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SEARCH WARRANTS IN WHITE-COLLAR CRIME CASES

The Department of Justice has increased its use of search warrants, including “sneak-and-peek” warrants, in lieu of subpoenas, in high-profile white-collar crime cases. The authors, former assistant U.S. Attorneys, criticize the practice as needlessly harmful in some instances. They argue that the DOJ should enact internal guidelines requiring prosecutors to consider the necessity for the warrant, the harm to the business or third parties caused by its execution, and safeguards to ensure that employees and bystanders are informed of their rights.

By Robert H. Hotz, Jr. and Harry Sandick *

In November of 2010, federal agents executed searches at a number of hedge funds in New York City as part of the federal government’s crackdown on insider trading. The searches sent shock waves throughout the hedge fund community. Long thought to be an investigative tactic against organized crime, narcotics trafficking, and terrorism, search warrants are now a well-established part of the prosecutor’s arsenal against white-collar crime. Moreover, based on the relative ease and common usage of grand jury subpoenas in white-collar cases, many practitioners and probably many federal judges may operate on a misconception that search warrants are only used when there is some exigency.

This article discusses two issues relating to the use of search warrants in white-collar cases. First, we discuss the absence of any guidelines for federal prosecutors to

determine when it is appropriate to use a search warrant to collect documents or physical evidence from an ongoing business as part of a white-collar investigation. It is obviously devastating for a legitimate business, such as a hedge fund or a broker-dealer, to have a search warrant executed on its premises, as it attracts great public attention and puts the business under a cloud of suspicion.¹ The tool of investigation itself can be punitive, even in the absence of any finding of guilt. Although many prosecutors state that care is taken not to

¹ Although some regulated businesses also are required to disclose a grand jury subpoena, the process of responding to a grand jury subpoena is far less public than is the execution of a search warrant. Also, in many cases, the government will accept voluntarily produced documents rather than insist upon service of a grand jury subpoena.

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bring a business into public disrepute unnecessarily, neither the rules nor statutes that govern search warrants, nor even the internal procedures followed by prosecutors in the Department of Justice, lay down any standard that permits prosecutors to determine when a search warrant is an appropriate investigative step in a white-collar investigation. Adequate safeguards to prevent the misuse of an ordinary search warrant should be instituted by the government.

Second, we discuss the use of a delayed-notice warrant, more commonly known as a “sneak-and-peek” search warrant. As the name implies, a sneak-and-peek search warrant allows federal agents to enter a home or business covertly and gather evidence without leaving a copy of the warrant.² In late 2010, the government used this unique and comparatively novel type of search warrant in an insider trading case.³ The episode went largely unnoticed because the hedge fund manager subsequently pled guilty and cooperated with the government. Whether the government will continue to use this technique in white-collar cases and whether there are adequate safeguards to prevent abuse are fertile subjects for discussion.

THE USE OF SEARCH WARRANTS IN THE WHITE-COLLAR SETTING

In general, prosecutors can choose to collect physical and documentary evidence in a white-collar case using either a search warrant or a grand jury subpoena *duces tecum*. For the most part, the two investigative tools achieve comparable ends for the government. A subpoena, like a search warrant, can be used to obtain paper documents, computer files, or other physical evidence from a business. But unlike the execution of a search warrant, the service of a subpoena usually does not result in significant adverse publicity to the business

or otherwise injure what may ultimately be an innocent business.⁴ The concerns of destruction of contraband or a risk to public safety that often motivate prosecutors to use a search warrant in the context of a narcotics investigation do not typically exist in the white-collar context. In most cases, there is little or no risk that the materials sought by the government in a white-collar context will be destroyed after a subpoena is served by the federal government. Nor is there ordinarily any risk to public safety that requires the use of a search warrant.

