



Chapter 1

Investigation and Pretrial Preparation

PRELIMINARY INVESTIGATION

INVENTORY OF EVIDENCE

PHOTOGRAPHS AND DIAGRAMS

THE CHAIN OF EVIDENCE

THE SEARCH WARRANT AFFIDAVIT

THE SEARCH WARRANT

INVESTIGATION AFTER PROCEEDINGS BEGIN

SCIENTER AND RELATED PROBLEMS

LINKING THE SUSPECT WITH THE SALE

INDIVIDUAL INTERVIEWS

Prior to undertaking an investigation, a prosecutor must review the elements of the current law in his jurisdiction, and he should thoroughly understand all elements of the obscenity offense. He must know what must be done to prove each element. While this is certainly true in other criminal prosecutions, it is especially necessary in an obscenity case due to the complex and developing nature of the law. In addition, rules for search and seizure of obscenity are specialized and are more difficult than in other areas of law.

A prosecutor must be aware that he will be required to prove *scienter* (knowledge) on the part of the obscenity defendant, i.e., he must show that the defendant knew the character and nature of the contents of the suspect materials. However, he need not show that the defendant knew or believed that the material was actually obscene. *Hamling v. United States*, 418 U.S. 87 (1973); *Smith v. California*, 361 U.S. 147 (1959). *Scienter* can be established any number of ways, as discussed in Chapter 6.

PRELIMINARY INVESTIGATION

The initial information regarding an alleged obscenity offense usually comes from either a complaining citizen or from information or reports from the local police department. Obviously, a determination must be made as to whether or not the law is being violated. If so, the prosecutor must ensure that his police department conducts a proper and thorough investigation. The prosecutor must also ensure that the police department procures sufficient testimony and physical evidence that will be admissible in court, will withstand the attacks of the defendant's counsel, and will be understood by a jury. The obscenity case may proceed pursuant to the purchase or search and seizure of the allegedly obscene materials (films, photographs, magazines, video cassettes, etc.). Upon obtaining the materials, the prosecutor may consider sending the materials to his police department crime laboratory or other facility for any of the following purposes:

(1) The lab may disclose latent fingerprints which might positively identify the suspect or his associates. Any latent prints obtained could be processed through the fingerprint section of the FBI identification division, which maintains extensive records of the prints of kidnapers, extortionists, bank robbers, and pornographers. If bookstores place cellophane covers on their publications to keep patrons from browsing, this might furnish an invaluable source of latent fingerprints. Latent prints belonging to the operator or owner being identified on these covers could be circumstantial evidence that he

had knowledge of the contents of the publications (*scienter*).

(2) Comparison with similar films, magazines and photographs to identify the time and place of origin. This type of analysis can be of use in establishing the period of the statute of limitations and fixing the venue. It can be used as well to establish "comparables" to material in other cases where convictions have been sustained. For example, a comparison may reflect whether the same type of film or magazine was found to be obscene in other cases. It can also possibly identify the source (processing plant and distributor by positive identification of the photography or printing materials used).

(3) Handwriting, handprinting and typewriter comparison. In *United States v. Orito*, 413 U.S. 139 (1973), a federal obscenity case originating in Los Angeles, a handwriting expert identified handwritten printing appearing on a label attached to a shipment of obscene material as belonging to the defendant and his wife.

(4) Ink and paper comparison and analysis. The ink used to label film titles and numerical listings on reels and film containers are comparable and should not be overlooked. The paper being used to wrap the shipment might be compared with that found in the location of the search and found to be identical. Also, the ink used to sign for the receipt of obscene material under an assumed name may positively identify the suspect when coupled with handwriting analysis.

(5) Identifying marks left by packaging tools or equipment.

(6) Hair and fiber comparisons. Samples of hair or fibers from rope, twine, or string can be easily overlooked, but can often be found in film containers or packaging cartons used in shipping or transporting the material.

INVENTORY OF EVIDENCE

Each individual item of evidence seized pursuant to the execution of a search warrant or incident to an arrest or purchased and then inventoried, should be numbered and described for future identification. In *United States v. West Coast News Company, Inc.*, 228 F. Supp. 171 (W.D. Mich. 1964), a federal obscenity case in Grand Rapids, Michigan, approximately 147 items were contained in one envelope and only the envelope was marked with an identifying number. The defense attorney dumped all 147 items out of the envelope and demanded to know the means by which the witness on the stand could

be able to identify any of the items, much less distinguish one from the other. In a film case, not only the reel but the film itself should be marked with numbers corresponding to the exhibit envelope.

