IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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CLERK-ALBUQUERQUE

ELIAS GONZALES,

Plaintiff,

vs. No. CIV-03-1150 BB/WDS

THE CITY OF ALBUQUERQUE,
and ROBIN BURGE

Defendants.

DEFENDANT CITY OF ALBUQUERQUE'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT REQUESTING DISMISSAL OF PLAINTIFF'S MUNICIPAL LIABILITY CLAIMS

COMES NOW, Defendant City of Albuquerque (hereinafter "Defendant City") by and through Assistant City Attorney Stephanie M. Griffin and pursuant to Fed. R. Civ. P. 56 and D.N.M.LR-Civ. 7, and hereby states the following for its Memorandum in Support of its Motion for Summary Judgment Requesting Dismissal of Plaintiff's Municipal Liability Claims:

INTRODUCTION

On October 1, 2003, Plaintiff filed his first complaint wherein he pled a municipal liability claim against Defendant City of Albuquerque. [See, Doc. 1, Compl.] Plaintiff alleged in his Complaint that Defendant City has a policy of inadequately investigating and corroborating allegations of criminal wrongdoing, of executing search warrants in an unreasonable manner and of monitoring its officers in the use of confidential informants. [See, Doc. 1,Compl, Count IV] On January 8, 2004, Defendant City, along with the other named defendants, filed a Motion for Summary Judgment. [See Doc. 11] Plaintiff responded to Defendant City's portion of the Motion by filing a series of Rule 56(f)

a7

affidavits. [See Docs. 17, 27, and 28] While Defendants' Motion for Summary Judgment was pending before the Court, Plaintiff was allowed to file an Amended Complaint wherein he included a second municipal liability claim. [See, Doc. 47, First Amend Compl, Count VI] Plaintiff alleged in his second municipal liability claim that Defendant City has a custom and practice of failing to follow state pre-deprivation procedures as well as a custom and practice of failing to train officers in forfeiture law. See id. On June 29, 2004, Defendant City filed a 12(b)(6) Motion to Dismiss this second municipal liability claim. [See Docs. 50 and 51] On October 27, 2004, this Court issued a Memorandum, Opinion, and Order denying all of the parties' motions. [See Doc. 62] In the Memorandum, Opinion, and Order, this Court found that Plaintiff's procedural due process claim was against the City. See id. However, the Court also noted that it was not apparent that Plaintiff has sued the individual City employee responsible for the decision to retain the money. See id at 12, n. 12. Finally, this Court allowed Plaintiff to conduct discovery on the issues raised in the Rule 56(f) affidavits. See id. at 13. Now that discovery has concluded, Defendant City is filing this Motion for Summary Judgment requesting dismissal of all of Plaintiff's municipal liability claims.

STATEMENT OF FACTS

1. On April 24, 2003, Detective Robbin Burge obtained a search warrant for the residence located at 10901 Red Robin S.W., the 2003 black Hummer, VIN 5GRGN23U13H124745, bearing NM FLB385, and for the person of Elias Gonzales. See Search Warrant (Exhibit A) and Affidavit for Search Warrant (Exhibit B)

2. The search warrant and warrant affidavit were approved by the Honorable Albert S. Murdoch. See id

3. The search warrant was executed on May 2, 2003. See Return of Inventory (Exhibit C)

4. During the execution of the search warrant, $ 4,276.00 in cash was found and tagged into evidence by Detective Burge. See id

5. Detective Burge testified in her deposition that the cash was taken because she felt that Plaintiff was living above his means and because the warrant itself authorized the seizure of cash. See Exhibit D, Deposition of Robbin Burge, pp. 108, 109, 110

6. It was Detective Burge's intent to offer the cash to the DEA for possible forfeiture. See Exhibit D, p. 114, lines 1 through 4

7. The cash was not offered to the DEA for forfeiture and the cash was not returned to Plaintiff within 10 days because Detective Burge forgot to do so and because Plaintiff did not contact her asking to return the money. See Exhibit D, p. 37; pp. 119-120

8. Plaintiff does not know the date that each policy referred to in Paragraphs 31, 33, 34, and 35 of his Amended Complaint became the official policy for Defendant City. See Exhibit E, Pltf's Ans to Interogg, Interrog No. 20

9. Plaintiff does not know the name and title of each person who instituted the custom, practice and/or policy described in Paragraphs 31, 33, 34, and 35 of his Amended Complaint. See Exhibit E, Ans to Interrog. No. 21

10. Plaintiff does not have a copy of each policy identified in Paragraphs 32 and 34 of his Amended Complaint. See Exhibit F, Pltf's Ans to Req for Prod, Req. for Prod. No. 16

11. Plaintiff does not have any training materials that he contends that Defendant City failed to train its officers on. See Exhibit F, Req. for Prod. No. 18

12. Defendant City of Albuquerque has written policies and procedures concerning the use of Confidential Informants. See Exhibit G, Albuquerque Police Department Policies and Procedures Manual, Procedural 2-04 et seq.

13. Defendant City of Albuquerque has written policies concerning the execution of search warrants. See Exhibit H, Albuquerque Police Department Policies and Procedures Manual, Procedural 2-16 et seq.

14. Defendant City of Albuquerque has written policies concerning the forfeiture of money and property. See Exhibit I, Albuquerque Police Department Policies and Procedures Manual, Procedural 2-37 et seq.

STANDARD OF REVIEW

"Summary judgment procedure is properly regarded not as a procedural short cut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure a just, speedy and inexpensive determination of every action.' " Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). Under Rule 56(c) of the Federal Rules of Civil Procedure, the movant

> bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which the movant believes demonstrates the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)). The movant may negate elements of the non-movant's factually unsupported claims or defenses "with or without supporting affidavits." Id. To properly respond, the non-moving party "must go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." Id. at 324 (citing Fed. R. Civ. P. 56(c)). The standard for summary judgment is essentially the same as the standard for a judgment as a matter of law under Rule 50(a), which provides that the "trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (citations omitted). In ruling on a motion for summary judgment, the district court should not weigh the evidence and determine the truth of the matter. Id. at 249. Instead, this Court should ask whether a reasonable jury could return a verdict for the non-moving party based on the evidence before the jury. Id. If the evidence presented by the non-moving party is merely colorful or not significantly probative, the entry of summary judgment is proper. Id. at 249-50. Accordingly, "[t]he mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient . . .." Id. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is 'no genuine issue for trial.' " Matsushita Electric Industrial Co. v. Zenith Radio Corp, 475 U.S. 574, 587 (1986) (quoting First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968)).

LEGAL ARGUMENT

"A plaintiff suing a municipality under section 1983 must show: "(1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation." Myers v. Oklahoma County Bd. Of County Commissioners, 151 F.3d 1313, 1316 (10th Cir. 1998) (citing Monell v. Dep't of Social Services, 436 U.S. 658, 694 (1978)). "A municipality may not be held liable where there was no underlying constitutional violation by any of its officers." Hinton v. City of Elwood, 997 F.2d 774, 782 (10th Cir. 1993)(citing City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986); Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445, 1447-48 (10th Cir. 1990); Watson v. City of Kansas City, 857 F.2d 690, 697 (10th Cir. 1988)). In the instant case, Plaintiff alleges two separate municipal liability theories against Defendant City. First, Plaintiff claims that Defendant City has a policy of inadequately investigating and corroborating allegations of criminal wrongdoing, of executing search warrants in an unreasonable manner and of monitoring its officers in the use of confidential informants. [See Doc. 47, Count V] Second, Plaintiff claims Defendant City has a custom and practice of failing to follow state pre-deprivation procedures as well as a custom and practice of failing to train officers in forfeiture law. [See Doc. 47, Count VI] Accordingly, Defendant City will discuss these two theories in turn.