However, there are powerful benefits that the government can derive from using a search warrant instead of a subpoena. First, a search warrant can be used to collect all of the documents sought by the government in a single day, without any opportunity for the business to object or to limit the scope of what is taken. The only limitation on the scope of the search warrant is the review of a warrant application conducted by a magistrate judge in an *ex parte* context,⁵ and this review is limited to confirming the existence of probable cause⁶ and making sure that the search warrant is sufficiently particularized.⁷ Privileged documents typically will be collected and then reviewed by government agents and attorneys (often by a so-called “taint team” that is separated from the prosecution team by an “ethical wall”) and it often will be incumbent on the business to file motions under Rule 41 of the Federal Rules of Criminal Procedure for the return of documents that are privileged, outside the scope of the search warrant, or essential to the operation of the business.⁸ By contrast, when a grand jury subpoena is served on a

² Another common use for a sneak-and-peek warrant is to search packages traveling by mail or by courier without being required to disclose immediately that the package was searched.

³ *In the Matter of the Premises Known and Described as 747 Third Avenue, Tenth Floor Manhattan, New York 10017*, 10 MAG 2509 (November 12, 2010); see also *U.S. v. Barai and Longueuil*, 11 MAG 332 at fn. 2 (February 7, 2011).

⁴ For an example of the negative publicity following the execution of a search warrant, see the press coverage of the seizures at Level Global, Diamondback, and Loch Capital. Peter J. Henning, *What a Search Warrant Means*, NEW YORK TIMES DEALBOOK, Nov. 23, 2010, <http://dealbook.nytimes.com/2010/11/23/what-a-search-warrant-means/>.

⁵ FED. R. CRIM. P. 41(b).

⁶ FED. R. CRIM. P. 41(d).

⁷ U.S. CONST. amend. IV. See also *Maryland v. Garrison*, 480 U.S. 79, 91 (1987).

⁸ FED. R. CRIM. P. 41(g).

business, its attorneys will be permitted an opportunity to comply with the subpoena by carefully collecting documents, reviewing the documents for privilege, and in some cases objecting to the scope of the subpoena (or even filing a motion to quash the subpoena).⁹ All of these steps and protections are avoided when the government simply charges in and seizes evidence using a search warrant.

Second, documents obtained pursuant to a search warrant are subject to no limitation on their disclosure to others, whereas documents produced in response to a grand jury subpoena are protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure and cannot be shared with state authorities or with civil authorities absent permission of the court.¹⁰ When prosecutors are conducting a joint investigation with the Securities and Exchange Commission or with attorneys in the civil division of a U.S. Attorney's Office, this can be a significant benefit derived by the Government from the use of a search warrant.¹¹

Third, when a search warrant is executed at an office, federal law enforcement often seeks to interview employees of the business being searched. Although the setting is almost inherently coercive, employees typically are not in "custody" during the execution of the search warrant.¹² As a result, the executing agents are not required to advise the employees of any right to

remain silent.¹³ Nor are most employees aware of their right to decline an interview request and therefore they frequently agree to be interviewed without a full awareness of the consequences to themselves or their business. None of this is possible when a grand jury subpoena *duces tecum* is served on a business. Similarly, employees often are not careful to review the language of the search warrant and therefore will not know to remind the executing agents that there are limits to what premises may be searched, and what objects may be seized. Nor are employees aware that they are not required to consent to an expansion of the scope of the search warrant. A lawyer, often with experience in criminal law, handles the response to a grand jury subpoena, thereby allowing the rights of the business to be protected.

In short, the government has powerful incentives to use a search warrant even where a grand jury subpoena would do just as well, and yet a business may suffer serious collateral consequences from the execution of a search warrant, even when the business is ultimately never charged or convicted of any offense. This harm cannot be undone by a future vindication at or before trial, and if the business is never charged with a crime, the remedy of suppression is not even available. Given these facts, an outsider to the criminal process might assume that the use of a search warrant in the context of a white-collar investigation would be given special scrutiny under the statutes or rules that govern the issuance of a search warrant. At a minimum, one might assume that the use of a search warrant in a white-collar investigation is subject to heightened internal oversight by the Department of Justice. Although the Department of Justice has certain limited internal procedures governing searches of "disinterested" third parties, no generalized safeguards applicable to search warrants of legitimate businesses appear to exist.¹⁴ It is almost

⁹ See, e.g., *In re Grand Jury Subpoenas Dated Mar. 9, 2011*, 179 F. Supp. 2d 270 (S.D.N.Y. 2001) (granting Government motion to compel documents and testimony from attorneys over claimed work product and attorney client privilege exceptions).

