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# ALERT

JANUARY-FEBRUARY 1978

## CRIMINAL DIVISION

FROM THE OFFICE OF  
THE ATTORNEY GENERAL  
OF THE STATE OF MAINE



### MESSAGE FROM THE ATTORNEY GENERAL JOSEPH E. BRENNAN

I have long felt that the preparation of search warrant affidavits is one of the more difficult tasks confronting law enforcement officers. In addition, it is a task which must be performed well, since a defective affidavit can result in the reversal of an otherwise valid criminal conviction.

In an effort to assist law enforcement officers to carry out this function, this issue of the ALERT sets out in detail the procedures for preparing a search warrant affidavit. We believe that if officers follow the step-by-step approach described in the ALERT, they will reduce the possibility that the affidavit will be defective.

Despite the value of a step-by-step guide, officers should recognize that it has limitations. Even a lengthy issue of the ALERT cannot possibly deal with all of the problems which may be encountered in drafting a search warrant affidavit. Thus, officers should seek advice whenever they are faced with an unfamiliar problem. In fact, unless the local practice dictates a different procedure, the preparation of these affidavits should usually be a cooperative effort of the police officer and the prosecutor.

JOSEPH E. BRENNAN  
Attorney General

## PREPARING AN AFFIDAVIT FOR A SEARCH WARRANT

This issue of the ALERT discusses the preparation of search warrant affidavits. The October 1970 and August 1972 issues of the ALERT and chapters II-B and II-C of the Maine Law Enforcement Officer's Manual have addressed the law relating to search warrants and affidavits in some detail. While this article will frequently discuss the law which governs search warrant affidavits, it is not intended as a replacement for the material which has appeared earlier in the ALERT and the Manual. Rather, its primary purpose is to provide officers with practical suggestions and techniques which they may use in the actual preparation of an affidavit.

The law requires, of course, that searches be conducted pursuant to a warrant issued by a neutral and detached magistrate except in certain narrowly defined situations. (This article will not discuss the circumstances under which a warrantless search is constitutionally permissible. For a review of the exceptions to the warrant requirement see chapters III-A to III-D of the Law Enforcement Officer's Manual.) It is therefore likely that at some point during his career a law enforcement officer will have to apply for a search

warrant. This article is designed to provide officers with a step-by-step approach to the preparation of affidavits in support of search warrants. Officers are encouraged to refer to the article when they are actually in the process of drafting an affidavit and to make sure that each relevant point mentioned in the article is addressed in the affidavit. Officers will also find it necessary to amend the affidavit "checklist" as changes in the case law or in the court rule (Rule 41 of the Maine Rules of Criminal Procedure) relating to search warrants require. Finally, the affidavit should always be submitted to a prosecuting attorney for his evaluation, unless local practice is otherwise, before it is submitted to a magistrate.

### THE PURPOSE AND IMPORTANCE OF THE AFFIDAVIT

Before discussing the mechanics of preparing search warrant affidavits, the reasons why an affidavit must be submitted in support of a search warrant will be examined.

The need for an affidavit stems from the rule that a magistrate may

issue a search warrant only upon a finding that probable cause exists for the search. Since at the time a warrant is requested the magistrate will be unfamiliar with the facts of the case, there must be a procedure for communicating those facts to him. This is the purpose of the affidavit. Thus, in preparing an affidavit the officer should keep in mind that his primary objective is to inform the magistrate of all the relevant facts he will need to know in order to decide whether or not to issue the warrant.

Why must the facts constituting probable cause be set out in writing in an affidavit rather than merely recited orally to the magistrate? In the event that the validity of the search warrant is challenged, a trial court at a suppression hearing or an appellate court (ordinarily Maine's Law Court) must have some way of knowing precisely what information was given to the magistrate when he made his decision to issue the warrant. The best way of assuring that an appellate court will know exactly what information was before the magistrate is to have the information set out in writing.

The affidavit facilitates the process of appellate review by creating a permanent record of the facts constituting probable cause. To ensure that the relevant facts are provided to the magistrate in writing rather than orally, Rule 41(c) of the Maine Rules of Criminal Procedure specifically states that "[a] warrant shall issue only on an affidavit sworn to before a district judge or complaint justice . . . ." (The full text of Rule 41, which governs the procedure for obtaining and executing a search warrant in Maine, appears at the end of this article.) Thus, there is a legal duty imposed upon the law enforcement officer to submit an affidavit whenever a search warrant is sought.

It must be remembered that it is the affidavit, not the war-

rant itself, which must establish probable cause to search. If the affidavit is deficient, it does not matter what appears on the face of the warrant, since "[t]he warrant must stand or fall solely on the contents of the affidavit." *State v. Gamage*, Me., 340 A.2d 1, 9 (1975). See also *State v. Hawkins*, Me., 340 A.2d 255, 259 (1970); *State v. Cadigan*, Me., 249 A.2d 750, 759 (1969). Moreover, pursuant to the "four corners" rule all of the facts and circumstances which go to the establishment of probable cause must appear in the affidavit. *State v. Smith*, Me., A.2d (January 23, 1978); *State v. Fernald*, Me. 381 A.2d 282 (January 4, 1978). Any relevant facts which the officer may know but which he neglects to describe in the "four corners" of the affidavit will not be considered by an appellate court when the court is reviewing the lawfulness of a search conducted pursuant to a warrant.

Thus, the importance of the affidavit cannot be over-emphasized. Whenever applying for a search warrant, the law enforcement officer should remember that his affidavit is not merely a formality which can be prepared with little thought or with a lack of thoroughness. On the contrary, because it is the affidavit which will serve as the basis for testing the adequacy of probable cause, that document will be scrutinized with great care by the issuing magistrate, defense counsel, the trial court and ultimately, the appellate court. Because of the operation of the exclusionary rule, the most diligent investigation and prosecution may be wasted if a search which produces incriminating evidence is held unlawful because of an insufficient affidavit.

It is in light of these considerations that the task of preparing search warrant affidavits should be approached.

## THE AFFIDAVIT AND REQUEST FORM

Many law enforcement officers are familiar with a form entitled AFFIDAVIT AND REQUEST FOR SEARCH WARRANT (sometimes referred to as the "A & R" form). This form, which consists of a single sheet of paper and which is prepared and distributed by the District Court, is reproduced below:

---

STATE OF MAINE  
 Kennebec . . . . ., ss  
           District Court  
           District . . . . .  
           Division of . . . . .  
           . . . . .

AFFIDAVIT AND REQUEST  
 FOR  
 SEARCH WARRANT

To \_\_\_\_\_, Judge, Complaint  
 Justice, of the District Court to be  
 holden at \_\_\_\_\_ in the  
 County of \_\_\_\_\_, and  
 State of Maine.

\_\_\_\_\_ a  
 of \_\_\_\_\_, in the County  
 of \_\_\_\_\_  
 in said State of Maine, on oath  
 complains that he has probable  
 cause to believe and does believe  
 that on the premises known as  
 \_\_\_\_\_ located at  
 \_\_\_\_\_ Street, in  
 the City/Town of \_\_\_\_\_  
 County of \_\_\_\_\_  
 in said State, said premises being  
 owned/occupied by \_\_\_\_\_

\*said premises being owned/  
 occupied by a person or persons to  
 your complainant unknown.

There is now being concealed  
 certain person/property, to wit;

\_\_\_\_\_ that said person/property (state  
 reason for seizure)

WHEREFORE, the said prays that a warrant may issue authorizing a search in the daytime of the above described premises, for said person/property; and that if said person/property, or any part of the same be there found, the said , or the person having said person/property in his custody or possession, may be arrested and held for examination as the law directs.