PHOTOGRAPHS AND DIAGRAMS

The outside and inside areas of the establishment where the items were seized or purchased should be photographed. The photographs can be enlarged for courtroom presentation during trial. It may be advantageous for the inside photography to take place during the search and, if possible, casually show the suspect, especially if he is reading the search warrant. However, do not take posed photographs.

The prosecutor should consider having a diagram of the premises made. The diagram may note the location of each suspect when arrested, the location of each item of evidence seized or purchased, and the identity of the officer making the seizure or purchase. This diagram can later be enlarged in the form of a chart by the police department cartographer and be displayed in court to avoid any conflicts as to the circumstances of the seizure or purchase. If you do not prepare a diagram, you should at least ask one of your witnesses to draw a diagram on a chalk board as he testifies to demonstrate the store's layout. The photographs made of the premises would supplement the diagram or drawing. This type of preparation and attention to detail will serve to minimize the defense attorney's attack on any search and seizure aspect of the case and can be very helpful in proving scienter and pandering as will be discussed below.

THE CHAIN OF EVIDENCE

It is incumbent upon the prosecutor to ensure that the evidence remains intact, that no one except for authorized personnel be allowed to view it or handle it without his permission, and that a log or record is maintained from the time of seizure or purchase up to and including the presentation in court. In practice, most trial judges do not require the prosecutor to produce and prove a complete chain of custody, as you do in drug or scientific evidence, for the film or book. Usually the material is admitted after testimony by the officer that he personally placed his name or initials, badge number, date and place of seizure or purchase, on the film or magazine when it came into his possession and that he has reviewed it and can say that it is the same

film or book and that it has not changed, been altered or edited. It is good case control (and preservation for appeal) strategy to have a formal log or record kept, especially since the judge may require the full chain to be established.

The log or record should list when and where the material was seized or purchased, others present, where it was reviewed and labeled for evidence, date, time and place where it was stored. Any time the evidence is opened for examination, a notation should be made on the log or record indicating whose permission was obtained for viewing the evidence. With such a log or record, the defense attorney will have very little to work with to establish a break in the chain of evidence, i.e., that the evidence has been mishandled in any matter such as for private purposes. The log or record will reflect all or any portion of the evidence being sent to the crime laboratory or elsewhere for examination and when it was returned. Evidence in the prosecutor's possession must be made secure and should be as carefully dealt with as money or controlled substances. Many court clerks, police, and prosecutors may want to see the material, but nothing is more embarrassing or helpful to the defense than a "dog-eared" exhibit.¹

THE SEARCH WARRANT AFFIDAVIT

The prosecutor should always assist in the preparation of the necessary affidavit and search warrant for presentation to a magistrate, at least in the first case or in making a "form" for repeated later use. The affidavit should contain a detailed recitation of the underlying facts of the investigation, which would enable the magistrate to form an independent judgment that there is probable cause to believe that a crime has been committed and that the material in question is obscene. The magistrate need not see the film to determine probable obscenity but at least read a factual summary of the sexual contents and setting. Include the running time, type of film, viewing circumstances, and say whether it is "hard-core" where sex is explicit and penetration is clearly visible ("PCV") or whether simulated, close up

¹This might seem basic, but do not overestimate good judgment when it comes to the security of obscenity exhibits. In 1985 in Phoenix, Arizona, it was headline news that an investigator for the coroner's office gave a friend explicit nude photographs of a murdered young girl as she lay on the coroner's examination table. The "friend" used the photographs to entice young girls in his neighborhood into nude photography sessions, and in 1987 pled "no contest" to criminal charges involving these incidents of sexual molestation. This investigator's conduct has obviously caused much embarrassment to the coroner and his staff. *The Arizona Republic*, April 13, 1985.

shots, etc. The purpose is to allow this magistrate to judge if he or she thinks the work is probably obscene under the test for obscenity. The following is an excellent example of what an affidavit should contain and was issued in Florida against the film "Deep Throat":

Affiant's reason for his belief based on his knowledge and experience as a vice officer of the Miami Beach Police Department that the laws of the City of Miami Beach, Florida were violated as stated above and the facts establishing the grounds for this Affidavit and the probable cause for believing such exist, are as follows:

While on duty as a Sergeant of Police in the employment of the City of Miami Beach Police Department on January 26, 1973, I, the affiant, at approximately 7:45 P.M. attended a complete performance of the motion picture described above. I gained entrance to the interior of the Sheridan Theatre by paying a five dollar (\$5.00) admission fee at the box office. At this time I observed approximately thirty other persons purchase tickets and enter the theatre.