¹⁰ FED. R. CRIM. P. 6(e)(3)(E)(iv) ("The court may authorize disclosure – at a time, in a manner, and subject to any other conditions it directs – of a grand-jury matter . . . at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state . . . for the purpose of enforcing that law.").

¹¹ To obtain grand jury materials from prosecutors for the purpose of a civil action, government civil attorneys must show "particularized need." See, e.g., *S.E.C. v. Rajaratnam*, 622 F.3d 159, 183 (2d Cir. 2010).

¹² *United States v. Burns*, 37 F.3d 276, 281 (7th Cir. 1994) ("[A] suspect who is detained during the execution of a search warrant has not suffered a restraint on freedom of movement of the degree associated with a formal arrest, and is thus not in custody for purposes of *Miranda*." (citation omitted); *United States v. Ritchie*, 35 F.3d 1477, 1485-86 (10th Cir. 1994) (same).

¹³ *United States v. FNU LNU*, 653 F.3d 144, 148 (2d Cir. 2011) ("An interaction between law enforcement officials and an individual generally triggers *Miranda*'s prophylactic warnings when the interactions becomes a 'custodial interrogation.'").

¹⁴ The U.S. Attorney's Manual, in Section 9-19.210, states that "[n]ormally a search warrant should not be used to obtain documentary materials held by a disinterested third party." However, the term "disinterested third party" does not seem to have broad application, and the rule still permits the prosecutor to obtain a search warrant "if the use of a subpoena or other less intrusive means would substantially jeopardize the availability or usefulness of the materials sought." Also, the provision states that the application for such a search warrant can be approved by any attorney for the government, suggesting that these warrants – aimed at entities that are

entirely within the discretion of the individual prosecutor to use a search warrant in a white-collar investigation, subject only to the constitutionally required showing that evidence of a crime will be found if a search warrant is executed. In many U.S. Attorney Offices, only the approval of a unit chief is needed to apply for a search warrant, so there may not be much weighing of the benefits and harms.

To be sure, prosecutors speaking on panels about this subject routinely state that they will resort to a search warrant in a white-collar case only if the circumstances require its use, and many or most federal prosecutors are surely mindful of the harm that can be visited upon a business and its customers, clients, and investors by the execution of a search warrant. There are also practical concerns that make search warrants undesirable in routine cases. Gathering a team of agents to conduct a search, inventory the evidence seized, and then having a separate “taint team” review potentially privileged material is time consuming and can be a huge drain on resources. Nevertheless, the public is arguably ill-served by a system that depends entirely on the proper exercise of authority by individual prosecutors. Practices may vary across the many different component offices and branches of the Department of Justice, and not all prosecutors are experienced in white-collar matters or are careful to consider the possible impact of the search warrant. Nor are prosecutors themselves well-served by a system that gives them no guidance other than their own experience and “gut instinct” about whether a search warrant should be used in a particular case.

BRINGING FAIRNESS TO THE WHITE-COLLAR SEARCH WARRANT

In light of these circumstances, prosecutors should consider enacting internal guidelines that would apply throughout the Department of Justice and specifically govern the use of search warrants in white-collar investigations. Although the precise content of such regulations may be reasonably subject to debate, they should force prosecutors to consider the following three questions before making an application for a search warrant in a white-collar context:

- *Is a search warrant necessary to achieve the goals of the investigation?* In the context of wiretap applications made under Title III, the prosecutor is required to explain to the Office of Enforcement Operations (within the Department of Justice)¹⁵ and then to a district judge why this particular investigative tool is necessary for the prosecutor to use.¹⁶ If there are alternative means that could equally achieve the goals of the investigation, then no wiretap application may be made or granted. A similar requirement of a showing of necessity with internal approval by either the U.S. Attorney or the Office of Enforcement Operations, would be appropriate in the context of white-collar search warrants (if not in the context of search warrants generally). In terms of candor to the court in seeking a search warrant, prosecutors also should disclose previously employed means of obtaining evidence. Given the tremendous incentives under existing Department of Justice policy for businesses to cooperate with the government in investigations

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neither targets nor subjects – may be issued without any special oversight or supervision. The provision also suggests, by implication, that when preparing a search warrant to obtain documents from a non-disinterested party, the prosecutor is not required to consider the availability of less intrusive means.