A. Plaintiff's First Municipal Liability Claim – An Alleged Policy of Inadequate Investigation, Unreasonable Execution of Search Warrants, and of Inadequate Monitoring of the Use of Confidential Informants

Plaintiff's First Municipal Liability Claim is predicated upon whether Detective Burge violated Plaintiff's rights under the Fourth Amendment. As discussed in Detective Burge's Motion for Summary Judgment, she did not violate Plaintiff's Fourth Amendment rights and accordingly, pursuant to the Heller Rule, Plaintiff's First Municipal Liability Claim must be dismissed against Defendant City as a matter of law. See id.

Notwithstanding, there is no evidence in this case that a municipal policy or custom was the moving force behind any alleged constitutional deprivation. In the instant case, Plaintiff alleges that Defendant City "has adopted a policy of inadequately investigating and corroborating allegations of criminal wrongdoing, of executing search warrants in an unreasonable manner, and of monitoring its officers in the use of CIs." [Doc.47, ¶ 31] Plaintiff claims that this policy was the "moving force" behind an alleged constitutional violation. [Doc.47, ¶ 32]

In order to warrant liability against a municipality, any alleged policy must be a "policy, statement, ordinance, regulation, or decision officially adopted and promulgated" by the municipality's officers. Lankford v. City of Hobart, 73 F.3d 283, 286 (10th Cir. 1996)(internal citations and quotations omitted). Plaintiff cannot name one city official who "officially adopted the policy" alleged in Paragraph 31 of his Complaint. See Exhibit E, Ans to Interrog. No. 21. An "official policy" often refers to formal rules or understandings -- often but not always committed to writing -- that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81 (1986)(plurality opinion). As stated above, Defendant City's official policies pertaining to the use of confidential informants and the execution of search warrants are written and are contained in Sections 2-04 and 2-16 of its Standard Operating Procedures Manual. See Exhibits G and H. These policies and procedures are lawful on their face as they promulgate the protections and safeguards of the Fourth Amendment. See id.

In Lankford, the plaintiff claimed that the defendant municipality had adopted an official policy promoting sexual harassment. Lankford, 73 F.3d 283. However, the

Tenth Circuit found that there was no such evidence. Id. at 286. Instead, the court found that there was evidence to the contrary because the municipality had a written city policy expressly forbidding it. Id. The Tenth Circuit also found that the person who the plaintiff attributed to promulgating the alleged sexual harassment policy was not a final policy maker and therefore the alleged policy was not the official policy for the City. Id. at 286-87. Likewise, in the instant action, Plaintiff has no evidence that Defendant City has officially adopted a policy of inadequately investigating and corroborating allegations of criminal wrongdoing, of executing search warrants in an unreasonable manner, and of monitoring its officers in the use of CIs. He cannot even name the person who allegedly adopted such policy. Given these circumstances, Plaintiff certainly cannot show that his claimed unconstitutional policy was adopted by a person with final policy making authority. Instead, Defendant City's written policies conform with Fourth Amendment protections. Therefore, just as in Lankford, this Court should find that Plaintiff's First Municipal Liability Claim should be dismissed because it is without merit as a matter of law.

B. Plaintiff's Second Municipal Liability Claim – An Alleged Policy of Failing to Follow State Pre-Deprivation Procedures and Failing to Train Officers in Forfeiture Law.

As set forth above, the first predicate for finding municipal liability is the commission of a constitutional violation by a municipal employee. "[W]here a municipality is 'sued only because [it was] thought legally responsible' for the actions of its officers, it is 'inconceivable' to hold the municipality liable if its officers inflict no constitutional harm, regardless of whether the municipality's policies might have 'authorized' such harm." City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986). In the instant case, this Court stated that Plaintiff's procedural due process claim does not appear to be against Detective Burge or Detective Fuller, but rather that this claim is against Defendant City. [See Doc. 62, p. 10, n. 9] However, even though this claim may be against the City, Plaintiff must still identify a municipal employee or employees who allegedly deprived him of his procedural due process rights. Even though discovery has closed, Plaintiff has yet to identify any such employee.

To establish a claim under Section 1983, Plaintiff must identify individuals who were personally involved or whose acts were causally connected to the alleged constitutional violation of which he complains. Woods v. Edwards, 51 F.3d 577 (5th Cir. 1995); see also Saucier v. Katz, 533 U.S. 194, 212, 121 S. Ct. 2151, 2161-62 (2001), Ginsburg concurring (plaintiff, after pre-trial discovery, failed to offer proof that Saucier had a hand in the allegedly violent shove and therefore Justice Ginsburg was not persuaded that the plaintiff even tendered a triable claim against Saucier) Individual liability under Section 1983 must be based on personal involvement in the alleged constitutional violation. Foote v. Spiegel, 118 F.3d 1416, 1423 (10th Cir. 1997). This Court even notes "it is not apparent he [Plaintiff] has sued the individual City employee responsible for the decision to retain the money." [See Doc. 67, p. 12, n. 12.] Because Plaintiff has not identified a municipal employee who was personally involved in the commission of a violation under the procedural due process clause, Plaintiff's second municipal liability claim must fail as a matter of law.

Plaintiff's second municipal liability claim must also fail because this claim is premised upon an allegation that Plaintiff's due process rights were violated because the money was not forfeited in accordance with state law. Claims based on violations of state law and police procedure are not actionable under Section 1983. Medina v. Cram, 252 F.3d 1124, 1133 (10th Cir. 2001)(citing Romero v. Board of County Comm, 60 F.3d 702, 705 (10th Cir. 1995); Wilson v. Meeks, 52 F.2d 1547, 1554 (10th Cir. 1995) and Davis v. Scherer, 468 U.S. 183, 194-96 (1984)). The Tenth Circuit even said in its decision in Gonzales vs. City of Castle Rock, 366 F.3d 1093 at 1100 (10th Cir. 2004)(en banc), cert granted, 160 L.Ed 2d 316, 125 S.Ct. 417 (2004) "We certainly concur with the common refrain in these cases that the mere violation of state law does not automatically give rise to a constitutional due process violation, and that the due process clause should not be so stretched that it becomes a font of tort law to be superimposed upon whatever systems may already be administered by the States." Id (internal quotations omitted). Therefore, even if Plaintiff were to identify a City employee who allegedly committed a procedural due process violation against him, the violation itself would be predicated upon this employee's alleged failure to follow state forfeiture law, which in and of itself does not amount to a constitutional violation.

In addition to Plaintiff's inability to show that a municipal employee violated his procedural due process rights, Plaintiff also cannot make the second predicate showing and establish that a policy or custom was the "moving force" behind the alleged infraction. In fact, Defendant City has written policies and procedures pertaining to forfeiture of cash. See Exhibit I. As set forth herein under the "Statement of Facts," Detective Burge was aware that the cash had to be forfeited which is why she was going to see if the DEA would initiate forfeiture proceedings. See Fact No. 6 cited herein. This was not done because of some City policy or because of an alleged failure to train, but rather because Detective Burge simply forgot to follow up with the DEA. See

Exhibit D, p. 37; pp. 119-120. Accordingly, Plaintiff's Second Municipal Liability Claim must also fail as a matter of law.

CONCLUSION

As illustrated above, each of Plaintiff's municipal liability claims must be dismissed as a matter of law. The First Municipal Liability Claim must be dismissed because Plaintiff cannot show any constitutional infraction against Detective Burge and because Defendant City has policies and procedures concerning the use of confidential informants and execution of search warrants. These policies and procedures are lawful on their face and Plaintiff cannot show otherwise. Plaintiff's Second Municipal Liability Claim must be dismissed because he has not identified a municipal employee or employees who allegedly deprived him of his procedural due process rights. Nevertheless, even if Plaintiff were to identify any such employee the constitutional violation he alleges that this person committed is predicated upon a failure to follow state law. A constitutional violation cannot be predicated on such a theory. Finally, as mentioned above, there was no policy or custom that was the "moving force" behind any alleged violation of the procedural due process clause.

WHEREFORE, Defendant City respectfully requests that this Court dismiss Plaintiff's Municipal Liability Claims with prejudice and order all other relief this Court deems just and proper.

