreted as finding the required nexus automatically because the items were instrumentalities. The better position, consis-

500. *Warden v. Hayden*, 387 U.S. 294, 307 (1967).

501. 651 P.2d 696 (Okla. Crim. 1982).

502. *Id.* at 698.

503. *Id.*

504. 661 P.2d 897 (Okla. Crim. 1983).

505. *Id.* at 901.

506. *Id.*

507. See *State v. Dingle*, 279 S.C. 278, 306 S.E.2d 223 (1983) (.22 caliber ammunition properly seized when warrant was for .22 caliber weapon).

tent with *Hicks*, is to require probable cause for any item seized outside the scope of the warrant that constitutes "mere evidence" of a crime. Thus, in *Caffey*, the court should have analyzed the ammunition in terms of an instrumentality, and the receipt on the basis of probable cause.

VIII. SUPPRESSION UNDER THE GOOD FAITH EXCEPTION

In 1984, the United States Supreme Court adopted a reasonable good faith exception to the exclusionary rule where evidence has been illegally seized under a defective search warrant. In *United States v. Leon*,⁵⁰⁸ the Court concluded that the purpose of the exclusionary rule was "to deter police misconduct rather than to punish the errors of judges and magistrates."⁵⁰⁹ Since the exclusion of evidence will have no meaningful deterrent effect on a magistrate who issues a search warrant, evidence will be suppressed "only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule."⁵¹⁰

Leon is by no means a blanket exception covering all aspects of the exclusionary rule. The decision is premised on a presumptively invalid warrant, and is not applicable to issues raised concerning the execution of the warrant⁵¹¹ nor to the permissible scope and intensity of the search.⁵¹² In addition, the police officer's reliance on the magistrate's determination of probable cause must be "objectively reasonable."⁵¹³ In determining whether good faith is met the test becomes "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."⁵¹⁴

508. 468 U.S. 897 (1984). For commentaries on *Leon*, see: Alschuler, "Close Enough for Government Work": *The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309; Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287 (1985); and LaFave, "The Seductive Call of Expediency": *U.S. v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895 (1984).

509. *Leon*, 468 U.S. at 916.

510. *Id.* at 918.

511. See *supra* text accompanying notes 365-441.

512. See *supra* text accompanying notes 442-507.

513. *Leon*, 468 U.S. at 926.

514. *Id.* at 922 n.23.

There are then four specific instances where the suppression of illegally seized evidence remains appropriate under *Leon*. The first is where the issuing magistrate based the determination of probable cause on "information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth."⁵¹⁵ Thus, the decisions under the doctrine articulated in *Franks v. Delaware*⁵¹⁶ remain sound law. An example of this situation can be found in the *Fuccillo* decision.⁵¹⁷ In that case the executing officers possessed specific information as to the identity of certain women's clothing that could be found at a retail store. The officers did not specifically identify the articles sought, but rather obtained a search warrant that was not limited in scope to the contraband items. As a result, wholesale seizures were made of all the women's clothing at the store. The court found that the agents were "reckless in not including in the affidavit information which was known or easily accessible to them."⁵¹⁸

The second major area of misconduct that will permit suppression of evidence is when the magistrate abandons his judicial role and fails to perform his neutral and detached function.⁵¹⁹ This reaffirms much of the Court's precedent in this area and allows suppression where the magistrate has acted as a "rubber stamp" or shown partiality to the state.⁵²⁰ An illustration of this rule is seen in the Arkansas case of *Stewart v. State*⁵²¹ wherein the police officer knew an arrest warrant had been presigned by the judge and issued by the clerk. The court held that the officer knew that the "issuing magistrate wholly abandoned his judicial role."⁵²²

The third important exception to *Leon* is when the affidavit supporting the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unrea-

515. *Id.* at 923 (citing *Franks v. Delaware*, 438 U.S. 154, 171 (1978)).

516. *See supra* text accompanying notes 193-211.

517. *See supra* text accompanying notes 310-316.

518. 808 F.2d at 178.

519. *Fuccillo*, 468 U.S. at 923 (citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979)).

520. *See supra* text accompanying notes 42-69.

521. 289 Ark. 272, 711 S.W.2d 787 (1986).

522. 711 S.W.2d at 788.

sonable.”⁵²³ In *State v. Anderson*⁵²⁴ a search warrant was issued without an affidavit or any recorded sworn testimony in violation of state law.⁵²⁵ In holding that the evidence seized should be suppressed the court commented:

The procedure of providing an affidavit when obtaining search warrants is so standard a practice that we cannot consider such a deficiency as falling within the purview of good faith error. When we adopted the Rules of Criminal Procedure it was hoped we were providing a concise, correct set of rules governing searches, seizures, which would in general set forth the procedural aspects of criminal law. The rules should be common knowledge to law enforcement officers and judicial officers who have the duty and responsibility to authorize searches.⁵²⁶

The court concluded by viewing compliance with its procedural rules as a “threshold requirement before we consider the question of good faith”⁵²⁷

A more common ground of error occurring under this exception is the use of a “bare bones” affidavit. In *Leon*, the Court stated that “[n]othing in our opinion suggests . . . that an officer could obtain a warrant on the basis of a ‘bare bones’ affidavit and then rely on colleagues who are ignorant of the circumstances”⁵²⁸ In *State v. Huft*,⁵²⁹ an affidavit alleged that an informant had told the affiant that two named individuals were growing marijuana in their basement. The affidavit did not contain the underlying circumstances of how the informant got his information, nor did it contain any allegation regarding his reliability.⁵³⁰ The court held that the affidavit was so devoid of probable cause that it rendered the

523. 468 U.S. at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring)).