The theme of the motion picture, "Deep Throat," as personally observed by the affiant, involves a young girl (billed as Linda Lovelace and referred to by that name in the picture) and her inability to achieve orgasm during normal sexual activities. A friend persuades her to see a psychiatrist (referred to as Dr. Young), who discovers that her clitoris is absent from her genitalia, but exists deep within her throat. The remainder of the picture deals mainly with satisfying Linda's new-found orgasmic capacity, Dr. Young's sexual drives and abilities, and a number of friends and patients whose sexual capabilities are enlisted and slaked in promoting Linda's therapy, which consisted of "deep throat" fellatio.

The *scenario* is as follows: Linda arrives home to find her roommate seated on a kitchen counter, legs spread and looking bored while a male performs cunnilingus upon her. The two girls engaged in idle conversation. The next scene is at a swimming pool, where Linda tells her roommate of her sexual problems. The roommate suggests a stag line to try to satisfy Linda. The scene shifts to an apartment where males are arriving and being issued numbers for their turn (the last number heard is 12). There follows a sequence 10 or 15 minutes in length wherein Linda, in the bedroom and the roommate, in the living room, engage in multi-positional, poly-coupling sexual acts which include fellatio and cunnilingus, in duos and

trios, anal intercourse with simultaneous fellatio, digital penetration and manipulation of the anus during fellatio and cunnilingus. Several scenes depicted ejaculated sperm directed onto the females back after withdrawing from a posterior coupling, and other scenes displayed ejaculated sperm on "Linda's" face.

In the next following series of scenes, both girls are walking along in street attire, during which a verbal recap of the foregoing occurs. Linda complains that she did not achieve sexual gratification despite taking on 14 men, "not counting those who went twice." When Dr. Young's examination discloses Linda's anomaly he suggests that she can achieve orgasm by practicing "deep throat" fellatio, starting with him. Linda then performs fellatio on Dr. Young, the camera being directed at her, head on. During this act she completely envelopes his penis in her mouth. She continues this therapy to the accompaniment of a musical background whose lyrics exhort her to go "way down deep," etc. She achieves orgasm accentuated by the use of inserted shots of bells being struck, fireworks exploding and the blast-off of a space rocket. Dr. Young tries to achieve orgasm by Linda's efforts, ejaculating upon her face.

Dr. Young capitalizes on Linda's sexual requirements by employing her as a nurse/therapist who makes house calls on his patients. The first such call depicted begins with Linda performing fellatio upon a male patient on his kitchen table. Next following is a scene showing "Linda" lying on the table and the patient, while standing penetrates her anally with his penis. While so engaged, he places a glass tube, about the size and shape of a penis, into her vagina. The entry end is closed, and into the other, open end, the patient pours cola. He then inserts a plastic tube into the vaginally enclosed receptacle, and with Linda, alternately sips from it to a musical soundtrack whose words parody the TV commercial, "Things go better with Coke." Following this there are a series of scenes wherein Dr. Young is shown speaking into a tape recorder mike while having sexual intercourse posteriorly with his bored deadpan nurse. Then a scene of the doctor in bed, seemingly sexually satisfied. Linda uncovers him, exposing his penis, which is seen to be covered with a bandage. Linda removes the bandage and this is followed by more scenes of both girls performing fellatio on the doctor, and of the doctor having intercourse with one or the other. In one of these scenes Linda is seen to completely envelope his penis with her mouth. Meanwhile Dr.

Young performed cunnilingus upon Linda Lovelace.