Respectfully Submitted,

CITY OF ALBUQUERQUE
Robert M. White
City Attorney

Stephanie M. Griffin
Assistant City Attorney
Attorney for Defendant City of Albuquerque
P. O. Box 2248
Albuquerque, New Mexico 87103
(505) 768-4500

I hereby certify that a true copy
of the foregoing was mailed
to the following counsel of record:

Joseph P. Kennedy
Kennedy & Oliver, P.C
Attorney for Plaintiff
1000 Second Street NW
Albuquerque, New Mexico 87102
(505) 244-1400

W. Ann Maggiore
Butt Thornton & Baehr PC
Attorney for Defendant Burge
P.O. Box 3170
Albuquerque, NM 87190-3170
(505) 884-0777

on this 21st day of April, 2005.

Stephanie M. Griffin
Assistant City Attorney

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT
STATE OF NEW MEXICO

FILED
SECOND JUDICIAL DISTRICT
MAY 2
JULIE Y. MONTOYA

SW '03 - 00097

VS.

Elias Gonzales
10901 Red Robin Road, SW
Albuquerque, New Mexico
DOB: 1/8/76
SSN: 525-21-7153

A Black 2003 Humvee 4-door Hummer
NM FLB385
VIN: 5GRGN23U13H124745

SEARCH WARRANT

THE STATE OF NEW MEXICO, TO ANY OFFICER AUTHORIZED TO EXECUTE THIS WARRANT: Proof by Affidavit for Search Warrant having been submitted to me, I am satisfied that the person named/described and/or property described in the Affidavit are located where alleged in the Affidavit, and I find that grounds exist for the issuance of the Search Warrant. A copy of the Affidavit is attached and made part of this Search Warrant.

YOU ARE HEREBY COMMANDED to search forthwith the person and/or place described in the Affidavit, commencing between the hours of 6:00 am and 10:00 pm (unless I have specifically authorized a nighttime search as stated below), and continuing thereafter until completed, for the person and/or property described in the Affidavit, serving this Warrant together with a copy of the Affidavit, and making the search and if the person and/or property be found there, to seize the person and/or property and hold for safekeeping until further Order of the Court.

Executing Officer(s) are directed to prepare a written inventory of a person or property seized. You are further directed to file the return and written inventory with the Court promptly after execution of this Search Warrant.

DATED THIS 24 DAY OF April, 2003, AT 4:55 P.M.

JUDGE

AUTHORIZATION FOR NIGHTTIME SEARCH

EXHIBIT
A

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT
STATE OF NEW MEXICO

SW '03-00027

FILED

VS

ELIAS GONZALES
10901 RED ROBIN ROAD, SW
ALBUQUERQUE, NEW MEXICO
DOB: 1/8/76
SSN: 525-21-7153
DES: SMA, 5'6", 180 LBS, Black hair
Brown eyes

A Black 2003 Humvee 4-door Hummer
NM FLB385
VIN: 5GRGN23U13H124745

AFFIDAVIT FOR SEARCH WARRANT

Affiant, Detective R. Burge, being duly sworn on her oath, states that she has reason to believe that on the following described property and person named above: The property to be searched is located at 10901 Red Robin Road, SW. The property located at 10901 Red Robin Road, SW, is a two-story structure made of pink stucco and has a pitched roof. The front door to the residence faces south as does the white two-car garage door. The numbers "10901" are black, approximately 2" in height, affixed to the structure, and are located west of the garage door. Directly above the black numbers is a porch light. A small porch located west of the garage door covers the front door area. The porch area is extended west to the end of the structure and an additional porch light is located west of the front door. There is a large window west of the front door and two additional large windows on the 2nd floor, which also face south.

Elias Gonzales, a 27 year old Spanish male, approximately 5'6, 180 lbs, black hair and brown eyes.

A black 2003 Humvee 4-door Hummer, bearing NM FLB385, VIN: 5GRGN23U13H124745, registered to Elias Gonzales at 10901 Red Robin Road, SW, Albuquerque, New Mexico.

Affiant and other Detectives are familiar with Mr. Gonzales, the 2003 Humvee, the residence located at 10901 Red Robin Road, SW, and will be present during the service of the search warrant.

In the City or County designed above there is now being concealed: Crack cocaine or other controlled substances in unknown quantities, narcotics related paraphernalia.

EXHIBIT
B

RBM

Laura Chamas-Ortega

Documentations showing ownership or control of the described premises and described vehicle, and documentation of illegal transactions. U.S. Currency, firearms, ammunitions, or any equipments used to facilitate drug transactions (such as manufacturing or preparation for distribution). It has been Affiant's experience that narcotic traffickers often possess weapons to protect their money and contraband.

The facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: Affiant is a full time salaried, Law Enforcement Officer with the Albuquerque Police department, has been so employed for 13 years and is currently assigned to the Gang Unit. Affiant has investigated numerous felony crimes and is familiar with aspects of illegal narcotic related activities, narcotics, trafficking, and in working with informants.

Within the last 49 hours, Affiant arranged a controlled narcotic purchase with the use of a Confidential Source (CS). On this controlled purchase, Affiant and other Detectives arranged to meet with the CS at a predetermined location where the CS and its vehicle was searched and found to possess no money or narcotics. During the controlled purchase, Detectives kept the CS under constant surveillance excluding approximately one minute where the CS had met with the target, Elias Gonzales. Affiant and other Detectives could not conduct surveillance while the CS and Gonzales met due to previous contacts with Gonzales. Affiant and other Detectives observed Gonzales and the CS walk up to Gonzales' vehicle, a 2003 4-door Humvee, bearing NM FLB385, Gonzales opened the door of the Humvee, pleased his hands inside the vehicle then handed a small unknown item to the CS. The CS then handed Gonzales an unknown item. Affiant then observed the CS and Gonzales walk away from the 2003 4-door Humvee, bearing NM FLB385, then from each other in different directions. After the controlled purchase, the CS turned over small amount of suspected cocaine. The CS and its vehicle was searched and found to posses no money or narcotics. Affiant field-tested a portion of the suspected crack cocaine from the controlled purchase and the results were positive for cocaine. Affiant tagged the cocaine from the controlled purchase into the APD Evidence Unit. Based on Affiant's training and experience, individuals who engage in the sell of illegal narcotics keep the illegal narcotics inside their residence.

Following the controlled narcotic purchase, Affiant conducted surveillance on the residence located at 10901 Red Robin Road, SW. and Affiant observed Elias Gonzales drive away from the residence in a black 2003 Humvee bearing NM FLB385. Affiant also conducted a records search through the Bernalillo County Assessors Office and learned that Elias Gonzales is the documented owner for the residence located at 10901 Red Robin Road, SW.

Affiant and other Narcotic Unit Detectives have previously worked with this informant on several occasions and have found that its information has been extremely accurate. The information given by this informant has been verified through Police investigations, which has resulted in the issuance of numerous search warrants, the seizure of large amounts of narcotics as well as the seizure of property and U.S. Currency. The informant

KGM

is not working off any changes and understands that if the information proves correct a monetary reward could be received.

Based on the aforementioned acts, Affiant requests that a search warrant be issued for the residence located at 10901 Red Robin, SW, the 2003 black Hummer, VIN: 5GRGN23U13H124745, bearing NM FLB385, and for the person of Elias Gonzales.

AFFIANT　　　　AFFIANT'S SIGNATURE

Subscribed and Sworn to before the above named County of the State of New Mexico this 24 day of April 2003, at 1451 am/pm.