Separately, the Department of Justice treads lightly when considering whether to execute a search warrant on an attorney or a journalist who is a “disinterested third party,” or even a subject attorney. See U.S. Attorney’s Manual § 9-19.240 (procedures for search warrants “directed at seizure of any work product materials or other documentary materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication”); U.S. Attorney’s Manual § 19.220 (procedures for search warrant aimed at obtaining materials from a disinterested third-party physician, lawyer, or clergyman); see also U.S. Attorney’s Manual § 9-13.420 (procedures for searching the premises of subject attorneys).

¹⁵ 18 U.S.C. § 2516(1) (listing DOJ officials who may authorize the filing of a wiretap application to a district judge, including the Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General). See also U.S. Attorney’s Manual § 9-7.110 (“When Justice Department review and approval of a proposed application for electronic surveillance is required, the Electronic Surveillance Unit of the Criminal Division’s Office of Enforcement Operations will conduct the initial review of the necessary pleadings...”).

¹⁶ As set forth in 18 U.S.C. § 2518(1)(c), in addition to establishing probable cause, the government must provide the district court with a “full and complete statement as to whether or not investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.” This “necessity” requirement prevents the government from resorting to wiretapping “in situations where traditional investigative techniques would suffice to expose the crime.” *United States v. Kahn*, 415 U.S. 143, 153 n.14 (1974).

and voluntarily report wrongdoing in order to avoid prosecution,¹⁷ a search warrant of a legitimate business enterprise (as opposed to an organized crime operation or drug-dealing crew) would seem to be an exception to ordinary practice. Prosecutors should be asked by supervisors, “Why is a search warrant necessary in this case as opposed to a subpoena? What harm will the investigation suffer if a grand jury subpoena is used?” In cases where the use of a grand jury subpoena may lead to the destruction of evidence, or where there is some particular need for the evidence to be obtained quickly, the search warrant application should be made. But if no valid reason for preferring a search warrant can be articulated, then a grand jury subpoena should be the investigative tool of choice.

- *What harm to the business or to third parties will be caused by the execution of the search warrant?* The government also should be required to consider the collateral consequences that the particular business to be searched will suffer from the execution of the search warrant.¹⁸ Does the business have investors

or customers who are likely to abandon the business in the aftermath of the search warrant? Even apart from the harm caused to the business, will the execution of the search warrant so interfere with the functioning of the business that it will cause harm to innocent third parties, such as clients or customers? It may be that in certain cases, a search warrant may cause harm that is unavoidable given the need for the use of a warrant, *e.g.*, if the destruction of evidence is imminent. Still, to make the government at least consider the possible harm to the business or to third parties as part of its decision to seek a search warrant makes mandatory what most good prosecutors have always taken into account.

- *Are safeguards being taken to ensure that employees or other bystanders are adequately informed of their rights?* The current Fifth Amendment jurisprudence does not recognize a right to receive *Miranda* warnings unless the individual being questioned is “in custody” at the time when the government seeks to question the individual.¹⁹ An individual who is present during the execution of a search warrant is not “in custody” in the same manner as an individual who has been arrested and is sitting in handcuffs in the precinct house.²⁰ Nonetheless, it is foolish to ignore the inherently coercive setting that exists during the execution of a search warrant. Consider the context: A team of armed federal agents wearing raid jackets enters an office and loudly tells the employees not to move. The employees then may be shepherded into a confined space in the office as the agents begin to rifle through the employees’ personal and business files, collecting documents and taking computers, phones, and electronic devices and other media. Employees may not be permitted to leave the premises until the search is completed or may reasonably believe that they must remain on the premises during the search and answer questions from the agents. Even if the employees are not in “custody” in the technical sense of *Miranda*, neither are they well-positioned to exercise their rights. Moreover, their statements

¹⁷ Principles of Federal Prosecution of Business Organization § 9-28.700 (2012) (“In determining whether to charge a corporation and how to resolve corporate criminal cases, the corporation’s timely and voluntary disclosure of wrongdoing and its cooperation with the government’s investigation may be relevant factors.”), <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