\*The said

on oath further states that he is positive that the person/property is in the place to be searched and it is necessary to prevent the removal of said person/property, that a warrant issue authorizing a search in the nighttime of the above described premises.

Dated at this day of 19

Subscribed and sworn to by the said this day of 19 , before me

District Judge  
Complaint Justice

\*Delete Sections not applicable.  
CR-8-76 Rev.

At one time, the "A & R" form was the only document utilized by those seeking a search warrant. Thus, in *State v. Cadigan*, Me., 249 A.2d 750 (1969), the only document submitted to the magistrate by an assistant county attorney was an A & R form, the blanks of which had been filled in. The Law Court held that the search was unlawful because probable cause could not be constitutionally determined by the magistrate on the basis of the information in the form. As can be seen from an examination of the form, there is little room for a complete presentation of all the

facts to the magistrate who must determine whether probable cause exists for the issuance of a warrant. As stated by the Supreme Judicial Court in *State v. Gamage*, Me., 340 A.2d 1, 6 (1975), the form is

"... so skeletal in its design and typographic layout as to leave little room for the elaboration of the grounds of probable cause, which is an essential requirement for the issuance of a warrant under Rule 41(c)."

Because of the inadequacies of the A & R form, officers began submitting more detailed affidavits in addition to the A & R form. However, this posed a problem for the reviewing court since it was often unclear whether the A & R form and the supporting affidavit constituted a single affidavit or whether, in fact, they were two separate affidavits. Compare *State v. Benoski*, Me., 281 A.2d 128 (1971), with *State v. Stone*, Me., 322 A.2d 314 (1974). Accordingly, the reviewing court was required to determine whether the supporting affidavit was sufficiently incorporated by reference in the A & R form. See *State v. Gamage*, Me., 340 A.2d 1, 7 (1975).

In view of these problems associated with the A & R form, it is recommended that officers, when applying for a search warrant, not submit an A & R form to the magistrate **unless local practice requires otherwise**. All the information contained in the A & R form can be adequately presented in the one, detailed affidavit prepared by the officer. It is suggested therefore that an officer applying for a search warrant draft his own affidavit (which, of course, would contain a "request for a search warrant".) If the procedures recommended in the following portions of this article are followed, all the information called for by the A & R form will be contained in the officer's own affidavit.

If local practice in the officer's jurisdiction requires completion

and submission of the A & R form, the officer should state specifically in the A & R form that the property being sought "is subject to seizure on the basis of the facts and circumstances set forth in the affidavit of Officer John Doe, dated ....., which is attached hereto and incorporated by reference herein." The officer should then, **before** submitting the documents to the magistrate, staple the completed A & R form to his own detailed affidavit.

### A STEP BY STEP APPROACH TO PREPARATION OF THE AFFIDAVIT

To many law enforcement officers the task of drafting a search warrant affidavit appears quite difficult. However, preparing an affidavit will be less imposing if the law enforcement officer takes the time to understand what he is trying to accomplish and how best to approach the problem. It is suggested that if the officer approaches the affidavit in a logical and step-by-step fashion, he will have little difficulty in drafting a complete and legally sufficient affidavit.

Rule 41 of the Maine Rules of Criminal Procedure sets forth generally the requirements for the issuance of a search warrant. Rule 41(a) specifies that a search warrant may be issued by either a District Court Judge or a complaint justice "with jurisdiction of the area wherein the property sought is located."

Rule 41(b) states the types of property which may be searched for and seized pursuant to a warrant. Any property

- (1) stolen or embezzled; or
- (2) designed or intended for use or which is or has been used as a means of committing a criminal offense; or
- (3) the possession of which is unlawful; or

(4) consisting of non-testimonial evidence which will aid in a particular apprehension or conviction, may be subject to seizure pursuant to a search warrant.

Rule 41(c) requires that the affidavit include a specific designation of the person or place to be searched, the owner or occupant thereof, if known, and the person or property to be searched for. Rule 41(c) also expressly requires that the affidavit establish probable cause to issue the warrant.

In setting forth the essential elements of an affidavit, Rule 41 itself provides the basis for a helpful and appropriate outline for the preparation of a search warrant affidavit. Virtually all affidavits can be drafted pursuant to a five step procedure as follows:

**STEP 1**

**A Statement Directing the Affidavit and Request to a Particular Magistrate.**

**STEP 2**

**A Statement of the Officer's Identity and Experience.**

**STEP 3**

**An Introductory Paragraph Which Includes:**

- A. A description of the person or place to be searched, including the name of the owner or occupant of any such place, if known, and
- B. A description of the property to be seized, including a statement as to why the property is seizable.

**STEP 4**

**A Presentation of the Facts Which Establish Probable Cause to Search.**

**STEP 5**

**A Conclusion, Including a Specific Request for a Warrant to Seize Particular Property.**

Following this step-by-step approach should make the drafting of search warrant affidavits much easier for law enforcement officers. Each of these steps will be discussed in greater detail below, and sample language will be offered.

**STEP 1**

**A Statement Directing the Affidavit and Request to a Particular Magistrate**

At the top of the affidavit the officer should write the **title** of the affidavit, which should appear as follows:

**"AFFIDAVIT AND REQUEST FOR SEARCH WARRANT"**

After entering the title, the first step in preparing an affidavit is to determine to whom the application for a search warrant is to be made. As stated earlier, Rule 41(a) provides that either a District Court Judge or a complaint justice may issue a search warrant. Therefore, the officer's affidavit should be addressed to the magistrate who is being asked to issue the warrant. This should be done in the first sentence which should address the appropriate District Court Judge or complaint justice. For example:

**"To . . . . ., Judge (Complaint Justice) of the District Court to be held at Bangor, in the County of Penobscot and in the State of Maine."**

Frequently the officer will know at the time that he is preparing the

affidavit the particular magistrate to whom the affidavit will be submitted. In such cases, of course, the officer will enter the magistrate's name at the time he is drafting the affidavit. (The name can always be stricken and the appropriate name added if the originally designated magistrate is unavailable.) Occasionally, however, the officer will not know what magistrates are available at the time he is drafting the affidavit. (Good police procedure dictates, however, that the officer begin to determine the availability and whereabouts of a magistrate as soon as the officer decides to seek a search warrant.) In such cases the space for the name of the magistrate, and his title, should be left blank until a magistrate has been located.

The officer must, of course, determine **which** District Court Judge or complaint justice may issue a warrant to search for the particular person or property. Rule 41(a) provides that a warrant may be issued by a District Court Judge or complaint justice who has "jurisdiction of the area wherein the property sought is located." This means that in order to decide what magistrate may issue the warrant the officer must first determine in which district of the District Court the person or property sought is located. The territories of the districts of the District Court are set out in 4 M.R.S.A. §154. Once the officer has determined the judicial district in which the person or property is located, he must ascertain which District Court Judge(s) is **assigned** to that district and which complaint justices **reside** in that district since only these persons may issue a search warrant to search for property located within the district. See *State v. Fernald*, Me., 381 A.2d 282 (January 4, 1978). The one exception to this rule is provided by 4 M.R.S.A. §161, which authorizes the Chief Judge of the District Court to specifically

direct a complaint justice to issue a warrant authorizing a search for property located in a judicial district other than the district in which the complaint justice resides. Absent such express authorization, a complaint justice may issue a warrant only to search for property located within the district of the District Court in which he resides.