DISTRICT COURT JUDGE

RETURN AND INVENTORY

STATE OF NEW MEXICO
-VS-
ELIAS GONZALES
10901 RED ROBBIN ROAD, SW
ALBUQUERQUE NM
DOB: 1/8/76
2003 HUMVEE
NM FLB385

I received the attached Search Warrant on 4/24/03 And executed it on 5-2-03 at 14:35 Hours. I searched the person or premises described in the Warrant and left a copy of the Warrant with:

____
(name of the person searched or owner at the place of search)

Together with a copy of the inventory for the items seizes. The following is an inventory of the property taken pursuant to the Warrant:

U.S. Currency RF Pant Pocket $318 (R Bruz)
US Currency Master Bedroom $1000 (J Hudson) (F.F.)
US Currency Master Bedroom Compart $3958 (F. Fuller)
Four NM ID's
One Marijuana Pipe

This inventory was made in the presence of Robbin Bruz And Kevin Fuller
Applicant for Search Warrant — Owner or other witness

Signature of Officer or Detective — Signature of Owner or Witness

Return made this 9th day of May, 2003 at 3:00 hours.

(Judge Clerk)

EXHIBIT
C

CERTIFIED AS A TRUE AND CORRECT COPY OF THE ORIGINAL FILED IN MY OFFICE,
JUANITA M. DURAN, Clerk
of the District Court
By: ______ Date 12/2/03
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELIAS GONZALES,

Plaintiff,

vs. CIV 03-1150 BB/WDS

THE CITY OF ALBUQUERQUE,
ROBIN BURGE and KEVIN FULLER,
City of Albuquerque Police Officers,

Defendants.

DEPOSITION OF ROBBIN BURGE

Wednesday, February 16, 2005
9:00 a.m.
500 Fourth Street, Northwest
Suite 105
Albuquerque, New Mexico 87102

PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE, this deposition was:

TAKEN BY: MR. JOSEPH P. KENNEDY
ATTORNEY FOR PLAINTIFF

REPORTED BY: GERALD R. SCHULTZ, N.M. CCR No. 230
PAUL BACA PROFESSIONAL COURT REPORTERS
500 Fourth Street, Northwest
Suite 105
Albuquerque, New Mexico 87102

EXHIBIT
D

by Elias Gonzales or by me about this cash?

A. I didn't get one from you, and I gave Elias my cell phone number, which I have voice mail on it. I didn't give him the office number.

Q. Okay. And you didn't get a voice mail from Elias Gonzales about the cash?

A. No, I did not. No.

Q. Did you ever even think about the cash after putting it in the locker at SID until the lawsuit was filed?

A. No, I didn't.

Q. Okay. So there's never an occasion where you checked up to find out, you know, the status of the DEA or the cash or anything?

A. No, I didn't.

Q. Okay. So, basically, your understanding was that if the DEA didn't want to adopt the forfeiture, you were going to return the money to Elias. Right?

A. That was my intent, yes.

Q. Okay. But, essentially, you didn't remember about the cash: is that fair?

A. Yeah, that's fair.

Q. Okay.

A. I should have followed up and I didn't.

together?
A. Just my style.
Q. Okay. Had you already made a decision at the time you put the cash in the envelopes that you're going to seize the cash?
A. No, because we weren't finished searching yet.
Q. Okay. What happened-- Well, did anything happen after that time when you finished searching that led you to want to seize the cash?
A. Yes.
Q. What?
A. Based on the check stub that we found in his car and the contents of the house, I felt that he was living above his means.
Q. Okay.
A. And I-- Before I left I pulled into his driveway, he walked up to my car--it was a truck, actually--and I told him--I told him I was getting ready to go on vacation. I don't remember if it was the next day or-- It was coming up in the next few days. And so I told him to give me a couple weeks. I was going to see if the DEA wanted to seize the money. And I gave him my cell phone number. I said, "Call me in a couple weeks, and I'll tell you whether

it's seized or I'll get you the money back."
And he said, "Okay." And he put-- He held his phone up to my window, and I saw him put--I assumed he put my number in his cell phone. It appeared that he did.
Q. Uh-huh. But when you found the cash in the house--or when the other officers found the cash in the house and gave it to you, you didn't at that point say, Oh, do you know what? I'm going to give this to the DEA or try to give--or see if the DEA wants this. You were still conducting your investigation.
A. Yes.
Q. All right. And the things that led you to want to offer the cash to the DEA for possible forfeiture was his check stub and the contents of his home revealed to you that he was living above his means?
A. Yes.
Q. All right. I don't want to be difficult or anything, but we talked about the affidavit for search warrant asking for permission to seize U.S. currency, and did that--I mean, did that play any part in your seizure of the cash?
A. No, because it was a large amount and it was over $100. If it would have been $60 or $70, I

wouldn't have taken it.
Q. Right. Okay. But what I'm trying to get at: the search warrant-- We went through the affidavit for search warrant. It says-- You know, you asked for authority to seize certain items, and one of them is U.S. currency.
A. Right.
Q. All right. But you weren't necessarily going to seize U.S. currency: is that fair?
A. Depending on how much we found or if we found any at all.
Q. And depending on the further investigation that you conducted.
A. Right, the total search.
Q. The total search. Okay. What about the contents of his house indicated to you that he was living above his means?
A. The pool table. He had, I believe, black couches--black leather couches. He had a large screen--I believe it was a wide screen TV, a bunch of electronic equipment. The kitchen-- I don't remember the dining room table. I remember there was one. There was another-- Upstairs there was another big screen TV, I believe, in one of the kid's room. It appeared to be a kid's room. There was toys and

Q. And if the DEA had any interest in it, at some point that would have had to have been transferred to the DEA. Right?
A. Correct.
Q. But have you been in situations where the DEA is actually there executing a search warrant and actually does the seizure itself, the physical taking of the property?
A. I've done search warrants with them. I don't remember if we took property or not. Shoot. I know when we've done like big roundups and we're doing like several warrants at a time for DEA that they've taken stuff at those. I wasn't at that particular house, I was at a different house, and then we all meet and debrief on things that have been taken.
At the particular one that I was at, I don't remember if we--if we took any money or not.
Q. Okay. Have you seen situations in which--similar to Elias Gonzales, in which money or vehicles are seized by APD and then offered to DEA
A. I haven't been present at them, no.
Q. Okay. Are you aware of them?
A. Central narcotics, I believe, still does it.
Q. Okay. And you base that on, what, just

Q. Okay. And did you see-- I mean, was there cash there?
A. I don't know. I didn't see it. I just saw the card.
Q. Just the card?
A. Yeah.
Q. Okay. And did you talk to anyone there about that?
A. About what?
Q. Did you ask someone to give you the evidence card for this case, give a case number?
A. Yes.
Q. And a person came up and gave you the--
A. There were three cards.
Q. Two cards?
A. Three.
Q. Okay. And there wasn't any problem presented to you as far as doing that?
A. Not that I remember.
Q. Okay. And did you complete any other paperwork to release the money back to Elias Gonzales?
A. No.
Q. And was there any reason why you didn't do that within ten days of the seizure of the cash?
A. Because-- Well, there are several

reasons. And I'm totally to blame because I dropped the ball. One was Elias never contacted me, so I assumed that the DEA took it. I didn't follow up with the DEA. So ultimately it was my responsibility, and I just didn't do it.
If he would have called me, I would have--I know I couldn't have kept it--not me but the city--and I would have given it back, and I just dropped the ball.
Q. Okay. When you say "dropped the ball," I mean, forgot about it: is that fair?
A. Yeah, that's fair.
Q. Okay. But, again, there's no--that you're aware of, there's no written policies or procedures as to how you should handle that money at this point in time?
A. Like what?
Q. Like, you know, officers should put the money into evidence within ten days.
A. Do the seizure paperwork like through the city or give it to a federal agency within that ten days. There was some-- It was when that double jeopardy stuff was coming through, we were told not to do it. I tried finding that memo--I can't find it--that Ruben Davalos wrote. There's some confusion

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ELIAS GONZALES,

Plaintiff,

vs. No. CIV-03-1150 BB/WDS

THE CITY OF ALBUQUERQUE,
ROBIN BURGE and KEVIN FULLER,
City of Albuquerque Police Officers,

Defendants.