524. 286 Ark. 58, 688 S.W.2d 947 (1985).

525. 688 S.W.2d at 949.

526. *Id.* at 950.

527. *Id.*

528. 468 U.S. at 923 n.24.

529. 106 Wash.2d 206, 720 P.2d 838 (1986).

530. 720 P.2d at 839.

search warrant defective and the evidence seized during the search inadmissible.⁵³¹

The final major category of error that allows the suppression of illegally seized evidence occurs when the warrant is "so facially deficient — i.e., in failing to particularize the place to be searched or the things to be seized — that the executing officers cannot reasonably presume it to be valid."⁵³² This is the most confusing language of the *Leon* opinion because while it obviously leaves much of the prior law concerning particularity in place,⁵³³ it requires suppression only to the extent that the executing officer cannot presume it to be valid. Thus, suppression will not be required for every error in failing to particularize, but only those that should give the officer notice or doubt about the sufficiency of the description.

Interpretations by lower courts have not necessarily followed the apparent intent of the Supreme Court to divide particularity violations into the categories of those facially deficient and those deficient — but not facially. In the leading case of *United States v. Spilotro*,⁵³⁴ the Court concluded that suppression was appropriate when a search warrant was held to be overbroad in allowing wholesale seizures. In authorizing the panel's opinion, Judge Kennedy stated:

We conclude that the warrants here do not describe the items to be seized with sufficient particularity, and we cannot conscientiously distinguish this case from others in which we have held warrants invalid because of their general terms [T]he government could have narrowed most of the descriptions in the warrants either by describing in greater detail the items one commonly expects to find on premises used for the criminal activities in question, or, at the very least, by describing the criminal activities themselves rather than simply referring to the statute believed to have been violated. As the warrants stand, however, they authorize wholesale seizures of entire categories of items not generally evidence of criminal activity, and provide no

531. *Id.* at 841. See, e.g., *United States v. Barrington*, 806 F.2d 529, 532 (5th Cir. 1986); *State v. Adkins*, 346 S.E.2d 762, 774-75 (W. Va. 1986).

532. *Leon*, 468 U.S. at 923.

533. See *supra* text accompanying notes 232-364.

534. 800 F.2d 959 (9th Cir. 1986).

guidelines to distinguish items used lawfully from those the government had probable cause to seize.

The Gold Rush warrant authorized, among other things, the seizure of address books, notebooks, notes, documents, records, assets, photographs, and other items and paraphernalia evidencing violations of the multiple criminal statutes listed. The government did not know, or at least did not recite, the precise identity, type, or contents of the records sought. The Gold Rush warrant should have named or described those particular items. For instance, the warrant might have authorized the seizure of "records relating to loan sharking and gambling, including pay and collection sheets, lists of loan customers, loan accounts and telephone numbers, line sheets, bet slips, tally sheets, and bottom sheets."⁵³⁵

Other reported cases have continued to uphold suppression as the appropriate remedy when an overbroad warrant authorizes a wholesale seizure of items.⁵³⁶ The lack of specificity in the description of the items sought operates against the officer's claim of good faith reliance. At least the initial interpretations of this portion of the *Leon* opinion have left intact the prior decisions over particularity. Indeed, there may prove to be no difference in the development of the law after *Leon*, because the courts may find it difficult, if not impossible, to distinguish the categories.

CONCLUSION

The law governing the issuance and execution of search warrants has been developing slowly into an area of specialization that only prosecutors and experienced criminal defense attorneys dare to enter. This situation has been caused by the lack of educational opportunities available for both law students and members of the bench and bar. In many of the cases reviewed in this article errors were unintentionally passed over by defense attorneys. In other cases, the appellate courts did not analyze adequately the issues properly raised by the defense.

535. *Id.* at 964 (citations omitted).

536. *United States v. Washington*, 797 F.2d 1461 (9th Cir. 1986); *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985).

This state of affairs has begun a necessary reversal toward a more educated and perceptive bar. The catalyst is undoubtedly the United States Supreme Court's decision in *Leon*. While fashioning a good faith exception to the exclusionary rule, the case also reaffirms, with slight alterations, the constitutional requirements over the neutrality of the magistrate, particularity of the descriptions and scope and execution of the warrant. A careful examination and analysis of the search warrant process is underway in our court system and will continue until the progeny of the *Leon* decision are more numerous. At that time, analysis will disclose that the traditional rules governing the warrant process continue to provide the constitutional framework for the freedoms guaranteed by the fourth amendment.