A problem sometimes encountered by law enforcement officers who are applying for a search warrant, particularly in the rural areas of the state, is the unavailability of magistrates. This problem often arises, however, because the officer is unaware of the identity of the complaint justices within a given district. The officer should maintain an up-to-date list of the complaint justices (and their addresses and telephone numbers) for his use at the time a warrant is needed. If the officer is uncertain as to who have been designated complaint justices within a given district, the officer should contact the office of the Chief Judge of the District Court.

## STEP 2

### A Statement of the Officer's Identity and Experience

The second step in preparing an affidavit is for the officer-affiant to properly identify himself to the judge or complaint justice. This may be done in the following way:

**"I, John Smith, being first duly sworn on oath, depose and say that I am a Sergeant in the Portland Police Department and I have been a law enforcement officer for five years."**

In most cases the above should be sufficient to properly identify the affiant and to give some indication as to his experience. However, in some cases an officer's training

and expertise may be extremely helpful in establishing probable cause to search. In narcotics cases, for example, an officer's judgment, based on his training and expertise, may add special significance to the facts contained in the affidavit.

If the affiant has decided to set out his training and expertise in the affidavit, it is suggested that this be done as one of the numbered paragraphs in which the affiant sets out the facts and circumstances constituting probable cause (see Step 4 below). The following is an example of a description of an officer's expertise in the area of narcotics:

**"1. I am a sergeant in the Portland Police Department and have been a law enforcement officer for the past 5 years. For the past 30 months I have been assigned to the Narcotics Division of the Portland Police Department and have worked exclusively in the investigation of controlled substances. During that time I have conducted in excess of 200 controlled substances investigations and have arrested more than 400 persons for violations dealing with heroin, cocaine, LSD, amphetamines, barbiturates and other dangerous drugs. I have directly participated in more than 25 undercover buys of controlled substances. I have also participated in the seizure of controlled substances on more than 150 occasions. I have also worked with other experienced officers in the field and have attended more than 50 hours of classes on the subject of the use, identification, packaging, and sale of controlled substances. Among the courses I have attended is the two-week school on narcotics and dangerous drugs conducted by the Drug Enforcement Administration."**

The above description is an example only, and law enforcement officers will have to prepare their own description of their training and expertise in a particular field.

Because a detailed description of the officer's expertise is often quite lengthy, it is suggested that officers who seek warrants on a regular basis prepare and make copies of a complete statement of their training and expertise. The copies can then be used in all subsequent affidavits prepared by the officer. Of course, the statement should be updated periodically.

Finally, it should be emphasized that a statement of the affiant's experience, or the experience of another officer on whose information the affiant relies, should be included in the affidavit **whenever** it may add weight to the observations made by the affiant. Thus, an officer's experience in areas such as arson investigation, ballistics, fingerprinting or investigation of motor vehicle accidents should be included in the affidavit if he has relied on such experience during the course of the investigation.

## STEP 3

### An Introductory Paragraph which Includes:

- A. A description of the person or place to be searched, including the name of the owner or occupant of any such place, if known, and
- B. A description of the property to be seized including a statement as to why the property is seizable.

After addressing the affidavit to the appropriate magistrate and identifying himself, the officer should begin the body of the affidavit with an introductory paragraph which informs the magistrate, in summary fashion, what it is the officer wishes to seize, why it is seizable and where it is located. The purpose of this paragraph is **not** to provide the facts which constitute probable cause; such facts are set forth in the

numbered paragraphs which follow the introductory paragraph (see Step 4 below). The purpose of the introduction is to give the magistrate, before he starts reading the main portion of the affidavit, a basic outline as to what is being sought and why it must be seized. Additionally, the introductory paragraph often serves, by itself, to satisfy the requirement that the affidavit describe specifically both the place to be searched and the property to be seized.

### A. Describing the Place to be Searched

In applying for a search warrant, the requesting officer is claiming that there is seizable property located at a particular place. Before a warrant can be issued, therefore, the place to be searched must be **specifically** described. A specific description is required not only by Rule 41(c), but by the United States Constitution, which mandates that "no warrants shall issue, but upon probable cause . . . and **particularly describing the place to be searched . . .**" The reason for the requirement is obvious: unless the place to be searched is described specifically, there is a possibility that the officers executing the warrant will enter and search the wrong premises.

As a general rule, search warrant affidavits should describe the place to be searched with such a degree of particularity as will enable the officer executing the warrant "to ascertain and identify the place intended by reasonable effort." *State v. Brochu*, Me., 237 A.2d 418, 422 (1967). The description of the premises should be specific enough so as to exclude any other place. The following standard may be a helpful guideline: the place to be searched should be described with sufficient particularity so that if another officer were executing the warrant and he were totally

unfamiliar with the place or its general location, he would have no difficulty in identifying the correct place. Although it has been stated that "[a] technical description of the place to be searched is not necessary," *State v. Brochu, supra*, it is suggested that the affidavit contain the fullest description possible.

Care must be taken to insure that the description is **accurate**. However, if there is a technical inaccuracy in the description of the place to be searched, a thorough description of the place might overcome this. Thus, if the description is technically incorrect (for example, if there is a typographical error in the address given for a single unit dwelling) but is sufficiently detailed to permit the executing officer to locate the premises with reasonable effort, the warrant would probably be upheld. *See, e.g., United States v. Melancon*, 462 F.2d 82 (5th Cir. 1972).

Bearing these general principles in mind, the officer should consider the following specific examples which are presented for the purposes of illustration only.

#### 1. Single unit dwelling, the address of which is known.

In describing places the address of which is known, the officer should give the street address as well as a physical description of the structure itself. A thorough physical description of the structure may help sustain the warrant if it turns out that the street address is incorrect. For example:

**"I have probable cause to believe that certain property . . . is located at the premises owned and occupied by John Doe at 120 Water Street, Portland, Maine, which premises are further described as a single-story dwelling house with a green shingled roof and a light brown wooden exterior, and which premises include all rooms, attics, basements and storage areas**

**therein as well as the surrounding grounds, garages and outbuildings thereon."**

Whether the description of the premises should be more detailed than that which appears in this example will depend upon the circumstances of the case. A description of a single unit dwelling should not, however, be any less complete than that which appears above. Additional techniques which may be used in describing the place to be searched are discussed in the section which follows.

#### 2. Single unit dwelling, the address of which is unknown.

Often the place to be searched may not be identifiable by a street address. This is frequently the case in rural areas and parks for mobile homes. If the street address of the premises to be searched is not known, the officer should use greater particularity in describing the premises in the affidavit. Because the greater detail which is required in such cases will require a longer description, it is suggested that in the introductory paragraph the officer make only a general reference to the premises and identify its owner or occupant and then give a complete description of the premises as the last numbered paragraph before concluding the affidavit. For example:

**"I have probable cause to believe that certain property . . . is located at the residence owned and occupied by John Doe on the Elm Road in Belgrade, Maine, which residence is further described herein. The basis for my probable cause is as follows:**

\* \* \*

[Ten numbered paragraphs setting forth the facts constituting probable cause.]