¹⁸ Just weeks after the execution of a search warrant in late 2010, Loch Capital closed its funds and laid off its employees. Katherine Burton & Saijel Kishan, *Loch Capital Said to Have Closed Its Hedge Funds Last Year After FBI Raid*, BLOOMBERG, Mar. 7, 2011, <http://www.bloomberg.com/news/2011-03-07/loch-capital-said-to-have-closed-funds-at-end-of-last-year-after-fbi-raid.html>. Level Global suffered the same fate. Azam Ahmed, *For Level Global, F.B.I. Raid Is a Final Blow*, NEW YORK TIMES DEALBOOK, Mar. 4, 2011, <http://dealbook.nytimes.com/2011/03/04/for-level-global-f-b-i-raid-is-a-final-blow/>. In January 2012, the Securities and Exchange Commission charged Level Global with participating in insider trading. Two Level Global employees, Spyridon Adondakis and Anthony Chiasson, were charged with both criminal and civil violations arising out of the same insider trading scheme. See Securities and Exchange Commission, Litigation Release No. 22230 (Jan. 19, 2012), <http://www.sec.gov/litigation/litreleases/2012/lr22230.htm>. As of this writing, neither Loch Capital nor its principals, Todd and Timothy McSweeney, have been publicly charged with criminal or civil violations. See Matthew Goldstein, *FBI Has Eyed Loch Capital Founder since 2009 – filing*, REUTERS, May

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27, 2011, <http://www.reuters.com/article/2011/05/27/insider-hedgefunds-idUSN2710527620110527>.

¹⁹ *United States v. FNU LNU*, 653 F.3d at 155 (where defendant is not in “custody,” *Miranda* warnings are not required).

²⁰ *Id.* (analyzing whether defendant was in “custody” for *Miranda* purposes and focusing on whether a reasonable person in the defendant’s position would have considered what transpired to be “the equivalent of a formal arrest”).

do not merely bind themselves, but also may bind the company in future criminal or even civil litigation.²¹ Given all of these pressures upon the employee during the execution of a warrant, it is reasonable for an employee to be advised prior to an interview that he is not required to consent to an interview, and that the choice is entirely his. In most cases, it would seem that there is little, if any, legitimate law enforcement purpose served by denying such a modest advice-of-rights to an employee, and it should be routine to give such an instruction unless some compelling circumstance makes it impractical or unnecessary.

In short, there are serious questions whether new circumstances require new rules and safeguards to protect the civil liberties of those who are swept up in the criminal justice system.²² The Constitution only requires a showing of probable cause in order to obtain a search warrant. In today's world where prosecutors use aggressive investigative techniques, such as search warrants that previously were reserved for violent offenders in white-collar cases, prosecutors should be required to consider the special harm that the execution of a search warrant may cause before using this powerful investigative technique.

THE STATUTORY AUTHORITY FOR SNEAK-AND-PEEK WARRANTS

The statutory authority for sneak-and-peek warrants is found in the PATRIOT Act. Section 213 of the Act authorizes federal agents to secretly enter the premises without leaving a copy of the warrant and to conduct searches.²³ A magistrate or district judge may permit the federal agents to delay giving notification of the search

for an initial period up to 30 days if the court finds "reasonable cause to believe that providing immediate notification of the execution of the warrant may have an 'adverse result'"²⁴ The term "adverse result" is defined by another statute as: (i) endangering the life or physical safety of an individual; (ii) flight from prosecution; (iii) destruction of or tampering with evidence; (iv) intimidation of potential witnesses; or (v) otherwise seriously jeopardizing an investigation.²⁵ The initial period of delayed notice to the owner or occupant of the home or business can be extended by the court for "good cause shown."²⁶ Such extensions can be for up to 90 days and there is no limit on the number of extensions the government may seek.²⁷ The warrant also may permit federal agents to seize "tangible property" during the search if the court issuing the warrant "finds reasonable necessity for the seizure. . . ."²⁸ The benefits to the government of executing a sneak-and-peek search are obvious – the target of the investigation is unaware that his home or office has been searched and, therefore, all things being equal, the investigation remains covert.

While the PATRIOT Act was passed by Congress in 2001 to strengthen the federal government's ability to combat terrorism, curiously the statute authorizing sneak-and-peek search warrants is not limited to crimes of terrorism. In fact, the statute makes clear that a sneak-and-peek warrant may be issued "to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States."²⁹ Stated differently, a sneak-and-peek warrant can be issued for any federal crime.

