

UNITED STATES GOVERNMENT

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Memorandum

Assoc. Dir. _____
 Dep. AD Adm. _____
 Dep. AD Inv. _____
 Asst. Dir.:

- Adm. Servs. _____
- Crim. Inv. _____
- Ident. _____
- Intell. _____
- Laboratory _____
- Legal Coun. _____
- Plan. & Insp. _____
- Rec. Mgnt. _____
- Tech. Servs. _____
- Training _____
- Public Affs. Off. _____
- Telephone Rm. _____
- Director's Sec'y _____

TO : Assistant Director
Criminal Investigative Division

DATE: 7/18/79

FROM : Legal Counsel

SUBJECT: SITOL

b7c [Redacted]

[Redacted] b7c

PURPOSE: To advise of further request by court holding suppression hearing in the above-captioned matter in Los Angeles for additional Bureau regulations concerning execution of a search warrant and disposition of this request.

b7c **SYNOPSIS AND DETAILS:** With reference to Legal Counsel memorandum to Assistant Director, Criminal Investigative Division, dated 7/17/79, same caption, at 11:45 this date, SA [Redacted] Los Angeles Division advised the court had requested to be produced on 7/19/79 in Los Angeles Bureau regulations concerning execution of search warrants by Special Agents in effect during 1977. SA [Redacted] advised that the Field Office did not have a copy of the former Special Agents' Handbook or Manual of Instructions wherein this information would be located.

Pursuant to the court's request, Part II, pages 14b through 14J of the former Special Agents' Handbook were transmitted to SA [Redacted] via facsimile (copy attached) for delivery to the court.

RECOMMENDATION: None, for information.

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1- ENCLOSURE

Enclosure

APPROVED: _____

Director _____

Assoc. Dir. _____

Dep. AD Adm. _____

Dep. AD Inv. _____

Adm. Serv. _____

Crim. Inv. _____

Ident. _____

Intell. _____

Laboratory _____

Legal Coun. mpj

Plan. & Insp. _____

Rec Mgnt. _____

Tech. Servs. _____

Training _____

Public Affs. Off. _____

47-56689-172

- 1- [Redacted]
- 1- [Redacted] (Quantico)
- 1- [Redacted] (Manuals Desk, Rm. 5867)
- 1-Legal Research Unit

JUL 20 1979



ALL INFORMATION CONTAINED
 HEREIN IS UNCLASSIFIED
 DATE 4-8-82 BY SP-7ALG/

[Redacted]

[Redacted]

[Redacted]

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Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

b7c FBI/DOJ

PART II

3. SEARCHES AND SEIZURES

A. Constitutional guarantees

The 4th amendment provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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." Probable cause is defined under "Complaints" in M. of I., vol. I, sec. 1.

A Federal officer who obtains evidence by unreasonable search and seizure will not be permitted to introduce it in either the Federal courts or the state courts. Weeks v. U. S., 232 U. S. 383 (1914); Mapp v. Ohio, 367 U. S. 643 (1961).

B. Federal Rules of Criminal Procedure

1. Rule 41(a) provides that a search warrant authorized by this rule may be issued by a Federal magistrate or a judge of a state within the district wherein the property sought is located, upon request of a Federal law enforcement officer or an attorney for the Government.]
2. Rule 41(b) provides that a warrant may be issued to search for and seize any:
 - a. [Property that constitutes evidence of the commission of a criminal offense; or
 - b. Contraband, the fruits of crime, or things otherwise criminally possessed; or
 - c. Property]designed or intended for use or which is or has been used as the means of committing a criminal offense.
3. Rule 41(c) provides that a warrant shall issue only on an affidavit[or affidavits] sworn to before the[Federal magistrate or state judge]and establishing the grounds for issuing the warrant. [If the Federal magistrate or state judge]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 property and naming or describing the person or place to be searched. [The finding of probable cause

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DATE 4-8-82 BY SP2TAM

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PART II

may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the Federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the U. S. It shall command the officer to search, within a specified period of time, not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a Federal magistrate to whom it shall be returned.]

4. Rule 41(d) provides that 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 or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. [The Federal magistrate 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.

PART II

5. Rule 41(e) provides that a person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge 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 and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.
6. Rule 41(f) provides that a motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.
7. Rule 41(g) provides that the Federal magistrate before whom the 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 in which the property was seized.
8. Rule 41(h) in setting out the scope and definition of terms used therein provides that this rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in 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.] The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. [The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.]

PART II

C. Statutes

1. T 18, USC, § 3107 (formerly part of § 300a, T 5, USC), as amended 1-10-51, Public Law 915, provides:

"The Director, Associate Director, Assistant to the Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investigation of the Department of Justice are empowered to make seizures under warrant for violation of the laws of the United States."

