Particularly Describing the Evidence to Be Seized under a Search Warrant

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Categories : Search and Seizure, Uncategorized

Tagged as : fourth amendment, particularity, Search and Seizure, search warrants

Date : February 26, 2018

The Fourth Amendment states in part that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The reference to a particular description of the place to be searched and the things to be seized is called the particularity requirement. As it pertains to the things to be seized, the Supreme Court's most famous exposition of the requirement is in *Marron v. United States*, 275 U.S. 192 (1927), where it opined that the requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

In practice, officers regularly seek search warrants with catchall provisions. For example, in a drug case, an officer may seek authorization to seize drugs, paraphernalia, customer lists, and "any and all other evidence connected to drug activity." Are catchall statements like these consistent with the particularity requirement?

Generally, courts have held that they are. The rest of this post explains the reasoning courts have used to reach that result, explores the limits of the particularity requirement, and provides suggested practices for officers drafting search warrant applications.

Purpose of the requirement. The purpose of the particularity requirement is to minimize officers' intrusions upon citizens' privacy:

[T]hose searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. The warrant accomplishes this second objective by requiring a "particular description" of the things to be seized.

Coolidge v. New Hampshire, 403 U.S. 443 (1971) (citations omitted).

Catchall statements often permitted. In *Andresen v. Maryland*, 427 U.S. 463 (1976), the Supreme Court considered a case involving a real estate attorney who had defrauded the purchaser of a piece of property. Officers obtained a search warrant authorizing the seizure of specific items and documents, "together with other fruits, instrumentalities and evidence of crime [currently] unknown." The Court ruled that the quoted phrase did not authorize a search for evidence of any crime; in context, it clearly referred only to evidence of the specific fraud at issue, and so did not lack particularity. Although the focus of *Andresen* was on the reference to "crime" rather than "other fruits, instrumentalities and evidence," lower courts since then have generally approved similar catchall language that is limited to evidence of a specific offense. *See, e.g., United States v. Kuc*, 737 F.3d 129 (1st Cir. 2013) (search warrant in fraud case was sufficiently particular where it authorized the seizure of "'[a]ll records . . . and tangible objects that constitute evidence, fruits, and instrumentalities of violations of [specified criminal statutes] including, without limitation,' certain enumerated categories of items"; although the defendant argued that the phrase "without limitation" unlawfully expanded the scope of the warrant, the court ruled that it was merely a "transitional phrase" and that in context, the warrant was sufficiently particular because it described the targets of the fraud and some of the means by which the fraud was committed).

This issue has not been heavily litigated in North Carolina, but perhaps the leading case is *State v. Kornegay*, 313 N.C. 1 (1985), where a search warrant for evidence of an attorney's fraudulent activity "direct[ed] the seizure of all checkbooks, cancelled checks, deposit slips, bank statements, trust account receipts, check stubs, books and papers, etc. which would tend to show a fraudulent intent or any elements of the crime of false pretense or embezzlement." The court ruled that this description "of the items to be seized was as specific as the circumstances and nature of defendant's activities permitted."

Examples of lack of particularity. By contrast, courts often find a lack of particularity when a warrant seeks evidence of criminal activity generally, without limiting the search to evidence of a specific offense. *See, e.g., United States v. Galpin*, 720 F.3d 436 (2d Cir. 2013) (officers suspected that the defendant, a registered sex offender, had failed to disclose an online identifier and was using the internet to make inappropriate contact with children; they obtained a search warrant that authorized a search for "evidence that will constitute, substantiate or support violations of . . . NYS Penal Law and or Federal Statutes"; this was "facially overbroad" and lacked particularity)*; Cassady v. Goering*, 567 F.3d 628 (10th Cir. 2009) (search warrant was not particular where there was probable cause to search a farm for evidence of marijuana cultivation yet warrant authorized a search for "all . . . evidence of criminal activity" under the laws of any jurisdiction); *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989) ("The warrants' provision for the almost unrestricted seizure of items which are 'evidence of violations of federal criminal law' without describing the specific crimes suspected is constitutionally inadequate."). *But see United States v. Castro*, __ F.3d __, 2018 WL 746537 (6th Cir. Feb. 7, 2018) (officers suspected that the defendant was involved in a series of home invasion robberies; they obtained a search warrant for her phones; the warrant allowed a search for, among other things, "location data . . . photographs . . . correspondence . . . [and] telephone and address books . . . which reflect the receipt, purchase, transmission, and/or communication of a crime"; the reference to "a crime" did not violate the particularity requirement because, in context, it was clear that the search was for evidence of the armed robberies).

Suggested practice. Based on the authorities presented above, officers drafting search warrant applications may wish to (1) limit catchall language to evidence of a specific crime or type of crime, and (2) enumerate specific categories of evidence sought so that the catchall may be interpreted in light of the list of specified items.

Further reading. Those interested in reading more about this issue may consult Wayne R. LaFave, *Search and Seizure, a Treatise on the Fourth Amendment* § 4.6 (5th ed. 2012).