\* \* \*

11. The Doe residence is further described as being a 1970 Carvelle mobile home which is twelve feet in width by fifty-six feet in length. The trailer is further described as painted with three horizontal stripes of nearly equal width. The bottom stripe at the foundation of the trailer is white in color, the middle stripe is olive-green in color, and the top stripe up to the roof of the trailer is white in color. The Doe residence is further described as being the only residence located on lot 32 of Property Map 16 of the Town of Belgrade, County of Kennebec, State of Maine. The Doe residence is further described as being located adjacent to the Elm Road in said Town of Belgrade, the Elm Road being along the south side of the Doe property. The property on which the Doe residence sits is bordered on the West by the property and residence of James Ellis, on the North by the woods and fields belonging to Ralph Coulter, and on the East by the property and residence of Bruce E. Stokes, and, directly across the Elm Road, to the South by the lot and residence of Thomas J. Buck. The Doe residence is also described as the only trailer on the Elm Road that has horizontal white and olive-green stripes as described above. Furthermore, the lot upon which John Doe's trailer is located is further described as about 868 feet in depth and 150 feet in width bordering the Elm Road and the property of Ralph Coulter on the South and North sides respectively. Furthermore, there is a small aluminum shed behind the Doe trailer and the driveway leading to the Doe trailer is a gravel driveway."

Obviously this description is more detailed than would be necessary had a street address been known. Nevertheless, it must be emphasized that in preparing search warrant affidavits it is better to over-describe than to under-describe.

A helpful technique which may be used to supplement a description of premises, especially where there may be few existing landmarks by which to identify the premises, is to take a photograph of the premises or to draw a diagram of the location of the premises and to attach the photograph or diagram to the affidavit. The photograph or diagram should then be incorporated by reference in the affidavit. Thus, in the example given above a photograph or diagram of the Doe mobile home could be incorporated by reference by adding at the end of the description in paragraph eleven a sentence as follows:

"... A photograph of the said Doe residence is attached to this affidavit and is incorporated by reference herein."

or

"... A diagram showing the location of the Doe residence is attached to this affidavit and is incorporated by reference herein."

### 3. Multi-unit dwelling.

Greater thoroughness must also be employed in describing the location of an apartment which is part of a multi-unit dwelling. Because of the similarity in the entrances to each apartment and because of the proximity of the entrances, the likelihood of entry into the wrong residence may be greater in a multi-unit structure than, for example, a single-unit structure the address of which is known. This likelihood increases when the apartments are not identified by numbers or the number of the apartment is not known. Because a description of an apartment in a multi-unit dwelling will often be lengthy, officers may find it easier to give a brief description of the apartment in the introductory paragraph and a more detailed description as the last

numbered paragraph before the conclusion of the affidavit. For example:

"I have probable cause to believe that certain property . . . is located at the residence occupied by John Doe, which residence is Apartment number 14 at 1200 South Street in Waterville, Maine, and which residence is further described herein. The basis for my probable cause is as follows:

\* \* \*

[Ten numbered paragraphs setting forth the facts constituting probable cause.]

\* \* \*

11. The Doe residence, which is owned by McDonough Realty, Inc., of Waterville, Maine, is further described as being Apartment number 14 at 1200 South Street in Waterville, Maine. 1200 South Street is a three-story multi-unit apartment building, dark blue in color and bearing the name "Winter Haven Apartments." Apartment 14 is on the second floor of said apartment building and is the only apartment which is on the south side of the second floor and east of the stairwell. A diagram showing the location of the Doe residence (apartment 14) is attached to this affidavit and is incorporated by reference herein."

### 4. Motor Vehicles

Generally, in describing a motor vehicle, it is sufficient if the affidavit includes the color, year, make, model, license number and VIN number (if known) of the vehicle to be searched. However, if the license number is not known or if it is suspected that the number has been changed, other information should be given, including the vehicle's probable location, any collision damage to it, and any other distinguishing characteristics. Of course, the thorough and cautious approach to affidavit



preparation would dictate that the officer include this extra information regardless of whether the license number is known or suspected to have been changed.

Occasionally, the search of a motor vehicle will require the partial disassembly of the vehicle. In such a case, it is better practice for this to be specifically mentioned in the **conclusion** to the affidavit. For example:

**“WHEREFORE, your affiant asks that a search warrant issue to search the above-described red, 1974 Rolls-Royce 2-door hardtop bearing Maine registration number 12345, including all parts and compartments therein and including all areas within the passenger door . . . .”**

(For a general discussion regarding the conclusion to the affidavit, see Step 5 below.)

## 5. Persons

A search warrant may also be issued for the purpose of searching a person, although this is not often done. When a warrant to search an individual is requested, the description of the person should include the name, sex, race, age, height, weight, hair color, eye color and any distinguishing marks, if known.

## 6. Include the Name of the Owner or Occupant of the Premises

If the officer applying for a search warrant knows the name of the owner or occupant of the premises to be searched, he **must** include the name in his affidavit. Aside from the fact that this information is required by Rule 41(c), the information also serves to further describe the premises to be searched. For example, in one case the affidavit upon which the search warrant was based recited: “Place to be searched: 313 West 27th Street, a dwelling: The apartment of Melvin Lloyd Manley.” The court upheld the validity of the warrant, stating:

“. . . it adequately specifies the name of the occupant of the sub-unit against which it is directed and provides the searching officer with sufficient information to identify, without confusion or excessive effort such apartment unit.”

*Manley v. Commonwealth*, 176 S.E.2d 309, 314 (Va. 1970). If the name of the owner or occupant of the premises is not known, this should be stated in the affidavit. If both the owner and the occupant are known, it is suggested that both names be included.

## B. A Description of the Property to be Seized, Including a Statement as to Why the Property is Seizable.

Rule 41(c) of the Maine Rules of Criminal Procedure requires that a search warrant affidavit specifically designate the items that are to be searched for and seized. The Fourth Amendment to the United States Constitution, as well as Article I, §5 of the Maine Constitution, forbids a general exploratory search, and a search warrant based on an affidavit which does not specifically describe the things to be searched for and seized will be fatally defective.

How specific must the description be? Although there is no hard and fast formula, a good general rule is to describe the property to be seized with sufficient particularity so that the officer executing the warrant (1) can identify the property with reasonable certainty, and (2) is left with no discretion in deciding which property to seize.

In describing the property to be seized, it is necessary that the officer requesting the warrant indicate why the property is subject to seizure. As noted above, Rule 41(b) states the four types of property which are subject to seizure:

(1) stolen or embezzled property (i.e., “fruits of a crime”);

- (2) property designed or intended for use or which is or has been used as a means of committing a criminal offense (i.e., instrumentalities of a crime);
- (3) property the possession of which is unlawful (i.e., contraband); and
- (4) property consisting of non-testimonial evidence which will aid in a particular apprehension or conviction (although this category is broad enough to encompass property which also falls within (1), (2) or (3) above, it also covers other types of property which has value as evidence: blood stains, paint scrapings, etc.).

In the introductory paragraph, therefore, the officer should indicate that the property sought is seizable by indicating into which one (or more) of the Rule 41(b) categories the property falls. For example, is the property stolen? Is it an instrumentality of a crime? Is it unlawful to possess? Is it non-testimonial evidence which will aid in a particular apprehension or conviction?

The introductory paragraph should contain only a short and general statement as to why the property is seizable.