The scene following shows a "burglar" entering Linda's apartment, masked. He watches while she sits on a toilet tank, shaving her pubic area. A flashback to the doctor's office showing the doctor performing cunnilingus on the nurse while the nurse is speaking into the mike, describing the "burglar" as a wealthy patient who can be satisfied sexually only by causing females to think he is going to rape them. Back then to Linda's apartment, where the burglar, now referred to as Wilbur, is unhappy because Linda refuses to be frightened, but wants to satisfy him as part of his therapy and because she loves him. Wilbur proposes to her but she regretfully declines, telling him that the man she marries "must have a nine inch cock." Wilbur is despondent because he is "just four inches from happiness." Linda suggests he call Dr. Young for advice. He does so and is promised that Dr. Young can make his penis as big as he wants to be. Linda then performs fellatio on Wilbur while he sticks his finger into her anus, again to the music track singing directions to her to relax her throat and "go way down deep." More bells, fireworks and rockets signify Linda once more achieving orgasm. The picture ends with the words "The End," followed by "and deep throat to you all."

All of the photography of the sexually explicit scenes were clear, sharp and direct; all genitalia were clearly observed, and none of the sexual functions appeared to be simulated.²

After submission of the affidavit to the magistrate, and his satisfaction that probable cause exists, the magistrate will issue a warrant. If evidence of ownership, control, distribution, or scienter of the material is to be seized (business records, invoices, promotional materials, etc.) the request and facts showing they probably exist on the premises must be added to the warrant. *U.S. v. Torch*, 609 F.2d 1088 (4th Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). The prosecutor should ensure that the police officer executes the warrant within a given period of time, and gives a receipt specifically describing the property to the person from whom it was taken. The prosecutor should also ensure

²In *New York v. P.J. Video, Inc.*, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986) the U.S. Supreme Court found that search warrants with substantially less detailed descriptions established probable cause. However, the Court of Appeals of New York found that the New York Constitution imposed a more exacting standard than the Federal Constitution. *People v. P.J. Video, Inc.*, 501 N.E.2d 556 (N.Y. 1986). The Supreme Court opinion sets out the actual affidavits in the appendix, so this case should be handed to your magistrate to show what the law is and how much better your affidavit is than the ones upheld by the Court as a matter of law.

that when making a return on the warrant, the police officer delivers to the court a written inventory of the property taken for future identification. See Appendix A for other examples of affidavits and search warrants.

THE SEARCH WARRANT

In choosing to proceed by search warrant, the prosecutor should be aware that there are certain requirements unique to obscenity cases because of First Amendment considerations. These requirements are developed and discussed elsewhere in the section dealing specifically with search and seizure. Search and seizure problems may be obviated in a bookstore situation by directing an undercover police officer to purchase the allegedly obscene materials. The prosecutor may thereafter present them directly to the grand jury or magistrate seeking indictment on the obscenity charge. The charge will be based on the sale of the *purchased* material, thereby eliminating the risk of losing the material due to procedural mistakes in a search and seizure?

Other problems involve the execution of the search warrant. Before embarking on the execution of a search warrant in an obscenity case, the prosecutor may wish to brief the police officers on what to expect in the way of strategy devised by defense attorneys and what is expected of each officer. The officers should take their responsibility as seriously as in any other type of criminal investigation. The prosecutor should advise the police officers that any statement they make during the execution of the warrant can be turned against them in a court of law. Therefore, the officers should be warned that no careless statements are to be made that can be misinterpreted by the defense attorney later in court. Officers should be advised to be alert, businesslike and courteous — but be firm and not overreact to any gestures or statements made to them or about them while in the performance of their duty. The officers should also be warned that in many cases the suspect will want to call his attorney and stall for time, allowing the defense attorney ample time to arrive on the scene and attempt to elicit derogating statements from the officers. The officers should be advised that when a location is being searched pursuant to a warrant, the entire premises are in their custody and the officer in charge should control the movements of all individuals, for the safety of the officers as well as the suspects on the premises during the period

³Entry into a pornographic outlet and purchase of materials by an undercover police officer was held not to constitute a search or seizure within the meaning of the Fourth Amendment. *Mayland v. Macon*, 472 U.S. 463 (1985).

of the search and seizure. Should the defense attorney arrive at the scene, he can be met at the door, shown the warrant, and be advised to remain there until the officers within have completed the execution of the warrant. (See Appendix A for sample search warrants.)

During the execution of a search warrant is usually the best time to take photographs of the premises. Wide angle shots of each wall, shots from behind the counter to show what the employees see, close ups of various sections, displays, and racks, and some close enough to read the titles and signs should be taken. **Also** obtain shots of the peep shows and condition of their floors and seats. Many officers also videotape the search, but caution must be taken and the sound should be off so just visual tape is recorded. Also, different taping strategy applies depending on whether the tape is taken for evidence at trial to prove scienter, distribution, etc., or whether taken for protection from charges of misconduct, including scope of warrant, etc. or for both purposes.