PLAINTIFF'S ANSWERS TO DEFENDANTS CITY OF ALBUQUERQUE AND KEVIN FULLER'S FIRST SET OF INTERROGATORIES TO PLAINTIFF

TO: Stephanie Griffin
Assistant City Attorney
P.O. Box 2248
Albuquerque, New Mexico 87103-2248

Defendants City of Albuquerque and Kevin Fuller, by and through Assistant City Attorney, Stephanie M. Griffin, pursuant to Fed. R. Civ. P. 33, request you to answer the following Interrogatories in writing and under oath, within thirty (30) days of the date of service upon you.

INSTRUCTIONS

In answering these Interrogatories, please furnish all information which is available to you, including information in the possession of your attorneys or investigators for your attorneys, and with all information you can discover by making a reasonable inquiry.

If you cannot answer the following Interrogatories in full, after exercising due diligence to secure the information to do so, answer any part of the question which you can answer, state

EXHIBIT

E

INTERROGATORY NO. 20: **Please set forth the date(s) that each policy referred to in Paragraphs 31, 33, 34, and 35 of your Amended Complaint became the official policy for Defendant City of Albuquerque.**

ANSWER:

I don't know.

INTERROGATORY NO. 21: Please set forth the name and title of each person who instituted the custom, practice and/or policy described in Paragraphs 31, 33, 34, and 35 of your Amended Complaint.

ANSWER:

I don't know.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ELIAS GONZALES,

Plaintiff,

vs.

No. CIV-03-1150 BB/WDS

THE CITY OF ALBUQUERQUE,
ROBIN BURGE and KEVIN FULLER,
City of Albuquerque Police Officers,

Defendants.

PLAINTIFF'S ANSWERS TO DEFENDANTS CITY OF ALBUQUERQUE AND KEVIN FULLER'S FIRST REQUEST FOR PRODUCTION TO PLAINTIFF

TO: Stephanie Griffin
Assistant City Attorney
P.O. Box 2248
Albuquerque, New Mexico 87103-2248

You are hereby requested to respond and produce the following documents for inspection and copying within thirty (30) days of service upon you in accordance with the Fed. R. Civ. P. 34 at the office of the City Attorney, One Civic Plaza, Fourth Floor, Albuquerque, New Mexico, or at such other time and place as agreed upon by counsel.

EXHIBIT
F

REQUEST NO. 16:

Please provide a copy each policy identified in Paragraphs 32 and 34 of your Amended Complaint.

RESPONSE:

I don't have any policy.

REQUEST NO. 17: **Please produce a copy of each search warrant referred to in Paragraphs 29 and 30 of your Amended Complaint.**

RESPONSE:

Plaintiff has attached a copy of the search warrants in response to the motions for summary judgment.

REQUEST NO. 18:

Please produce a copy of the training materials that you contend that Defendant City of Albuquerque failed to train its officers on.

RESPONSE:

I don't have any.

Effective: 09/30/93; Still In Effect 10/01/95

2-04 INFORMANTS

POLICY:

The department uses information supplied from a variety of sources, including informants. Information supplied by informants will be utilized only if the information relates to allegations of a criminal act and in accordance with rules of criminal procedures and constitutional guarantees. Guidelines are hereby set forth for the management of records, funds, operations at the department level, and maintenance of the files which are kept at the unit or section in which they originated.

> Note: This policy in no way attempts to affect the Crimestoppers program policies or procedures as established by the Crimestoppers Citizens' Board of Directors.

DEFINITIONS:

2-04-1 [N/A] INFORMANT

Anyone who provides information on a suspected criminal activity including one or more of the following specific categories.

2-04-2 [N/A] CONFIDENTIAL INFORMANT (C.I.)

A paid or unpaid individual who is providing information to the police department; who for reasons of personal safety or other valid considerations, requests that his/her identity be kept confidential.

2-04-3 [N/A] UNWITTING INFORMANT

An individual involved in criminal activity who acts as an intermediary to negotiate illegal transactions, purchase contraband, or who otherwise unwittingly acts as an informant.

2-04-4 [N/A] PAID INFORMANT

Anyone who provides information about actual or alleged criminal activities with the expectation of financial compensation or other considerations. The compensation can include money, goods, services, or consideration on pending criminal charges.

2-04-5 [N/A] UNPAID INFORMANT

Anyone providing information about actual or alleged criminal activity and does so with no expectation of compensation but does expect anonymity.

Effective: 11/02/99; Replaces: 09/30/93
99-POC

2-04-6 CONCERNED CITIZEN/WITNESS
[N/A]

An individual who is providing information about actual or alleged criminal activity without expectation of reward or consideration on pending criminal charges.

2-04-7 ANONYMOUS INFORMANT
[N/A]

Anyone calling the police department with information who wishes to remain anonymous.

2-04-8 JUVENILE INFORMANT
[N/A]

Any informant under the age of eighteen.

2-04-9 PAYMENT
[N/A]

The actual exchange of information for money, goods, and services, or the draft of agreements through the prosecuting attorney's office to provide reduction of charges or plea agreements with informants.

2-04-10 EXPENSE REPORTS
[N/A]

Internal administrative documents (PD form 1204) used to provide an audit trail. Expense reports do not contain any information concerning the actual information received, nor do they report activity of the officer in matters concerning the case. Expense reports are not used to circumvent normal intelligence or criminal case files.

2-04-11 RECEIPTS
[N/A]

Receipts are normal business receipts or, in emergencies, handwritten receipts used to provide additional audit methods to ensure the proper use of Department funds. Receipts are attached to expense reports where applicable to provide a unified expense file on each operation involving informants.

2-04-12 INFORMANT FILES
[N/A]

Those files containing the true identity of confidential informants used by the employees of the Albuquerque Police Department. Informant files are kept at the appropriate activity level with all the necessary documentation to identify the informant.

RULES:

2-04-13 USE OF INFORMANTS

[3] ***A. All personnel to include uniformed patrol officers will follow these procedures when gathering information.**

Effective: 09/30/93; Still In Effect 10/01/95

2-04-13
cont'd

[3] B. Informants will not be used to circumvent any constitutional rights or guarantees of citizens, nor will they be utilized to entrap offenders.

C. All meetings with informants will be reported to the officer's supervisor.

*D. When meeting with informants, a minimum of two officers will be present. When necessary, the second officer can witness the meeting from a discreet distance, *provided that the witness officer can observe all actions and transactions between the officer and the informant.

E. A juvenile informant may only be utilized when written permission has been granted by the parent or guardian.

F. Informants will not be utilized in an active role when they are on probation or parole unless there is written approval from the probation or parole officer.

[6] G. All operations involving the use of informants will be documented in offense reports, intelligence reports, and/or informant profile sheets to comprehensively describe the activity or operation that occurred. This documentation should include statements, tape recordings, expense reports, and/or receipts.

H. Efforts shall be made to substantiate or otherwise verify all information received from informants prior to utilization of such information unless there is imminent danger to life or property. This type of exception must be approved by command level staff.

[6] I. Prior to an informant being paid for services, initial identification will be required. Identification requires completion of an Informant Profile Sheet (PD form 1201), the completion of an Informant Signature Card (PD form 1202), and an identifiable photo of the individual. The investigating officer's supervisor will be required to meet with all paid informants prior to the first payment.

2-04-14 INFORMANT FILES
[6]

A. An informant file will be completed on all paid and unpaid informants. The file will contain the Informant Profile Sheet (PD form 1201), the name of the officer collecting the information, and any appropriate comments evaluating the informant.

Effective: 11/02/99; Replaces: 09/30/93
99-POC

2-04-14
cont'd

B. The file will contain all transactions involving the informant, including the following:

1. Any payments to the informant.
2. Expense reports.
3. Receipts.
4. Any relevant criminal offense reports that may have a direct bearing on the classification/ evaluation of the informant.
* **5. Biographical and background information.**
* **6. Criminal history record.**
* **7. Code name or number of each informant.**

C. For paid informants, the file will also contain an Informant Signature Card (PD form 1202) and an identifiable photo.

[5] D. Intelligence reports or other unauthorized documents will not be retained in informant files.