2. T 18, USC, § 3109, provides that an officer may break open any outer or inner door or window of a house, or any part of a house, anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or a person aiding in the execution of the warrant.
3. T 18, USC, § 2231, makes it a violation for any person forcibly to assault, resist, oppose, prevent, impede, intimidate, or interfere with any person authorized to serve a search warrant and to make seizures thereunder. The penalty is \$5,000 or 3 years, or both. If a deadly weapon is used, or dangerous weapon, the penalty is \$10,000 or 10 years, or both.
4. T 18, USC, § 2232, makes it a violation to destroy or remove property to prevent its seizure.
5. T 18, USC, § 2233, makes it a violation forcibly to rescue, or attempt to rescue, seized property.
6. T 18, USC, § 2234, makes it a violation for an officer willfully to exceed his authority, or to exercise it with unnecessary severity, in executing a search warrant.
7. T 18, USC, § 2235, makes it a violation to procure a search warrant maliciously and without probable cause.

PART II

8. T 18, USC, § 2236, makes it a violation to search without a warrant either a private dwelling or to maliciously and without reasonable cause search any other building or property. This section does not apply to a person making a lawful arrest or conducting a consent search.

D. Methods of conducting lawful searches and seizures

1. Search by search warrant (See rule 41, Federal Rules of Criminal Procedure and T 18, USC, § 3103a.)

In making a lawful search under a search warrant, the officer may also seize the known instrumentalities, fruits, contraband, or other evidence of any other crime which he incidentally discovers while making the search for which the search warrant was issued. (See Bureau monographs on this subject which have been sent to all offices.)

[However, mere private possession of obscene matter cannot constitutionally be made a crime. Stanley v. Georgia, 394 U.S. 557 (1969). Therefore, material observed in plain view while an Agent is lawfully on the premises, as during the lawful execution of a search warrant, should never be seized merely because it appears obscene, no matter how offensive the material appears to be. Multiple copies of obscene items indicate commercial rather than private use. Where multiple copies are observed, immediately contact United States Attorney and consider advisability of obtaining search warrant.]

2. Search incident to a lawful arrest

At the time a lawful arrest is made, either with or without a warrant, Agents are authorized to search the subject's person and only that area within his reach for weapons and evidence (includes fruits and instrumentalities) of the offense. Contraband and evidence of other crimes may also be seized. Chimel v. California, 392 U.S. 175 (1969).

PART II

3. Search by consent

- a. The person of whom consent is asked must first be clearly informed of his constitutional right to refuse a search without a search warrant and he must waive that right. The Government must be able to show convincing evidence that consent was given freely and voluntarily. Mere submission to the desires of the officer is not consent. Fraud, subterfuge, misrepresentation, or duress, whether express or implied, voids the consent.
- b. Consent is preferably obtained in writing, using form FD-26. When the person gives consent but refuses to sign the form, it should be completed except for his signature. [Endorse on its face the fact that he read the form or that it was read to him, whichever was the case. Further, record on the form the exact language used to express consent.] If the required warning is given and oral consent is obtained without reference to the form or other writing, the fact of such warning

PART 10

and consent should be clearly reported. Where the person giving consent limits it in any manner, such as restricting the search to specific objects or to only a part of the premises, ~~FD-26~~ should be amended by hand to show any such limitations.)

[c.] Valid consent can be given only by one having the right to possess the premises at the moment. The right of possession to rented premises is in the tenant or hotel guest, not the owner. If the one entitled to possession has left the premises in care of a superintendent, plant manager, or other general agent, the latter may give a consent valid against the possessor. An employee without managerial or agency powers cannot give a consent valid against his employer. In corporate or business situations, consent should be obtained from the highest ranking official on the premises to be searched. For a search of company records, consent of the office manager, under whose control and supervision those records are kept, is sufficient. An employer's consent to search of the business premises is valid against an employee, except as to that part of the employee's desk, locker, etc., reserved exclusively for keeping the employee's personal possessions. In marital situations, either spouse may give a consent valid against the other to a search of their common dwelling, except for a suitcase, desk, or other thing or place therein exclusively owned or controlled by the other spouse. Validity of the consent is also doubtful where the spouse against whom the search is directed has previously refused consent to search. One spouse cannot give consent valid against the other to search of business premises under the control of the other, even though located under the same roof with the dwelling, unless the consenting spouse has been given agency authority by the controlling spouse. Such agency cannot be implied from the marital relationship alone. A partner in a business enterprise may give a consent valid against the other partners, probably subject to the same exceptions shown for a spouse. A householder may give a consent valid against a temporary, nonpaying guest residing in the dwelling at the moment. In the absence of authority to the contrary, such as an opinion of the USA, it should be assumed that a minor child (or other dependent) has no

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possessory right in the premises other than that derived from the parents and cannot give consent to search valid against the parents.