INVESTIGATION AFTER PROCEEDINGS BEGIN

When formal court proceedings begin, the prosecutor may consider having someone observe the courtroom appearances of the defendant to identify individuals coming to court with him or accompanying his attorney. The purpose of this procedure is to identify the defendant's associates and possibly uncover the principals in a larger operation that the preliminary phase of the investigation did not reveal. Many large distributors retain both local and nationally known attorneys to defend their smaller dealers. This type of information can be useful to the prosecutor in the case pending or help the prosecutor to develop other cases against identified principals in the future. If the defendant continues to operate his establishment in actual or apparent violation of the law after criminal charges are brought, the prosecutor may consider placing the establishment under surveillance. Telephone tolls for the subsequent period of surveillance should also be obtained. This procedure can assist in identifying any associates or hidden principals that may be replenishing the inventory, or that may be coming to the defendant's aid and conferring with him. New leads for subsequent cases could be obtained here as well.

SCIENTER AND RELATED PROBLEMS

Today's pornographer has become quite sophisticated and continually devises many new ways to avoid criminal prosecution. Quite often the owners and operators of hard-core theatres and bookstores will "school" their employees in various techniques of their own. Many of these techniques have been devised by defense attorneys specializing in pornography cases who are well aware of the various methods that may be employed to compromise an obscenity investigation or prosecution.

The police will often encounter a situation where the individual contacted during an obscenity investigation is under strict orders to answer no questions, to contact his attorney, and to refuse permission to inspect the premises. Alternatively, a suspect may feign cooperation in an attempt to determine how much the investigator or police officer knows about the operation and its principals, the purpose of the inquiry, and possibly the complaining witness or witnesses.⁴

During the investigation stage of an obscenity case, the prosecutor may use a number of different techniques to obtain information and evidence usable at trial. As noted previously, it will be necessary at trial for the prosecution to establish the *scienter* (knowledge) of individuals charged with the sale of allegedly obscene magazines or films. The *scienter* requirement makes it incumbent upon the state to show some knowledge of the general character and content (not specific contents) of the materials at issue in the court action by direct or circumstantial evidence. See: *Smith v. California*, 361 U.S. 147, 154 (1959); *Mishkin v. New York*, 383 U.S. 502, 510-12 (1966); and *Hamling v. United States*, 418 U.S. 87, 119-24 (1974). Frequently, the cashier in bookstores and absentee managers of movie theatres will attempt to insulate themselves from successful prosecution by asserting that they have no knowledge as to the content of the books which are sold or movies which are shown. This is often done by having the magazines in bookstores totally enclosed in cellophane wrappers, and in the case of movie theatres, having the manager never or seldom appear on the premises. In many instances, the covers on the publications or videocassettes which are in plain sight of a clerk or other employee may be sufficient to establish *scienter*. See: *Triplett v. State*, 722 S.W.2d 633 (Mo.Ct.App. 1986).

Among other methods of showing knowledge, the following approaches have met with success. With reference to the clerk in a

⁴A copy of the instructions to an employee of Sovereign News Company was seized in a Louisville, Kentucky investigation. See Appendix H, arrest warrants.

bookstore, it is often possible for an undercover police officer to establish direct knowledge by engaging the clerk in conversation. For example, the undercover officer might ask the clerk: "Do you have any gay group or fisting magazines?" or "I need a straight magazine or film for a bachelor party." Alternatively, an investigator might go in on a given day and purchase a particular type of magazine, just generally conversing with the clerk. He can then return the next day and ask the clerk, "Say, that stuff I got yesterday was alright, but can you suggest something better?" If the clerk responds affirmatively in any of these situations, a degree of knowledge is demonstrated. However, a particularly wily clerk may not "rise to the bait" in any of these situations. In this case, it has been possible for the officers to enter the bookstore, select four or five magazines which they believe are hard-core, and then proceed over to the clerk and lay the magazines down on the counter, saying to the clerk, for example, "Do you realize that you are selling hard-core magazines that depict intercourse and sodomy?" The officers can then leave and return a few days later. If the clerk is willing to or has sold these or similar magazines, then he is in no position to disclaim all knowledge as to the general character of the materials depicted in the magazines. Another method proven useful involves the use of a known police officer dressed in plain clothes. The officer will engage the clerk in conversation asking the clerk how he knows that the magazines are in fact not obscene. In a surprising number of occasions, the clerk will respond that the magazines are "not obscene" because either the clerks or the manager look at them before they are placed on the shelf to "make sure they don't show any penetration, or violence, or kids, or animals, etc." or "to make sure they are not obscene." Often individuals in the pornography business will mistakenly assert that particular materials must show actual penetration to be obscene or must show ABC — animals, bondage, or children. Any of these methods may provide evidence on the issue of *scienter*.