**“I have probable cause to believe that certain property, to wit, blood stains, which constitute non-testimonial evidence which will aid in the conviction of Andrew Burns for an unlawful homicide, is located . . . .”**

After the general statement in the introductory paragraph as to why the property sought is seizable, the officer must still set out facts and circumstances which establish probable cause to believe that the property is in fact seizable. This is done in the portion of the affidavit which follows the introductory paragraph (see Step 4 below). Thus, in the above example, after writing the introductory paragraph, the officer would present facts to establish probable cause to believe

that the blood stains would aid in the conviction of Andrew Burns for the unlawful homicide. (Additionally, of course, the officer would have to demonstrate probable cause that blood stains were present in the place which the officer requests to search.) If the affidavit fails to set forth sufficient facts to establish probable cause that the property sought is subject to seizure, it will be held invalid. Thus, in *State v. Benoski*, Me., 281 A.2d 128 (1971), the affidavit listed particular property and stated that the property described was "stolen property." However, the remainder of the affidavit failed to set forth sufficient facts to establish probable cause that the property sought was stolen property. Consequently, both the affidavit and the warrant which had been issued were held to be invalid.

The following discussion contains examples of descriptions of property which indicate why the property is seizable.

An affidavit describing **stolen property** should include the type, make or manufacturer, model, size, color, height, weight, shape and serial number (if known) of the stolen items. For example:

**"I have probable cause to believe that certain property, to wit, one portable R.C.A. 15-inch color television set, having a mahogany wood finish and bearing serial number 12345, is stolen property and is located at . . . ."**

A description which merely recites that "stolen property" is being sought, without particularly describing the stolen items, would be insufficient and a warrant based on such a description would be invalid.

If the number of stolen items being sought is quite substantial, the stolen property should not be listed in the introductory paragraph. Instead, the introductory paragraph should make a general reference to stolen property and the particular descriptions of the items

should appear as one of the numbered paragraphs in that portion of the affidavit which presents the facts constituting probable cause. For example:

**"I have probable cause to believe that certain property, to wit, stolen property which is described further herein, is located at . . . ."**

\* \* \*

[Eight numbered paragraphs setting forth the facts constituting probable cause.]

\* \* \*

**"9. The property which was stolen from the Jones' residence is as follows:"**

When describing **scheduled drugs**, the officer should specify the type of scheduled drug to be seized. For example:

**"I have probable cause to believe that certain property the possession of which is unlawful, to wit, heroin [or cocaine] [or amphetamines], is located at . . . ."**

Although some courts have held that a description using general terms such as "controlled substances", "narcotics" or "dangerous drugs" is sufficient, the better practice is to be more specific since there are many different types of controlled substances.

Frequently, an item of property may be seizable for several reasons, that is, the item may fall within more than one of the four categories in Rule 41(b). Thus, a stolen weapon might be used to commit a crime. The weapon would be subject to seizure both as stolen property (Rule 41(b) (1)) and as an instrumentality of a crime (Rule 41(b) (2)). (Technically the weapon would also be seizable under Rule 41(b) (4) since it would constitute non-testimonial evidence which would aid in a particular apprehension or conviction.) In such a case the introductory paragraph

should refer to both reasons for seizure. For example:

**"I have probable cause to believe that certain property, to wit, a .38 caliber Smith & Wesson revolver is stolen property and was used by Andrew Burns in the unlawful homicide of Arthur Arnold and is located at . . . ."**

Furthermore, the affidavit may seek different items of property which are seizable for different reasons. This fact should be made clear in the introductory paragraph. For example:

**"I have probable cause to believe that certain property, to wit, (1) a portable R.C.A. 15-inch color television set, having a mahogany wood finish and bearing serial number 12345 is stolen property, and (2) paint scrapings which constitute non-testimonial evidence which would aid in the apprehension and conviction of Andrew Burns for the crimes of burglary and theft, is located at . . . ."**

#### STEP 4

#### A Presentation of the Facts Which Establish Probable Cause to Search.

Every law enforcement officer is familiar with the phrase "probable cause." Although the term is difficult to define exactly, it has been stated that probable cause exists where the facts and circumstances shown are sufficient to justify an ordinarily prudent and cautious man in believing there is a reasonable basis for the search. *Beck v. Ohio*, 379 U.S. 89 (1964). The true function of a search warrant affidavit is to present sufficient factual information to the issuing magistrate to enable him to conclude that there is probable cause to believe that seizable property will be found at the place to be searched. It is essential that law enforcement officers recognize, first, that probable cause must be based on **factual** information, and second, that the issuing magistrate, not the officer, must

ultimately decide whether probable cause exists. Therefore, unsupported allegations or conclusions have no place in a search warrant affidavit.

How is probable cause established? There are essentially two factors to be considered in answering this question. First, the affidavit must contain **enough** factual information to satisfy the probable cause standard. Second, each item of information must be shown to have been obtained in a reliable way (by personal knowledge or observation) and the person providing the item of information must be shown to be credible. For a complete discussion of the law relating to establishing probable cause, see chapter II-C of the Maine Law Enforcement Officer's Manual.

The information which provides probable cause may come from a variety of sources—the observations of the affiant, a credible anonymous informant, a citizen informant, a fellow law enforcement officer. Moreover, in a given case the factual pattern which establishes probable cause may be very complicated. The task of the officer who is preparing an affidavit is to collect all this information and to present it to the magistrate in a logical and orderly fashion. The following are several suggested techniques which may avoid confusion in the presentation of the facts and circumstances constituting probable cause:

- a. All relevant **dates** and **times** should be noted with respect to each separate item of information.
- b. Each separate item of information should be presented in a separate paragraph and each of these paragraphs should be **numbered**. Although the numbering of the paragraphs may seem insignificant, it can be a great time-saver for those who have to refer to portions of the affidavit at a later time (for

example, the attorneys and the trial justice at a hearing on a motion for suppression or the Law Court on appeal). The numbering of the paragraphs will also make it easier for the officer preparing the affidavit to make references to different portions of his affidavit (for example, "as described more fully in paragraph 9 of this affidavit").

- c. Frequently it will be easier for the magistrate (or a reviewing court) to comprehend the facts in a given affidavit if they are presented in **chronological order**. Furthermore, a chronological presentation of the facts will often simplify the officer's task of preparing the affidavit.
- d. The use of **pronouns** such as "he", "she", "they" and the like should ordinarily be avoided. In a case which involves many different parties and in which the affidavit states that "he" did or said something, it may not be clear who "he" is. To avoid possible confusion, the officer should use the **name** of the person or persons rather than a pronoun.
- e. When one person has given another person certain information and that information is to be included in the affidavit, the officer preparing the affidavit should identify **both** the person who provided the information and the person who received it. Thus, a statement such as "Your affiant was told that the sale of heroin occurred at 2:00 a.m. on July 21, 1977" does not indicate who supplied the information to the affiant. In a given case the failure to identify the person who supplied information might be held to invalidate the affidavit and the warrant. This statement should read, "Your affiant was told **by John Jones** that the sale of heroin occurred at 2:00 a.m. on July 21, 1977." Similarly

a statement such as, "John Jones stated that he saw three men fleeing the scene", does not indicate to whom John Jones made the statement. Did he make it to the affiant? To a fellow officer? Or to some unknown third party? If the statement were made to the affiant it should be worded in the following manner: "John Jones stated to your affiant that he saw three men fleeing the scene."

### A SAMPLE AFFIDAVIT

Because probable cause may be established from information derived from many different sources, it is difficult to discuss all aspects of the problem within the confines of this article. Nevertheless, for the purpose of providing some guidance to law enforcement officers in preparing affidavits, a sample affidavit containing various types of information will be presented and analyzed. Those portions of the affidavit which have already been explained in the article will not be discussed.

### AFFIDAVIT AND REQUEST FOR SEARCH WARRANT

To Arthur M. Snyder, Complaint Justice of the District Court to be held at Bangor, in the County of Penobscot and in the State of Maine.