E. Informant files will only be retained in the Unit, or other appropriate activity in which they were originated.

[7] F. To ensure the safety and confidentiality of informants, access to informant files will be restricted to authorized personnel, as determined by Section/Watch Commanders, on a right and need to know basis. The files will be physically secured in a file cabinet or safe where access can be monitored at the Unit level.

G. The file will be stored and retrieved using a numeric or coded filing system. This code will be used to identify the informant in all other reports and transactions. The code number will be obtained from the Informant Log Book (PD form 1206). The informants true identity will not appear on any exterior portion of the file

H. The informant file will be completed within five working days of receipt of the initial information from the informant. It is the responsibility of the investigating officer to ensure that the informant file is complete.

[7] I. Appropriate items once in the file may not be purged. It may be necessary to show the overall performance of the informant when considering payment or reliability.

Effective: 09/30/93; Still In Effect 10/01/95

2-04-15 [7] INFORMANT LOG BOOK

A. An informant log book (PD form 1206) will be maintained with consecutive numbers to enable authorized personnel to identify the informant. The Informant Log Book will remain in the custody of the Section commander or his/her authorized designee and will be subject to audit by Inspections Unit personnel at the direction of the Chief of Police.

B. It will be the responsibility of the investigating officer to ensure that the informant is assigned a number from the Informant Log Book.

2-04-16 [7] SOURCE EVALUATION

A. Informants are to be evaluated for reliability prior to disseminating any information unless there will be an immediate impact on life or property. In this case, prior to release of information, Command approval for dissemination will be required.

B. The evaluation will be conducted by the investigating officer, and the evaluator will use the following criteria as found on PD forms 1201 and 1205:

Source Evaluation	Information Evaluation
A. Completely Reliable	1. Confirmed By Another Source
B. Fairly Reliable	2. Possibly True
C. Reliability Unknown	3. Truth Unknown
D. Anonymous	

C. The Informant Profile Sheet will be dated to ensure the informant is evaluated with the most current information. Upon completion of the investigation for which the informant was used, the investigating officer will re-evaluate the informant using another Informant Profile Sheet.

2-04-17 [6] CONFIDENTIAL INFORMANT PAYMENT POLICY

Informants who are assisting officers in an investigation may be offered a monetary reward based on the amount of cash which is forfeited in that investigation.

A. The standard rate of reward is ten percent (10%) of the cash which is forfeited to the Albuquerque Police Department.

Effective: 09/30/93; Still In Effect 10/01/95

2-04-17
cont'd

B. Other property such as real estate, jewelry, vehicles, firearms, and furniture which is forfeited, will not be included for purposes of determining the amount of the reward offered to the informant.

C. Officers should carefully explain to the informant that the reward is based on the amount of cash forfeited to the Albuquerque Police Department, and not on the amount seized. The informant will be told that the forfeiture process may take months to complete, and that they must wait until then for their reward.

D. Rewards are to be linked to the benefit the Albuquerque Police Department receives from the informant's contribution to the investigation.

1. An informant whose contribution leads directly to an arrest or seizure should receive ten percent (10%) of the amount of cash forfeited.
2. If an informant's contribution helped initiate the investigation, but is several steps removed from the arrest or seizure, then the reward offered to the informant will be reduced or eliminated appropriately.

E. Officers will carefully document the following:

1. Any promises of reward made to an informant.
2. The role or contribution of the informant in the investigation.

2-04-18
[7]
PAYMENT OF INFORMANTS

A. Prior to payments, the investigating officer will submit a request for informant funds for the purpose of receiving information from documented informants.

B. The section/watch commander and his/her unit supervisor will determine the necessity, feasibility and the reason for any cash payment to an informant. The amount to be paid to the informant will be determined based upon the value of the information, the impact of payments on departmental/unit funds, and the input from the case detective or investigating officer.

[6] C. The section commanders or their designated representatives will be the only ones authorized to disburse cash to officers for payment to informants only after submission of a written request, for Operational Funds Voucher (PD form 1203), by the requesting officer to his/her immediate supervisor.

D. Upon issuance of the funds, the investigating officer will sign a receipt for the funds, and the receipt will be attached to the expense report completed by the officer.

Effective: 09/30/93; Still In Effect 10/01/95

2-04-18 cont'd

E. A receipt will be completed when funds are distributed to the informant with the informants signature, the signature of the officer disbursing the funds, and the signature of a witnessing officer.

[6] F. Any payment to an informant over $1,000.00 requires prior approval from the appropriate Deputy Chief of Police.

[6] G. Payments of over $5,000.00 require approval from the Chief of Police.

2-04-19 [6] *EXPENSE REPORTS

A. An expense report (PD form 1204) will be completed on all disbursements. The original receipts of cash out, cash in, and the payment receipt signed by the informant will be attached.

[7] B. An expense report and a receipt will be required for each transaction by the officer, to contain sufficient information to cross reference the receipt to a specific expense report.

[7] C. The expense report contain only the informant's designated number. The signature of the disbursing officer and the witnessing officer shall appear on the report.

2-04-20 [6] CASH ON HAND LOG BOOK

A log book will contain the numerical sequence of the cash disbursement. This numerical sequence will correspond to the cash receipt log. The log will also contain the name of the investigating officer and the amount disbursed. This log book will show the available cash on hand (cash on hand ledger).

2-04-21 [7] AUDIT OF INFORMANT FUNDS

A. The section commander is required to conduct continual audits of informant funds to ensure proper use and to promptly identify procedural deficiencies. Additionally, section commanders will periodically audit the actual informant file to ensure that proper documentation and evaluation of informants is occurring.

B. The Section commander should report any findings of concern up the chain of command as soon as they are identified.

Effective: 09/30/93; Still In Effect 10/01/95

2-04-21
cont'd
[N/A]

C. The Department's Inspections Unit will also conduct audits of the informant files to include payment practices, informant evaluation, appropriateness of payment, and to ensure that all rules and procedures set forth in this section are being followed.

Effective: 03/11/97; Replaces 03/01/90
97-POC10

2-16 EXECUTION OF SEARCH WARRANTS

POLICY:

Standardized procedures will be followed in the execution of search warrants to ensure the effectiveness of the operation, the safety of personnel and the public, and that all legal requirements are met.

RULES:

2-16-1 [6] RESPONSIBILITIES OF AFFIANT OR AFFIANT'S REPRESENTATIVE

It is the responsibility of the affiant, or the affiant's representative to:

A. Brief the supervisor about the circumstances of a warrant prior to presenting the warrant to the District Attorney's office, secure the District Attorney's approval, and present the warrant to the judge for approval by the judge.

B. Ensure that a supervisor is present at the scene on all search warrants involving a dwelling or occupied structure and that the supervisor is thoroughly briefed before the search warrant is executed.

C. Ensure intelligence is gathered as is practical and reasonable given all the circumstances surrounding the warrant prior to the execution of the warrant.

D. Brief all participants about the area to be searched, items to be seized and any significant unusual circumstances which may exist involving the premises or its occupants. In situations where exigent circumstances are anticipated, the affidavit will include detailed facts upon which exigent circumstances are believed to be present.

E. Ensure all necessary copies of the warrant are brought to the scene. Give the defendant's copy of the warrant and affidavit to the defendant, if present, or leave on the premises along with a copy of the inventory of all items seized.

F. Be responsible for the return of the warrant, affidavit, and inventory to the District Court Clerk within three days.

G. Ensure necessary containers for evidence collected pursuant to the warrant are brought to the scene.

(effective 9/21/00)
*[5] **H. If a diversionary tactic (ruse) that has the potential to adversely affect or disrupt the public, is needed for the effective service of a search/arrest warrant, or for the implementation of a court-ordered electronic listening/homing device, the tactic must be reviewed prior to approval by the City Attorney's Office and the Chief of Police after collaboration with the Deputy Chief of Police - Investigations Support Bureau.**

Effective: 03/11/97; Replaces 03/01/90
97-POC10

2-16-2 [6] RESPONSIBILITIES OF THE SUPERVISOR IN CHARGE

A. The supervisor in charge will be the supervisor of the affiant.

Prior to serving a warrant the supervisor in charge will:

1. Be thoroughly briefed by affiant or affiant's representative and review the search warrant for probable cause prior to its being presented to the District Attorney's office. Additionally, ensure all significant, unusual circumstances regarding the premises or occupants are included in the warrant.

