

Alabama Rules of Criminal Procedure

Rule 3. Arrest warrant or summons upon commencement of criminal proceedings; search warrant.

Rule 3.9. Issuance of search warrant.

(a) EVIDENCE. A warrant shall issue on affidavit sworn to before the issuing judge or magistrate authorized by law to issue search warrants, establishing grounds for issuing the warrant, or upon oral testimony pursuant to Rule 3.8(b). If the judge or magistrate is satisfied that probable cause to believe that grounds for the application exists, the judge or magistrate, in the case of a warrant issued on affidavit, shall issue a warrant naming or describing the person and particularly describing the property and the place to be searched. Before ruling on a request for a warrant, the judge or magistrate may further examine, under oath, the affiant and any witnesses the affiant may produce. Such additional sworn examination shall be recorded verbatim by a court reporter, by recording equipment, or by other means, and shall be considered part of the affidavit for purposes of those proceedings; provided, however, that in reproducing any additional sworn testimony, the confidentiality of confidential informants shall be preserved.

(b) HEARSAY. The finding that grounds for the application exist or that there is probable cause to believe that they exist may be based upon hearsay evidence, in whole or in part, provided that there is a substantial basis for believing the evidence under the totality of the circumstances, given all the circumstances before the magistrate, including the credibility of the informer and the basis of his knowledge.

[Amended eff. 11-1-98.]

Committee Comments

Section (a) of this rule is based in part on Ala.Code 1975, §§ 15-5-3 and -4:

“Section 15-5-3.Probable Cause and affidavit required.

“A search warrant can only be issued on probable cause, supported by affidavit naming or describing the person and particularly describing the property and the place to be searched.

“Section 15-5-4.Examination of complainant and witnesses; contents of depositions.

“Before issuing a search warrant, a judge, or magistrate authorized by law to issue search warrants, must examine on oath the complainant and any witness he may produce, take their depositions in writing and cause them to be subscribed by the persons making them. Such depositions must set forth facts tending to establish the grounds of the application or probable cause for believing that they exist.”

This rule is similar to Rule 41(c)(1), Fed.R.Crim.P., and is in accord with such cases as *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, and *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), as interpreted by the Alabama Court of Criminal Appeals in *Houk v. State*, 455 So.2d 115 (Ala.Crim.App.1984). See also *State v. Butler*, 461 So.2d 922 (Ala.Crim.App.1984); *Dale v. State*, 466 So.2d 196 (Ala.Crim.App.1985).

The last sentence of (a) provides that the additional sworn testimony does not have to be incorporated into the affidavit before the search warrant is executed. Secondly, it provides that the additional sworn testimony can be recorded verbatim not only by a court reporter or by recording equipment but also by “other means.” For example, if only a small amount of additional testimony is required or if no court reporter or recording equipment is available, the additional examination can be typed or written in longhand. Thirdly, it provides that additional examination which is relied upon to support the warrant need be reproduced in later proceedings involving the warrant. If the affidavit and warrant are themselves sufficient, the additional examination need not be used. Fourthly, it provides that the confidentiality of informants is not to be jeopardized by the method of reproducing the additional examination relied upon. For example, the judge or magistrate may decide to examine the confidential informant under oath before issuing the warrant and he may preserve the examination by tape-recording it. If any part of that examination is made available in a subsequent proceeding, it should be made in such a manner that the identity of the informer is not revealed. Because the defendant might recognize the informant’s voice on the recording, a transcript should be used instead.