I, John Smith, being first duly sworn on oath, depose and say that I am a Sergeant in the Bangor Police Department and I have been a law enforcement officer for five years.

I have probable cause to believe that certain property, to wit, one portable R.C.A. 15-inch color television set, having a mahogany wood finish and bearing serial number 12345 is stolen property and is located at the residence

occupied by John King, which residence is Apartment number 14 at 200 East Street in Bangor, Maine and which residence is further described in paragraph 8 herein.

The basis for my probable cause is as follows:

1. At approximately 8:00 a.m. on August 1, 1977, I received a radio dispatch from Bangor Police Headquarters indicating that a burglary had occurred at the home of John Doe located at 132 Low Street in Bangor. I proceeded immediately to this address and spoke with Mr. Doe. Mr. Doe stated to me that when he awoke at approximately 7:30 a.m. on August 1, he noticed that his television set, which had been present in the house the previous evening, was missing. Mr. Doe described the television set to me as a portable R.C.A. brand 15-inch color television set, mahogany wood finish, bearing serial number 12345. I observed that a screen in the den window of the Doe residence had been cut open, providing an opening large enough for a man to enter through the window.

*(Comment: The information in this paragraph establishes that a crime has occurred and that the property sought to be seized is subject to seizure because it is stolen property. Although the information provided by John Doe to the officer will constitute hearsay when it is presented to the magistrate, the magistrate may rely on it because the two-part test for hearsay in an affidavit is satisfied. Is the source of the information credible? Yes, for two reasons: both because the source of the information is named in the affidavit and because he is the victim of a crime. Did the source of the information obtain his information in a reliable way? Yes, because the affidavit makes clear that Doe obtained his information by personal observation.)*

2. At approximately 2:30 p.m. on August 1, 1977, I received a phone call from a citizen informant and I spoke briefly with him. I then proceeded to the residence of this citizen informant in the city of Bangor. The informant told me that at approximately 4:00 a.m. on August 1, 1977, he was returning home from work and observed a man carrying a television set down Low Street in Bangor. The informant also told me that he observed the man place the television set in the back of a blue Ford van. The informant told me that he became suspicious of this activity because of the early hour. The informant told me that he wrote down the license plate number of the blue Ford van. The informant then handed me a piece of paper with the notation "Blue Ford van 54321" on it and told me that this was the license number of the van he had seen.

*(Comment: Here information is provided by a citizen informant directly to the affiant and the informant is not identified. Note that the information conveyed by the citizen was obtained through the citizen's own personal observations and that this is made clear in the affidavit by the words "observed" and "seen." Without such words the magistrate would have no idea how the citizen obtained the information; the magistrate might well conclude that the citizen's information was merely the result of rumor or suspicion. Note also that the affidavit makes clear (by means of such language as "the informant told me", rather than merely "the informant stated that") that the affiant obtained the information directly from the citizen.)*

3. I have had no prior contact with the citizen informant referred to in paragraph 2 of this affidavit. My own investigation of this citizen

reveals that he is not under arrest nor is he a suspect in any crime. The citizen told me that he gave the information because he wanted to help the police. The informant appeared to me to be a citizen acting in the interests of law enforcement and for no other reason.

*(Comment: Information received from a citizen informant is presumed to be reliable. See State v. Smith, Me., 379 A.2d 722, 725 (1977). However since the informant is not identified, it is necessary to present additional evidence tending to show that he is, in fact, a citizen informant.)*

4. At approximately 4:30 p.m. on August 1, 1977, I returned to the Bangor Police Department and was informed by a fellow police officer, Harold Jones, that he had contacted the Division of Motor Vehicles in the Secretary of State's Office in Augusta. Officer Jones informed me that he had been told by a person in the Motor Vehicle Division that a Mr. John King was the registered owner of a 1972 blue Ford van bearing license plate number 54321. Officer Jones also informed me that his check with the Division of Motor Vehicles revealed that Mr. King became the registered owner of this van in June, 1975, that the address on this registration is currently 200 East Street, Bangor and that the date of birth of John King is May 10, 1947. I then drove by the premises at 200 East Street and observed the exterior of the premises.

*(Comment: Here the affiant has received information from a fellow law enforcement officer. The credibility of the fellow officer does not have to be established since law enforcement officers are presumed to be credible. However, the affidavit must still indicate how the*

police officer-informant (i.e. Officer Jones) obtained his information. This is done here by indicating that Officer Jones obtained his information from the Motor Vehicle Division of the Secretary of State's Office. Note that it is not necessary to establish the credibility of the person in the Motor Vehicle Division or to establish how that person obtained his information. Persons performing record checks at the Motor Vehicle Division are presumed to be reliable, and it is presumed that they obtained their information from Motor Vehicle Division records.

The fact that the affiant personally observed the premises to be searched, as indicated in the last sentence of paragraph 4, reflects sound police procedure. Even if the affiant's surveillance turns up no additional information which will help establish probable cause, the affiant's first-hand examination of even a portion of the premises will assist him in his description of the premises to be searched.)

5. At approximately 10:00 a.m. on August 2, 1977, I met with a confidential reliable informant. This informant told me that he has known John King for several years and has been with King at the latter's residence at Apartment 14, 200 East Street, Bangor, on several occasions. The informant told me that on the evening of August 1, 1977, he was with King at 200 East Street, and that while there he observed an R.C.A. brand portable color television set. The informant also told me that on his previous visits to King's apartment, he had never observed this television set and that his most recent visit to King's apartment before August 1, 1977, was July 30, 1977.

(Comment: This is an example of information received by the affiant from an anonymous informant who is not a "citizen informant." Note that the affiant has made clear how

the informant obtained his information regarding the presence of the television set in the apartment, i.e., by personal observation.)

6. I believe the informant referred to in paragraph 5 to be reliable because on six prior occasions within the past eight months he has given me information, which has proven to be true on each occasion, and which resulted in the recovery of stolen property and the arrest of several people for the offense of burglary. I do not wish to disclose the identity of this confidential informant because I believe that such disclosure would impair his future usefulness to law enforcement and would endanger his life.

(Comment: The purpose of this paragraph is to establish the credibility of the anonymous informant whose information was set forth in the preceding paragraph. The informant's credibility is established in this case by showing that the informant has given reliable information in the past. It often happens that an affiant will not have had any prior contact with the "professional informant", although another officer has. In such cases it is proper for the affiant to use the information supplied by the informant provided the affiant identifies the officer and states why the other officer believes the informant to be credible. See State v. Lambert, Me., 363 A.2d 707 (1976).

Note that the numbering of the paragraphs has made it easy to tie the information in paragraph 6 to the informant in paragraph 5 and consequently avoids any possible confusion between the citizen informant and the informant in paragraph 5.)

7. At 10:45 on August 2, 1977, I was told by Mrs. Reynolds at the State Bureau of Identification,

State Police Headquarters, Augusta, Maine, that her check of the criminal record of John King, date of birth May 10, 1947, revealed that King had been convicted of burglary on three separate occasions.

8. The apartment of John King, which apartment is Apartment 14 at 200 East Street in Bangor, Maine, is further described as follows: 200 East Street is a three-story, multi-unit apartment building, dark blue in color and bearing the name "Winter Haven Apartments." The Winter Haven Apartments are owned by McDonough Realty, Inc., of Bangor, Maine. Apartment 14 is on the second floor of said apartment building and is the only apartment which is on the south side of the second floor and east of the stairwell. A diagram showing the location of the John King apartment (Apartment 14) is attached to this affidavit and is incorporated by reference herein.