It is worth noting that prior to the passage of Section 213, federal courts had allowed sneak-and-peek warrants under certain circumstances.³⁰ For example, the

²¹ As one W.D. Wash. court held, statements made by employees during proffer sessions with federal prosecutors have been deemed "vicarious admissions" by the company itself and admissible against the company at trial under Federal Rule of Evidence 801(d)(2)(D). See Howard E. Heiss & Mark A. Racanelli, *Can an Employee's Proffer Be Used Against the Company?*, New York Law Journal, Jun. 27, 2006, <http://www.law.com/jsp/nylj/PubArticleFriendlyNY.jsp?hubtyp e=&id=1151325326027> (discussing *United States v. Alaska Brokerage Int'l, Inc.*, No. CR06-11 (JLR) (W.D. Wash.)).

²² See, e.g., *United States v. Jones*, 132 S.Ct. 945 (2012) (holding that attachment of Global Positioning System tracking device to vehicle, and subsequent use of that device to monitor vehicle movements on public streets, constituted a search under the Fourth Amendment).

²³ 18 U.S.C. § 3103a.

²⁴ 18 U.S.C. § 3103a(b)(1) & (3).

²⁵ 18 U.S.C. § 2705(a)(2)(A)-(E).

²⁶ 18 U.S.C. § 3103a(c).

²⁷ *Id.*

²⁸ 18 U.S.C. § 3103a(b)(2).

²⁹ 18 U.S.C. § 3103a(a).

³⁰ See, e.g., *United States v. Villegas*, 899 F.2d 1324, 1336 (2d Cir. 1990) (stating that in instances where "non-disclosure of the authorized search is essential to its success, neither Rule 41 nor the Fourth Amendment prohibits covert entry"); *Katz v. United States*, 389 U.S. 347, 355 n.16 (1967) (while this case dealt with listening to and recording telephone conversations, the Court notes that "Rule 41(d) does require federal officers to serve upon the person searched a copy of the warrant and a

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Supreme Court permitted a sneak-and-peek search in *Dalia v. United States* in order to permit covert entry to install a Title III bug in a defendant's office.³¹ Similarly, the Second Circuit implicitly recognized the availability of sneak-and-peek searches before the enactment of the statute and permitted delayed notice of searches in certain limited circumstances.³²

GOVERNMENT STATISTICS REGARDING SNEAK-AND-PEEK SEARCH WARRANTS

Section 213 requires judges who receive applications for sneak-and-peek warrants to file a report to the Administrative Office of the United States Courts in order for the government to compile detailed statistical information regarding the number of applications received and the rulings on those applications.³³ The reports must indicate the nature of the application; whether the application was granted as requested, modified, or denied; the period of delay in giving notice of the search; the number and duration of any extensions delaying notice; and the offense specified in the application.³⁴ This data is compiled and maintained by the Director of the Administrative Office of the United States Courts who issues an annual report to Congress synthesizing the information.

The most recent published statistics show some interesting and possibly disconcerting facts. Applications for and approvals of sneak-and-peek search warrants are dramatically on the rise. In fiscal year 2008, there were a total of 763 sneak-and-peek warrant requests. In fiscal years 2009 and 2010, there were 1,150 and 2,395 such requests respectively.³⁵ The overwhelming majority of applications for sneak-and-peek warrants are approved. For example, in fiscal year 2010, 2,356 requests were granted, 23 were granted as modified, and only 16 were denied.³⁶ Requests for

extension of the delayed notice are also on the rise. In fiscal year 2008, there were 528 requests for extensions, followed by 749 requests for extensions in fiscal year 2009, and 1,575 requests in 2010.³⁷ Extensions are also routinely granted. In fiscal year 2010, 1,546 extensions requests were granted, 25 were granted as modified, and only 4 were denied.³⁸