Note that a vice officer can often testify that based on his years of experience, etc., the cover of a cellophane covered magazine is representative of the general contents of the magazine.⁵ What you can see through the plastic is usually sufficient, especially in light of the exclusive sexual nature of the rest of the stock in trade, the signs, posters, and catalogues present. The arrangement of stock on shelves into various categories, the layout of shelves and displays are also useful evidence in proving *scienter*. See also: *Corn. v. Hulehan*, 487

⁵In establishing *scienter*, you may also wish to consider a motion to the trial court to have the jury escorted for a "jury view" of the premises. However, your investigators should be prepared to describe any "changes" in the business's appearance. See sample Motion for Jury View in Appendix I.

A.2d 980,987 (Pa.Super. 1985); *Sedelbauer v. State*, 428 N.E. 2d 206 (Ind. 1981) *cert. denied*, 455 U.S. 1035 (1982); *Corn. v. Dane Entertainment Services, Inc.*, 505 N.E.2d 892,893 (Mass. App. Ct. 1987).

With the absentee movie theatre manager, police officers may use one of the approaches used with respect to the bookstore clerk. For example, the officer can approach the absentee theatre manager and say to him: "Do you realize that your theatre is exhibiting the movie 'Deep Throat' which depicts acts of intercourse, sodomy, and fellatio?" Then, if the theatre is raided a few days later, the absentee manager again is in no position to disclaim knowledge as to the general character of the movie in question. Also, testimony that the manager or "owner's" name is on the sales license, occupancy permit, incorporation papers, building licenses, Worker's Compensation or sales tax applications, lease, etc. are also probative. Actual notice can also be imposed on the owner, manager, employees, and the corporation itself, by delivery of a letter from the prosecutor setting out the title or brief description of specific films or books, stating that they contain explicit sexual conduct, are hard-core pornography, and are obscene. Such a letter should be informational only and *should not contain a threat* or option to "remove or be charged".⁶ Just say what the material is and hand it to the persons and serve on the statutory agent. Such notice procedure is specifically provided in Ohio Revised Code 2907.35(B), but is available to all prosecutors under common law evidence rules.

Scienter is often shown by circumstantial evidence, by testimony that the store is totally dedicated to hard-core or explicit material, with magazine and film cartons depicting on their covers nudes and sex acts, all within the open view of the cashier's counter and customers. The signs, advertisements, billboards, etc. are also described, and pictures used, to show knowledge. The theory is that anyone working or entering the store must know because everything is pornographic or sexually oriented and explicit. See: *State v. Burgun*, 384 N.E.2d 255 (Ohio 1978) (A bookkeeper who worked inside a fairly small warehouse where sexually explicit materials were stored, in conjunction with a series of prosecutions of one of her corporate employers for obscenity violations was held to establish sufficient notice to support a verdict.) *U.S. v. Pryba*, 678 F.Supp. 1218,1220-1222 (E.D.Va. 1988).

⁶A prosecutor may advise an individual that he will be prosecuted under a constitutional statute, absent compliance. See: *Bantam Books v. Sullivan*, 372 U.S. 58,71-72 (1963); *State Cinema of Pittsfield, Inc. v. Ryan*, 422 F.2d 1400,1401-02 (1st Cir. 1970); *Grove Press, Inc. v. Bailey*, 318 F.Supp.244,249-51 (N.D. Ala. 1970); and *May v. Harper*, 306 F.Supp. 1222,1223-25 (N.D. Fla. 1969). This must be carefully worded; you can give them the prosecution policy, not an ultimatum. Remember, the purpose is to impose scienter, not to force compliance.