(Comment: Techniques involved in describing the premises to be searched have been discussed earlier under Step 3.)

WHEREFORE, it is requested that a warrant issue authorizing a search, between the hours of 7:00 a.m. and 7:00 p.m., of the residence of John King, which residence is Apartment 14 at 200 East Street in Bangor, Maine and which residence has been further described in paragraph 8 herein, for the following property: one portable R.C.A. 15-inch color television set, having a mahogany wood finish and bearing serial number 12345.

s/

Sgt. John Smith  
Bangor Police Department  
Dated: August 2, 1977

(Comment: The conclusion to the affidavit is discussed below as Step 5.)

It bears repeating that the above sample affidavit represents only a small portion of the many types of information which may establish probable cause. It does not include all the possible ways that probable cause may be established, but simply illustrates the techniques to be used in presenting the information to the magistrate.

## STEP 5

### Concluding the Affidavit

The final step in the process of preparing the affidavit is to make a specific request for a search warrant. This can be done by means of the following language:

**“WHEREFORE, it is requested that a warrant issue authorizing a search, between the hours of 7:00 a.m. and 7:00 p.m., of the (here describe the person or premises to be searched; this description should be identical or nearly identical to that provided in the introductory paragraph), for the following property: (here describe the property to be seized; this description should be identical or nearly identical to that provided in the introductory paragraph.)**

An example of a conclusion appears at the end of the sample affidavit above. After the officer has completed the concluding paragraph, he should then present the affidavit to the magistrate. The officer must sign and date the affidavit in the presence of the magistrate.

## STALENESS

An additional consideration involving the establishment of probable cause which was not discussed in Step 4 is the problem of staleness. In a recent case, the Supreme Judicial Court of Maine

restated the general rule that “. . . probable cause to justify the issuance of a search warrant must exist at the time the warrant issues.” *State v. Willey*, Me., 363 A.2d 739, 741 (1976). Said another way, the information contained in the affidavit must not be “stale”. In the *Willey* case a warrant issued authorizing a search of the defendant’s home for the purpose of seizing marijuana. The affidavit in support of the warrant stated that marijuana had been purchased at the defendant’s residence on February 2, 1974. However, the affiant did not apply for a search warrant until March 5, 1974, 31 days later. The Court held that the affidavit failed to present sufficient facts which would justify a finding of probable cause that there would be marijuana in the defendant’s residence on March 5, the date the search warrant issued. The Court in *Willey* stated that whether probable cause is “stale” depends upon (1) the length of time involved, (2) the type of criminal activity involved, (3) the length of the criminal activity, and (4) the nature of the property seized. The *Willey* case illustrates the importance of submitting the affidavit to the magistrate as soon as practically possible after the necessary information has been obtained.

As has been pointed out earlier in this article, an equally important way to avoid having an affidavit invalidated on grounds of staleness is to specify in the affidavit the dates on which each event occurred and each piece of information was obtained. If the date of an event or observation is not provided, a court may be unable to determine whether the event or observation occurred in the distant past or only recently. In such a case, the court may be compelled to conclude that there is an inadequate basis from which to conclude that seizable property is still on the premises. *State v. Smith*, Me., A.2d (January 23, 1978); See *State v. Loder*, Me. 381 A.2d 290 (1978).

## NIGHTTIME SEARCHES

Rule 41(c) provides that when a warrant is issued it “shall direct that it be served between the hours of 7:00 a.m. and 7:00 p.m., unless the judge or complaint justice, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at another time.” If the officer wishes to obtain permission to execute the warrant at a time other than between the hours of 7:00 a.m. and 7:00 p.m., he must explain to the magistrate (i.e. show “reasonable cause”) why this is necessary. This can be done by setting forth the explanation as a separate numbered paragraph which should also be the last numbered paragraph before the conclusion to the affidavit. The officer requesting such authority should expressly indicate in the conclusion of his affidavit the hours between which he wishes to execute the warrant. (Of course, by appropriate language in the warrant, the officer may be authorized to execute the warrant at any time of the day or night.)

## BEFORE EXECUTING THE WARRANT

Once the magistrate has decided to issue the warrant and the warrant has been completed and signed, the officer should follow these two procedures before leaving to execute the warrant:

### Attach the Affidavit to the Warrant

In *State v. Gamage*, Me., 340 A.2d 1 (1975), the Law Court was confronted with the problem of

whether the affidavit before Court was the same affidavit that the magistrate examined when he issued the warrant. The affidavit was not physically attached to the warrant and the Court had to determine whether the affidavit was sufficiently incorporated by reference in the warrant. Although the Court concluded that the affidavit was incorporated by reference in the warrant, the problem would likely not have arisen had the affidavit been attached to the warrant. The Law Court in *Gamage* stated, in clear terms, that it prefers that the affidavit be physically attached to the warrant. As explained earlier, a search warrant must be based on an affidavit. Therefore, when a reviewing court is asked to decide whether a search warrant was properly issued, it must determine whether the affidavit was actually presented to the issuing magistrate. To avoid any possibility that the reviewing court will have difficulty deciding whether the affidavit is sufficiently incorporated in the warrant, the following suggestions should be followed. (1) If the magistrate decides to issue the warrant, make sure that the affidavit is **physically attached** (by stapling) to the warrant. (2) Read the warrant and make sure that it **explicitly incorporates the affidavit by reference**. The warrant should state the name of the affiant, the date of the affidavit and should state that it is incorporating the affidavit.

### Proofread the Warrant

In addition to checking the warrant to be sure that it has incorporated the affidavit by reference, the officer should also proofread the warrant, before leaving to execute it, to be sure that:

- (1) the judge or complaint justice signed it;
- (2) the warrant is dated;

- (3) the warrant specifically identifies the person or place to be searched;
- (4) the warrant specifically identifies the property to be seized;
- (5) the warrant is addressed to the appropriate law enforcement officer;
- (6) the warrant designates the court to which it is to be returned;
- (7) the warrant names the person or persons whose affidavits have been relied on for its issuance; and
- (8) the warrant designates the appropriate times of day within which it may be executed.

### AFFIDAVIT CHECKLIST

The following is a list of items which officers should check each time they are preparing an affidavit for a search warrant. Failure to include certain of these items may invalidate the warrant. This list is a general one and officers should add more detail to it as they see fit.

1. Is the property to be seized described with particularity?
2. Is the premises (or person) to be searched described with sufficient particularity?
3. Is the owner or occupant of the premises to be searched (if known) named in the affidavit as required by Rule 41(c)?
4. Does the affidavit make clear that the property which is sought falls into one of the four categories listed in Rule 41(b)?
5. Are important **dates** and **times** noted in the affidavit?
  - a. Is the **date** on which an event occurred specified?
  - b. Is the **date** on which a given piece of information was learned or obtained specified?
  - c. Is the information in the affidavit **stale**?
6. If the information, or part of the information, in the affidavit has

been obtained from an informant, does the affidavit show:

- a. Why the informant is credible?
  - b. How the informant obtained his information?
7. Are the facts in the affidavit enough to provide probable cause to believe that seizable items will be found on the premises?
  8. If the magistrate has issued a search warrant on the basis of the affidavit, has the search warrant been fully and properly completed by the magistrate?
  9. Have all documents which will be submitted to the magistrate been stapled together?
  10. Are the affiant's name and the date on which the affidavit is being submitted to the magistrate noted on each page of the affidavit and on any accompanying diagrams or photographs?