(effective 11/02/00) ***2. Accompany officers on all search warrants involving a dwelling or occupied structure to ensure that:**

   a. all officers who are part of the initial entry team are wearing a standard patrol uniform or the range uniform (BDU), and
   b. an adequate number of personnel are appropriately deployed.

3. Determine whether other agencies should be notified and included in the search; ensure appropriate measures are taken to make such notification and ensure such participation.
4. Ensure that specific tasks are assigned to each officer involved in the search as well as the assignment to videotape or photograph the scene after the scene is secure.
5. Notify a commanding officer of the plan to serve a search warrant. The commanding officer will be responsible for making a determination whether or not Tactical Team will be used.
6. Notify Radio Control no later than 15 minutes prior to the service of the warrant of:

   a. The location of the search.
   b. The time of the search.
   c. The unit or division responsible for the execution of the warrant.
   d. Any special circumstances relating to the service of the warrant.
   e. The approximate time the warrant will be served.

7. Ensure that if a warrant is to be served outside the city limits, the appropriate agency is notified prior to the service of the warrant. Representatives of that agency should be present, if possible and if they so desire, when the warrant is served.

Effective: 03/11/97; Replaces 03/01/90
97-POC10

2-16-2 A
cont'd

*[5] (effective 9/21/00) 8. **If a ruse that has the potential to adversely affect or disrupt the public, is needed to effectively serve the search warrant, ensure that the tactic has received proper review and approval as outlined in subsection 2-16-1 H.**

B. If the Tactical Team is not going to be used, the supervisor in charge will:

1. Make certain that all officers who participate in the execution of the search warrant are wearing clothing which clearly displays the badge of office on the chest and the Albuquerque Police Department shoulder patch that clearly identifies them as police officers prior to the execution of the warrant. Ensure everyone involved in the execution of the warrant is wearing protective body armor.

(effective 9/21/00)

- **If an approved ruse tactic is to be used in order to effect the initial entry to a premises, the supervisor in charge will determine if the official clothing with the badge and patch identifying them as police officers will or will not be worn.**

2. Assign officers to points of entrance and exit as necessary until entry has been made.
3. Be responsible for the decision to use force to gain entry in all situations where exigent circumstances are believed to exist.
4. Ensure officers only use those tactics for which they are adequately trained.
5. Ensure all persons involved in the execution of the warrant tape record the service of the search warrant. This will include all persons on the entry team as well as all persons on the curtilage. Such recording shall include, at a minimum, the period of time from just prior to entry until after the premises is secured. All tapes will be tagged into evidence in a timely manner. This section shall not apply to those situations where the scene has been secured prior to obtaining a search warrant.
6. Ensure police authority and intent shall be clearly announced at the appropriate time. The responsibility for making such announcement is to be specifically assigned.
7. Ensure a marked unit is parked on location and ensure the marked unit initiates red lights and begins making announcements over public address simultaneous to the service of the warrant. This section shall not apply to those situations where the scene has been secured prior to obtaining a search warrant.

2-16-2 cont'd

C. After the warrant is served, the supervisor in charge will:

Ensure the following tasks are accomplished once entry has been made:

1. Immediately after the area to be searched is secured, ensure that the scene is videotaped or photographed prior to the search. When appropriate, ensure evidence is videotaped or photographed as it is discovered, prior to its seizure and removal. Ensure the scene is videotaped or photographed after the search is completed.
2. Assign officers to specific areas of the scene to protect the scene, search for evidence, and prevent the destruction of evidence.
3. All occupants of the residence shall be located as quickly as possible. All persons found on the premises will be placed in a designated area which has been searched and secured, with an officer present at all times. Each person will be identified in a reasonable period of time and if the person is not a resident of the house, if the officers have no specific reason to fear the person, or the officers have no reasonable basis to believe the person has some type of connection to the premises or to criminal activity, then the person will be released.

   Persons will be frisked for the safety of the officers However, they should not be searched unless it is specifically indicated in the search warrant, or if there is probable cause to believe the persons are concealing or will destroy any possible evidence.
4. Enter on the return and inventory the specific description of found evidence, the location where found, and the name of the officer who found the evidence. When multiple items are to be listed, a separate inventory sheet should be used if necessary.
5. Inventory all seized property.
6. Maintain seized evidence and ensure it is tagged into evidence.
7. Prior to leaving the premises after completing the warrant service and search, make every reasonable attempt to secure the premises.

D. If the Tactical Team is going to be used, the supervisor in charge will:

1. Have the individuals who will be conducting the search stand-by in a pre-designated outer perimeter area or assigned post.
2. Resume control of the situation after being advised by the Tactical Team supervisor that the premise to be searched is secure.

2-16-3 [6] KNOCK AND ANNOUNCE/FORCEFUL ENTRY

A. Officers are required to knock and announce their identity and purpose and to wait a reasonable time to determine if consent to enter will be given prior to forcefully entering a residence to execute a search warrant unless exigent circumstances exist

2-16-3 cont'd

B. Forced entry may be justified by exigent circumstances. Exigent circumstances are defined as an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. Exigent circumstances include, but are not limited to:

1. Demonstrable risk that evidence will be destroyed while officers wait to be denied entry.
2. Specific information exists indicating that danger to officers or others present may be increased or a reasonable belief exists that full or partial compliance with the Knock and Announce rule would create or increase the risk of violence towards officers.

C. The supervisor in charge will confer with a commanding officer on warrants that may require force to gain entry prior to serving the warrant.

D. When reasonable, the supervisor in charge may contact the property owner to gain entry.

2-16-4 [6] USE OF THE TACTICAL TEAM

A. The supervisor shall make a determination, based on available information, whether the Tactical Team will be used to execute a warrant. The supervisor will notify the commanding officer of such determination and the basis for such. The commanding officer will have the responsibility for making the final decision.

1. The Tactical Team shall be used in all situations in which the suspect is known to be armed and is likely to use armed resistance.
2. The Tactical Team shall be used in all situations where the location is believed to be a large scale drug manufacturing location where explosive chemicals are used.
3. The Tactical Team should be consulted when the risk to officers and citizens may be significantly diminished because the TACTICAL Team's training, equipment and/or tactics significantly decrease the ability of the suspect to threaten the safety of officers and citizens. Examples of such situations include but are not limited to:

    a. The suspect's background reveals a propensity towards violence.
    b. The location will be difficult to enter or secure because of size, location or fortification.
    c. The location is such that neighborhood or patron sympathy could cause hostilities toward the police.

2-16-4 cont'd

B. The Tactical Team supervisor will be responsible for:

1. Ensuring specific tasks are assigned to each officer.
2. Controlling the premises until it is secure.
3. Coordinating with the affiant's supervisor.
4. Ensuring all participants are briefed about the area to be searched, items to be seized and any significant unusual circumstances which may exist involving the premises or its occupants.
5. Accompanying officers to the scene.
6. Determining the number of personnel to be deployed, as well as whether other agencies should be used.
7. Making certain all officers who participate in the execution of the search warrant are wearing clothing which clearly displays the badge of office on the chest and the Albuquerque Police Department shoulder patch, unless circumstances justify the need to use **an approved ruse tactic** to effect initial entry. **(effective 9/21/00)**
8. Ensuring rescue and ambulance are on stand-by, at the scene.
9. Ensure all persons involved in the execution of the warrant to tape record the service of the search warrant. This will include all persons on the entry team as well as all persons on the curtilage. Such recording shall include, at a minimum, the period of time from just prior to entry until after the premises is secured. All tapes will be tagged into evidence in a timely manner.
10. Ensure police authority and intent shall be clearly announced at the appropriate time. The responsibility for making such announcement is specifically assigned.
11. Ensure a marked unit is parked on location and ensure the marked unit initiates red lights and begins making announcements over public address simultaneous to the service of the warrant. This section shall not apply to those situations where the scene has been secured prior to obtaining a search warrant.