See: *United States v. Sandy*, 605 F.2d 210 (6th Cir. 1979); *United States v. Glassman*, 562 F.2d 954 (5th Cir. 1977). Be careful, this may not necessarily be inferred of an absentee manager. *Beier v. State*, 687 S.W.2d 2 (Tex.Crim.App. 1985). But see: *Porter v. State*, 440 N.E.2d 690 (Ind.Ct.App. 1982) and *Riley v. State*, 389 N.E.2d 367 (Ind.Ct.App. 1979) where scienter of absentee owners was proven circumstantially.

LINKING THE SUSPECT WITH THE SALE

Quite often, the success or failure of a prosecution depends on information available at trial linking the defendant with the establishment selling or showing the obscene material. In addition to the evidence that can be seized by search warrant from the stores, offices, warehouses, or residences, and the information gained from interviews with clerks, drivers, other employees, landlords, and business associates, either undercover or by immunity, the following are suggested sources of information:

Other Enforcement Agencies: The Federal Bureau of Investigation, U.S. Customs, Postal Inspectors, and the Internal Revenue Service can be excellent sources of information that might not otherwise be available. Periodically, special strike forces are created by the U.S. Department of Justice or State Attorneys General that could be potential sources of information. The U.S. Department of Justice has established the National Obscenity Enforcement Unit in Washington, D.C., (202) 633-5780, to assist federal, state and local prosecutors. The prosecutor should also consider making use of his liaison with other police agencies and prosecuting attorneys to obtain information. Frequent sharing of information by prosecutors and police departments pertaining to well-known pornographers will avoid duplication and wasted time in the investigative effort. If there is an active Law Enforcement Coordinating Committee in your federal district, pornography should be a subject of its efforts.

Public Utilities: The various utility companies (gas, electricity, water) maintain records of past and present subscribers at a particular address. Often, a subscriber's forwarding address is available if he has recently moved. In some cases, a subscriber's application for services will disclose type and place of employment, previous addresses, references and the spouse's name, and contain signatures of the responsible party.

Telephone Company: The telephone company will generally furnish a subscriber's name and address when a telephone number is

known. Addresses and telephone numbers may also be available for those persons having non-listed service (this information is restricted and requires a letter of explanation or subpoena from the police department or prosecutor's office). These records are usually available for up to three months after service has been terminated. Upon written request, the telephone companies will generally furnish records of toll calls made from a particular number for the preceding six months. Remember to check with all long distance providers in your jurisdiction, not just the telephone company. A record of telephone numbers used by a suspect at a given location, *e.g.*, a theatre or bookstore, could provide the prosecutor with valuable leads to ascertain the identities of the owner, distributors furnishing films for the theatre, and other business associates, some of whom may become informants or defendants.

Many video distributors are now using "800" toll-free services. With phone company cooperation, in compliance with a subpoena or court order, a record can be obtained of all incoming calls if arrangements are made in *advance* of the period of time in question.

Commercial Credit: Commercial credit information usually consists of the names of the owners or officers of the company, the type of business, the operational procedure, affiliates, financial structure, court actions and history of the firm (for example, Dunn and Bradstreet and local credit bureau reports). In many cases, a brief personal resume of the principals of the business will also be available.

Personal Credit: Personal financial information, such as an individual's type and place of employment, earnings, assets, banks, civil suits, bankruptcies, age and current and previous spouses, can be obtained from credit bureau records and credit card companies. (This information is restricted and requires a letter of explanation, or a subpoena, from the police department or prosecutor). Credit card records are often very useful. They may show travel patterns, regular meeting locations and even other illegal activities such as payment for prostitution.

Banks: Quite often, banks may serve as a source of valuable information. Information can often be obtained from banks without a subpoena, provided that the request is for investigative purposes only. Such information will be treated as confidential unless the bank is furnished with a subpoena. A subpoena may be required in instances where copies of records are to be requested or where the information is to be used in court. Monitoring a checking account of a theatre or bookstore may identify the true owner or operator, employees, or credit card accounts paid by check (through which the

origin or source of supply could be established). Defense attorneys representing pornographers may on occasion attempt to require a bank to furnish the identities of the individuals monitoring their clients' accounts, claiming a trespass on their rights of privacy. Some banks have a policy of cooperating with law enforcement agencies and others require a subpoena duces tecum before they will make their records available in order to protect themselves from civil suit. Some banks will immediately advise their clients of any inquiry about their accounts.