The statistics in the Second Circuit are in line with the national trend. In 2008, there were only 41 requests for sneak-and-peek warrants and warrant extensions in the Second Circuit, and not a single application was denied; in 2009, there were 122 such requests, again not one was denied; and in 2010, there were 347 such requests and only one was denied.³⁹ Of note, the Southern District of New York, which reported 174 sneak-and-peek warrant requests from fiscal 2008 to fiscal 2010 (150 of them in fiscal 2010 alone), is the only district court in the Second Circuit to have denied an application for a sneak-and-peek warrant in those three years.⁴⁰ Applications for and approvals of extensions of the delayed notice were also on the rise in the Second Circuit: in 2008, there were 16 requests for extensions; all were granted; in 2009, there were 57 requests for extensions; all were granted; and, in 2010, there were 96 such requests; all were granted although two were modified.⁴¹

The statistics also show that sneak-and-peek warrants and extensions for fraud cases were up from a total of 71 in fiscal 2008, to 76 in fiscal 2009, to 115 in fiscal 2010.⁴² Given these numbers in fraud cases, which are non-violent crimes, one wonders with how much rigor the "adverse results" test set forth in the statute is being applied by reviewing courts before approving sneak-and-peek warrants. By comparison, there were only five sneak-and-peek and extension applications for terrorism crimes in fiscal 2008, 14 in fiscal 2009, and 37 in fiscal 2010.⁴³

receipt describing the material obtained, but it does not invariably require that this be done before the search takes place").

³¹ 441 U.S. 238, 258-59 (1978).

³² *Villegas*, 899 F.2d at 1337 (emphasis added).

³³ 18 U.S.C. § 3103a(d)(1), (2).

³⁴ 18 U.S.C. § 3103a(d)(1).

³⁵ See Report of the Director of the Administrative Office of the United States Courts on Applications for Delayed-Notice Search Warrants and Extensions 1 (2008) (hereinafter the "Administrative Office Report"); Administrative Office Report 2009 at 1; and Administrative Office Report 2010 at 1.

³⁶ Administrative Office Report 2010 at 3.

³⁷ Administrative Office Report 2008 at 3; Administrative Office Report 2009 at 3; Administrative Office Report 2010 at 3.

³⁸ Administrative Office Report 2010 at 3.

³⁹ Administrative Office Report 2008 at 3; Administrative Office Report 2009 at 3; Administrative Office Report 2010 at 3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Administrative Office Report 2008 at 6; Administrative Office Report 2009 at 6; Administrative Office Report 2009 at 6.

⁴³ *Id.*

WHERE DO WE GO FROM HERE?

In an era where there is so much heightened concern about terrorism and rightfully so, when Congress and the President give law enforcement a tool to combat terrorism, it is worthwhile to see how that tool is being used in practice. In that vein, it is perhaps interesting to note that according to the most recent statistics for fiscal 2010, sneak-and-peek has been used twice as often in fraud cases as it has in terrorism cases. It also is worth noting that requests for delayed warrant notification are granted the overwhelming majority of the time. While statistics can often be misleading and can be interpreted in different ways, there was just one instance where a sneak-and-peek application was denied in the Second Circuit from fiscal years 2008 to 2010. This may reflect that the government has been judicious and careful in making requests for sneak-and-peek warrants. Thus, the lack of denials in the Second Circuit and the paucity of denials generally in other circuits may reflect that the system is working well and that there is no need for further legislation or judicial scrutiny of sneak-and-peek applications. On the other hand, 150 sneak-and-peek requests were sought in the Southern District of New York alone in fiscal year 2010 – or roughly 3 requests per week on average – which seems quite high. Given that only a single application was rejected in fiscal 2010,

there may be the need for additional reform or heightened judicial scrutiny of sneak-and-peek warrants.

Again, while statistics can be misleading, it should be noted that according to the published statistics, the overwhelming majority of sneak-and-peek warrants are obtained in narcotics cases. Only a few narcotics organizations are believed to be involved in terrorist activities. At a minimum, the statistics suggest that further study and analysis of sneak-and-peek warrants is warranted.

In particular, Congress, which made it easier for prosecutors to obtain judicial permission to delay notification to the target of a search warrant, may wish to assess whether delayed notification is being used only when it is necessary for the investigation, and not as a routine practice. Also, if Congress made this exception to the usual procedure in order to aid the investigation and prosecution of terrorism cases, and it is instead being used to allow the government to read mail or review office documents without having to provide notification, Congress may wish to return to the search warrant procedure – prompt notification – that served this country well during the two centuries that preceded the enactment of the PATRIOT Act. ■

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