2-16-5 [6] COMMUNICATIONS RESPONSIBILITIES

A. Radio Control will be responsible for advising all Communications personnel of the impending service of the warrant as soon as possible but no later than the scheduled start time of the service of the warrant.

Such advisement will include at least the following:

1. Posting written notification in a location clearly visible to all 911 and Dispatch personnel which includes the location, the time, involvement of Tactical Team and any other special information relating to the service of the warrant.
2. Use of the computer system to send a message to all Communication's consoles.

Effective: 03/11/97; Replaces 03/01/90
97-POC10

2-16-5 A
cont'd

3. Vocally advise personnel of the posting of notification of warrants.

B. Communications personnel will be responsible for regularly checking the posting location to view new information.

Effective: 05/13/92; Still In Effect 10/01/95

2-37 FORFEITURE OF MONIES AND PROPERTY

POLICY:

Department policy is to actively seek forfeiture of monies and property seized for felony violations of the state or federal Controlled Substances Act or as otherwise provided for by law.

RULES:

2-37-1 FORFEITURES UNDER THE CONTROLLED SUBSTANCES ACT, LIQUOR CONTROL ACT, AND COMPUTER CRIMES ACT

[7]

A. When property, vehicles, or monies are seized pursuant to the Controlled Substances Act, Liquor Control Act, or Computer Crimes Act, the investigating officer shall forward a copy of the initial offense/incident report to the Special Investigations Division (SID) within 48 hours of the initial arrest.

[7] B. Officers who have seized property, firearms, vehicles, or monies shall initiate the forfeiture procedure by completing a forfeiture worksheet form (PD 1109) and forwarding it with a copy of the completed case to the SID within ten days.

C. Monies seized by officers will be tagged into Evidence.

[N/A] D. All cases will be forwarded to the legal advisor by SID for review on a case by case basis for possible forfeiture litigation regardless of the amount of money seized or the value of the vehicle.

[N/A] E. Normally, forfeiture of vehicles with an estimated net value of less than $2,500 will not be pursued. However, vehicles will be reviewed on a case by case basis, regardless of estimated value.

2-37-2 FORFEITURE OF VEHICLES
[7]

A. Seized vehicles will be towed to the 4th Street Yards. A police department wrecker will be utilized from 0630 to 2230 hours, Monday through Friday. The wrecker of the day will be utilized between 2230 and 0630 hours and on weekends and holidays.

B. A complete inventory of the vehicle contents will be conducted and the inventory will be listed on a property supplement to be added to the original report.

EXHIBIT
1

Effective: 05/13/92; Still In Effect 10/01/95

2-37-2
cont'd

C. The vehicle will be secured and the Motor Transport Section shop foreman will be given the keys and advised of the vehicle's location. If the Motor Transport Section shop is closed, contact with the foreman will be made on the next duty day.

D. A title/lien history must be obtained on seized vehicles by the investigating officer and a certified copy of those documents will be attached to the completed case submitted to the SID.

The investigating officer will ensure that all leasing companies, lien holders, owners, and other interested persons are listed on vehicles submitted.

E. In an effort to control and manage vehicles that are seized during criminal investigations, and to expedite the forfeiture proceedings, these steps will be followed:

1. Form number PD-1109, titled "Worksheet Request for Forfeiture Proceedings Under Controlled Substance Act" has been revised. This form is to be filled out by the originating officer/detective and forwarded to the Investigations Information Service Unit in Special Investigations Division.
2. Form number PD-1109(A), titled "Confiscated Car Check Sheet," has been designed and will be attached to PD-1109 when the forfeiture involves a vehicle. This form will be filled out by the investigating officer's/detective's supervisor. The form includes a section which will require the supervisor to prioritize the vehicle in one of three categories:
    a. Superior - Vehicles that are in excellent condition, are 3 years old or less, and have low mileage (less than 30,000 miles).
    b. Average - Vehicles which are still valuable, are less than 5 years old and have moderate mileage (less than 50,000 miles), or have a "Blue Book" value of more than five thousand dollars ($5,000.00).
    c. Poor - Vehicles that are either in bad condition (regardless of age or mileage) or exceed 5 years in age or 50,000 miles. They will not be used for transportation by the department.
3. Photographs of at least the dashboard and exterior will be taken of each vehicle upon seizure, and the photographs will be tagged into evidence. The officer/detective seizing the vehicle will be responsible for removing all personal property from the vehicle and returning the items to the rightful owner, or if the owner cannot be determined, the items will be tagged into evidence for safekeeping. If the vehicle's title is present, the officer/detective will tag it into evidence.

Effective: 05/13/92; Still In Effect 10/01/95

2-37-2 E cont'd

4. Vehicles rated as "Superior" or "Average" will be stored in the impound area at the Gerald E. Cline Memorial Police Substation (SOD/N. Valley Substation). Vehicles rated as "Poor" will be stored at the city impound area as determined by the Motor Transport Section.
5. Exceptional cases will be reviewed by a SID lieutenant, who may upgrade a seized vehicle's status in this system if necessary to meet the needs of the department..

2-37-3 [N/A] SPECIAL INVESTIGATIONS DIVISION RESPONSIBILITIES

A. The SID is responsible for monitoring the progress and time limits on all forfeiture or intended forfeiture proceedings.

B. The SID will be responsible for routing the forfeiture request and completed case to the department Legal Advisor, within twenty days of seizure.

Approval/disapproval will be based on legal considerations, total dollar amount of monies, and condition of the vehicle.

2-37-4 [N/A] LEGAL ADVISOR RESPONSIBILITIES

A. The department Legal Advisor is solely responsible for all litigation.

B. When vehicles are forfeited by court order, the department Legal Advisor will forward copies of the order to the SID and the Property Management Division Commander.

C. When monies are forfeited by court order, the department Legal Advisor will forward copies of the court order to the SID and the department Fiscal Management Division. The Fiscal Management Division will forward the court order to the Evidence Unit where arrangements will be made to deposit the monies in a special account, designated by city ordinance.

2-37-5 [N/A] PROPERTY MANAGEMENT RESPONSIBILITIES

A. The Property Management Division will obtain title to the vehicle, assign it a police department unit number, and incorporate it into the police department vehicle fleet.

B. The Property Management Division will forward the court order and original title to the City Property Accounting Section.

A copy of the original title will be retained by the Property Management Division and will be annotated with the date that the original title was transmitted to the City Property Accounting Section.

Effective: 05/13/92; Still In Effect 10/01/95

2-37-6 [N/A] USE AND ACCOUNTABILITY OF SEIZED MONIES

The appropriate Deputy Chief shall authorize withdrawal of seized monies from the special account, as needed, and ensure its accountability and use in accordance with the Controlled Substances Act.

2-37-7 [N/A] SEIZURES AND FORFEITURES UNDER FEDERAL LAW

Seizures and forfeiture applications under federal law will be consistent with 2-37-1 through 2-37-6 except:

A. The U.S. Attorney's Office will determine legal feasibility of the forfeiture and will oversee the necessary document preparation and court presentation.

B. The SID will be solely responsible for delivering the forfeiture request and completed case to the appropriate federal agency and will act as liaison between the police department and any federal agencies involved.

C. The SID will be responsible for providing copies of federal forfeiture court orders to the police department Property Management Division and/or Fiscal Management Division.

2-37-8 [N/A] RETURN OF SEIZED VEHICLES

A. In the event that a seized vehicle is to be returned to the owner, the Legal Advisor's Office will notify the Property Management Division.

B. The Property Management Division will have sole responsibility for affecting the release. This will include physically turning the vehicle over to the owner or appropriate representative and ensuring that a release form is completed and signed by the applicable parties.

C. The original release department form will be forwarded to the Records Section for attachment to the original offense/incident report. Copies of the release form will be forwarded to the department Legal Advisor.