Despite the potential difficulties, banks are often an excellent source of information. Employee payroll checks may disclose present employees or former employees who were fired or otherwise dismissed from employment and who would be willing to furnish valuable inside information about the suspect's business. Quite often, a disgruntled former employee will make a good witness who could testify in court as to actual ownership and *scienter* on the part of the operator of the establishment.⁷ Examinations of bank records may disclose whether theatres or bookstores are locally owned and operated or are a part of a statewide or nationwide business. The local operator or manager may only make deposits into the account and the principal subsequently makes the withdrawal. In the more sophisticated operation, an account is set up and when a deposit slip is received in the central office, the funds are withdrawn and transferred to a central account in the name of the front corporation or "front man."

County or City Records: These records might disclose plats and maps of real property, legal descriptions, dimensions, **and** addresses of owners. For a reasonable fee, any title company will do a written title search showing ownership and any registered leases or liens. Then landlords and lienholders can be contacted as well. Also check for building, zoning, and occupancy permits, then contact remodeling contractors.

Commissioner of Revenue or Treasurer: Name of business and sales tax licensees and amount of taxes paid during the previous tax year or tax quarter. You may also often find the name and address of the property owner.

Registrar of Voters: Real names and addresses of those who registered in last election (includes state of birth, occupation, and

⁷ The authorized signature on the check might also prove useful, and this is why many businesses choose to pay their obligations "in cash," or use "rubber stamp" signatures.

signature).

Recorder: All records pertaining to real estate transactions (includes deeds, grants, transfers, mortgages, leases, liens, attachments, releases and powers of attorney, births and deaths, certificates of marriage, wills admitted to probate, papers in connection with bankruptcy, decrees and judgments of courts).

Clerk of Court: Civil and criminal files, corporations, fictitious firm names, divorce actions (includes wife's maiden name, names and ages of children, family income and description of marital property.)

Department of Motor Vehicles: Auto licenses and registrations, operators' licenses with photographs. Many pornographers lease vehicles' (sometimes from their "front" leasing companies) and the lease company may be able to provide valuable information.

State Department of Corporations or Secretary of State: All articles of incorporation filed in the state (includes names of officers, principal shareholders, addresses and capitalization). Also, annual reports of corporations.

State Controller: Keeps all accounts in which the state is interested, maintains the accounts of all persons indebted to the state.

Bankruptcy Court: Assets, debts, and background of parties.

Securities and Exchange Commission: Conducts and maintains records on fraud investigations regarding stock and security transactions.

Reverse Telephone Directories: Listings according to address.

City Directories: Listing by address.

Newspapers: Newspapers may provide information concerning the identity and address of the person paying for advertisements for bookstores or theatres. This may also be helpful in connecting a person to the act of pandering.

Leases: Information contained in a standard commercial lease can be invaluable in establishing the true identity of the bookstore or theatre owner.

Worker's Compensation: When applying for classification, a controlling person must sign an affidavit verifying the type and

hazards of a business and this information would establish knowledge or control.

Insurance: Applications for fire, casualty, and theft policies usually require a controlling person's signature (who is the beneficiary?). Although it may take some work to discover which company or agent wrote the policies, it may be possible just by asking various agents in your community. It is often common knowledge which agent wrote these controversial policies; often they are part of the high-risk pool, and possibly records of police or fire departments could help if there has been a theft or fire, arson, etc. at the location.

INDIVIDUAL INTERVIEWS

In conducting an obscenity investigation, individual interviews may be necessary.⁸ These may be with an innocent child, an angered parent, or a local businessman. On the other hand, it may be with a pornographer, his customers, a performer, prostitute or pimp. In the latter case, it will help the prosecutor to know the street jargon or terms of the trade, as many of these individuals will resort to the common vernacular during the course of the interview. (See Appendix B for glossary of some terms used in the trade). Although many of the terms used are rather common, some are exotic and the prosecutor should at least be familiar with them in order to make a proper analysis and evaluation of the information obtained during such an interview. Where in the course of an obscenity investigation it becomes necessary for a police officer or prosecutor to interview a witness of the opposite sex, especially those who may be a performer or prostitute, *always* have a third party present at the interview. Ideally, have a prosecutor or police officer of the same sex as the subject present. This could prevent later allegations of misconduct. Misconduct charges against officers and prosecutors are used by the defense in many vice cases and should be considered a serious matter in obscenity cases as well.

⁸ Extensive interviews will be necessary where "informant" testimony is to be used, especially cautious when dealing with informants who are involved in prostitution, narcotics and other criminal activities, as in any other type of investigation.