4. [Deleted]
5. Search of motor vehicles
 - a. Agents may search a mobile vehicle, without a warrant, when there is probable cause to believe that the vehicle contains evidence of a Federal violation. Brinegar v. U. S., 338 U. S. 160 (1949); Carroll v. U. S., 267 U. S. 132 (1925).
 - b. A legal search may be made of an automobile or other vehicle and evidence therein contained seized by search warrant, as incidental to lawful arrest (must be contemporaneous - Preston v. U. S., 376 U. S. 364 (1964)), or by consent.
6. Immunity of representatives of foreign governments and their property from arrest, search, and seizure
 - a. Diplomatic representatives of foreign governments in the U. S. are exempt from arrest by all officers, Federal and state.
 - b. Federal or state officers may not enter the office or dwelling of these diplomatic representatives for the purpose of making an arrest, search, or seizure.
7. Inventory and receipt for property obtained through search and seizure
 - a. During the course of a search incident to a lawful arrest, or by consent with a waiver, if money, property, documents, or anything of value is seized from the person or premises, an itemized list in duplicate (triplicate if by search warrant) of the property seized shall be made. The description of the property must be adequate and accurate.

The following certification must be set out at the end of the itemized list and

PART II

shall be witnessed by two Agents or one Agent and another person. If the person from whom the property was seized refuses to sign this certification, a notation should be made indicating the reason for refusal.

This is to certify that on _____ at _____, Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice, at the time of conducting a search of my person and/or the premises at _____ obtained the above-listed items. I further certify that the above represents all that was obtained by Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice.

(SIGNED) _____

Witnessed:

Special Agent
Federal Bureau of Investigation
U. S. Department of Justice

Special Agent
Federal Bureau of Investigation
U. S. Department of Justice

One copy of the itemized list is to be furnished the subject or person from whose premises the property was obtained as a receipt. The original shall be maintained in the exhibit envelope of the proper case file.

- [b. Where a search[of premises] is conducted under a search warrant, the itemized list and certificate shall be prepared in triplicate[since the law requires that the original thereof shall be returned to the Federal magistrate]issuing the search warrant. One copy of this itemized list [as an inventory, together with a copy of the search warrant, shall be turned over to]the subject as provided for in Rule 41 of the Federal Rules of Criminal Procedure.
- c. Whenever a search is conducted in any manner, no property or anything of value is seized, the following certificate shall be obtained:

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PART II

This is to certify that on _____ at _____, Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice, conducted a search of the premises at _____ occupied by me. I certify that nothing was removed from my custody by Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice.

(SIGNED) _____

Witnessed:

Special Agent
Federal Bureau of Investigation
U. S. Department of Justice

Special Agent
Federal Bureau of Investigation
U. S. Department of Justice

G. Counting recovered money

Whenever money or other property consisting of numerous items requiring counting is obtained in connection with Bureau investigations, the money or property should be independently counted by two Agents and their results compared for the purpose of verifying the accuracy of the count and detecting any errors.

E. Policy

1. Search warrants should be obtained in all cases wherever possible. Efforts to have search warrant issued, whether successful or not, should be reported. A copy of every affidavit filed by an Agent is to be obtained and filed as a serial in the case file.
2. USA's authority is necessary before applying for a search warrant.
3. Deleted
4. Searches and seizures must be planned and conducted in as short a period of time as possible.
5. There must be no exploratory searches.

F. Searches and seizures by state, local, or foreign officers

Relevant evidence seized independently by state, local, or foreign officers must be called to

PART II

the attention of the USA promptly and described in the next investigative report so that attention will be directed early to the circumstances of its seizure. All evidence seized illegally by state or local law enforcement officers is inadmissible in court, regardless of the jurisdiction of the officer by whom it was seized or the court in which it is presented. Mapp v. Ohio, 367 U. S. 643 (1961). Legality is to be tested by the Federal standard, however, with the result that a Federal court may uphold a seizure previously held illegal by a state court. Relevant evidence seized by foreign law enforcement officers in their own country and acting on their own initiative may be admissible in a U. S. court even though the evidence was not obtained in conformance with fourth amendment standards. Brulay v. U. S., 383 F. (2d) 345 (1967).

G. Searches and seizures by U. S. Customs Service

The Bureau will not request or conduct an examination or search of baggage or other material under the control of diplomatic personnel or similar official personnel of foreign governments without first obtaining the permission of the State Department. When information is received that such a person is carrying material of importance to the national security, the permission of the State Department is requested to have the search effectuated. Requests should be made to the local office of the U. S. Customs Service to effect a search of material in the possession of individuals who do not have any official status when in the opinion of the field it is believed that something of value will be ascertained (see part I, sec. 25H, of this handbook replacing of stops with INS). Bureau Agents may be present at such an examination in the capacity of an observer only.

[H. Upon request of a defendant, the Government shall
[permit the defendant to inspect and copy or photo-
[graph: written or recorded statements made by the
[defendant, the substance of any oral statement which
[the Government intends to offer in evidence at the
[trial made by the defendant whether before or after
[arrest in response to interrogation by any per-
[son then known to the defendant to be a Govern-
[ment agent, results or reports of physical or
[mental examinations, scientific tests, or ex-
[periments. If the defendant demands disclosure,
[he must upon request by the Government permit
[the Government to inspect and copy similar items
[in his possession. Upon request of the defendant
[the Government shall furnish to him a copy of
[his prior criminal records if any. Upon a
[sufficient showing the court may order the dis-
[covery or inspection be denied, restricted, or
[deferred, or make such other order as appropriate.
[(Rule 16.)]