### RULE 41. SEARCH AND SEIZURE

#### (a) Authority to Issue Warrant.

A search warrant authorized by this rule may be issued by a District Judge or complaint justice with jurisdiction of the area wherein the property sought is located.

(b) **Grounds for Issuance.** A warrant may be issued under this rule to search for and seize any property:

- (1) Stolen or embezzled; or
- (2) Designed or intended for use or which is or has been used as a means of committing a criminal offense; or
- (3) The possession of which is unlawful;
- (4) Consisting of non-testimonial evidence which will aid in a particular apprehension or conviction.

(c) **Issuance and Contents.** A warrant shall issue only on an affidavit sworn to before a district

judge or complaint justice specifically designating the person or place to be searched, the owner or occupant thereof, if known to the affiant, and the person or property to be searched for, and establishing the grounds for issuing the warrant. If the judge or complaint justice is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the person or property to be searched for and naming or describing the person or place to be searched. The warrant shall be directed to any officer authorized to enforce or assist in enforcing any law of the state of Maine. It shall state the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search the person or place named for the person or property specified. The warrant shall direct that it be served between the hours of 7:00 a.m. and 7:00 p.m., unless the judge or complaint justice, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at another time. It shall designate the court to which it shall be returned.

**(d) Execution and Return with Inventory.** The warrant may be executed and returned only within ten days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken. If the person is not present, the officer shall leave the copy of the warrant and the receipt at the premises. The return shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property was taken, if he is present, or in the presence of at least one credible person other than the applicant for the warrant. It shall be verified by

the officer. The judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

**(e) Motion for Return of Property and To Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the Superior Court in the county in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that:

(1) The property was illegally seized without a warrant, or

(2) The warrant is insufficient on its face, or

(3) The property seized is not that described in the warrant, or

(4) There was not probable cause for believing the existence of the grounds on which the warrant was issued, or

(5) The warrant was illegally executed.

The justice shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any criminal proceeding. The motion to suppress evidence may also be made in the county where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing. Any proceedings in the District Court shall be stayed during the pendency of a motion to suppress evidence; provided, that the motion is filed prior to the commencement of the taking of evidence in a preliminary examination.

**(f) Return of Papers to Clerk.** The judge of the court to which a search warrant is returned shall attach to the warrant a copy of the

return, inventory and all other papers in connection therewith and shall file them with the clerk of the District Court for the District and Division in which the property was seized.

**(g) Scope and Definition.** This rule does not modify any act inconsistent with it, regulating search, seizure and the issuance and execution of search warrants and under circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects.

## MAINE COURT DECISIONS

### Search and Seizure

#### A§2.1 Probable Cause

The defendant was convicted of sodomy (17 M.R.S.A. §1001), rape (17 M.R.S.A. §3151) and denial of the rights of a mental patient (34 M.R.S.A. §2259). On appeal to the Law Court, the defendant claimed that certain evidence admitted at his trial had been obtained as a result of an unconstitutional search of his room.

The defendant lived in a room at the Augusta Mental Health Institute where he was an employee. The State obtained a warrant to search the defendant's room where they found numerous photographs of nude women and an electric vibrator. The affidavit submitted in support of the warrant request alleged that the defendant was attempting to obtain sexual favors from female patients at the Institute by means of illegal drugs, sexual devices and erotic photographs. Prior to trial, the defendant moved to suppress the items seized from his room, but his motion was denied.

In his affidavit, the law enforcement officer who was requesting the warrant stated that he had probable cause to believe



that certain seizable items of property would be found in the defendant's room. The affiant's showing of probable cause consisted of the following:

"On October 3, 1974, . . . [two persons named] voluntary or former patients of the Augusta Mental Health Institute, reported to the Augusta Police Department that an employee of the Augusta Mental Health Institute, Alfred J. Loder, was attempting to obtain sexual favors from patients through the use of illicit drugs, cannabis, sexual devices and the taking and displaying of photographs and did in fact undertake sexual contact related to said attempts, to wit, did disrobe and fondle the bodies of certain female patients to wit, the said . . . [above-named two persons]. As a result of said report, your affiant does have reason to believe and does believe that the rooms occupied and controlled by the said Alfred J. Loder do now contain the afore-mentioned items of evidence and contraband, which are now possessed by the said Alfred J. Loder."

In reviewing the adequacy of this affidavit the Law Court stated the general rule that to justify the issuance of a search warrant there must be probable cause to believe that a crime had been or was being committed and that seizable evidence would be found at the place sought to be searched. Additionally, the facts establishing probable cause must exist at the time the search warrant is issued, that is, the information in the affidavit must not be "stale."

It should be noted that in the affidavit quoted above the affiant does indicate **when** he **received** the information from the two informers. However, the affidavit contains two glaring deficiencies. First, nothing in the affidavit indicates **when** the informers

**obtained** their information. Thus, it is impossible to determine **when** the defendant allegedly committed illegal acts against the patients. On the basis of the information contained in the affidavit, the Law Court was unable to determine whether the defendant was committing illegal acts shortly before the issuance of the search warrant or whether his criminal conduct occurred months beforehand. This case illustrates the importance of specifying the dates on which the informer learned of certain facts.

Second, the affidavit merely alleged, in general terms, that the defendant had engaged in illegal acts, but it did not specify **where** the illegal acts allegedly occurred. In his affidavit, the affiant assumed that the illegal acts took place in the defendant's room at the Augusta Mental Health Institute. The Law Court pointed out, however, that "the affidavit must state facts and not merely conclusory assertions." Thus, the information contained in the affidavit did not establish probable cause to believe that the property sought to be seized would be found in the defendant's room at the time of the search.

Because the affidavit was fatally defective, the Law Court was compelled to conclude that the search warrant was invalid and to reverse the defendant's convictions. *State v. Loder*, Me., 381 A.2d 290 (1978)

## Items of Interest

The following is a notice regarding the procedure for issuing citations to violators of the Habitual Offender Law. Any questions concerning this notice should be directed to Stephen Wright, Assistant Attorney General, at 289-3636.

Law Enforcement officers should be aware of the provisions of the Habitual Offender Law as they pertain to the offense of operating a

motor vehicle after suspension of license. Any person who has been adjudicated an habitual offender is prohibited from operating a motor vehicle for a minimum period of one year. See 29 M.R.S.A. §2276. A violation of this prohibition is a Class D crime. See 29 M.R.S.A. §2280, and 17-A M.R.S.A. §4-A.

When checking with the computer at the Motor Vehicle Division of the Secretary of State's office for the purpose of ascertaining an individual's license status, law enforcement officers should also determine whether the individual has been adjudicated an habitual offender. If so, the individual operating the motor vehicle is violating 29 M.R.S.A. §2280 as well as 29 M.R.S.A. §2184. However, it is preferable to charge the individual under section 2280 in view of the legislative intent that habitual offenders be subjected to a harsher penalty. Accordingly, a Uniform Traffic Ticket and Complaint should be issued charging a violation of §2280.

*Comments directed toward the improvement of this bulletin are welcome. Please contact the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, Room 507 - State Office Building, Augusta, Maine 04333.*

## ALERT

The matter contained in this bulletin is intended for the use and information of all those involved in the criminal justice system. Nothing contained herein is to be construed as an official opinion or expression of policy by the Attorney General or any other law enforcement official of the State of Maine unless expressly so indicated.

Any change in personnel or change in address of present personnel should be reported to this office immediately.

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