

Alabama Rules of Criminal Procedure

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

Rule 3.8. Grounds for issuance of search warrant.

A search warrant authorized by these rules may be issued if there is probable cause to believe that the property sought:

- (1) Was, or is expected to be, unlawfully obtained;
- (2) Was, or is expected to be, used as the means of committing or attempting to commit any offense under the laws of the State of Alabama or any political subdivision thereof;
- (3) Is, or is expected to be, in the possession of any person with the intent to use it as a means of committing a criminal offense or is, or is expected to be, in the possession of another to whom that person may have delivered it for the purpose of concealing it or preventing its discovery; or
- (4) Constitutes, or is expected to constitute, evidence of a criminal offense under the laws of the State of Alabama or any political subdivision thereof.

[Amended eff. 12-1-97; Amended eff. 11-1-98; Amended 12-12-2023; eff. 2-1-2024.]

Committee Comments

This rule is essentially the same as Alabama Code 1975, § 15-5-2, and shall govern unless otherwise provided by law.

Committee Comments to Amendment Effective December 1, 1997

The committee proposed this amendment to comply with the recommendation by the Alabama Supreme Court that Rule 3.8 be redrafted to permit the broader issuance of anticipatory search warrants. *Ex parte Oswald*, 686 So.2d 368 (Ala.1996). In *Oswald*, the Alabama Supreme Court held that anticipatory search warrants are not per se unconstitutional, but that those that

fail to comply with Rule 3.8, Alabama Rules of Criminal Procedure, are impermissible.

The Alabama Supreme Court noted in *Oswalt* that the use of present- and past-tense language in Rule 3.8 (as it read before this amendment) restricted the issuance of anticipatory search warrants. The amendment permits anticipatory search warrants by adding future-tense language. Now a warrant to search for property that is not within the jurisdiction when the warrant is issued, but that is expected to be within the jurisdiction when the search is conducted, is valid if it otherwise complies with the rule.

A common factual basis for anticipatory search warrants occurs when the officer presents evidence that contraband is on a “sure course” to a certain premises. It is clear that the affidavit supporting the anticipatory search warrant must show elements beyond the mere fact that the officer believes that a delivery of contraband is going to occur. The affidavit must also reveal how the officer obtained this belief, how reliable the sources are, and what part, if any, the state or a governmental agency will play in the delivery. The judicial officer will then decide whether there is probable cause to believe that the delivery will occur, and whether there is probable cause to believe that the contraband will be located on the premises when the search takes place. See, e.g., *United States v. Garcia*, 882 F.2d 699, 703-04 (2d Cir.1989).

Committee Comments to Amendment Effective November 1, 1998

The amendment to Rule 3.8 adds subsection (b) which authorizes the issuance of search warrants on oral testimony, as is authorized in the federal courts. This amendment basically tracks the provisions of Rule 41(c)(2), Federal Rules of Criminal Procedure, but has been modified to recognize that not all magistrates are authorized under Alabama law to issue search warrants.

Committee Comments to Amendment of Rule 3.8 Effective February 1, 2024

Subdivision (b) of this rule has been removed. A provision permitting the issuance of a search warrant based upon oral testimony, affidavit testimony, or a combination thereof, communicated by telephone or other reliable electronic means when the applicant is outside the presence of the issuing judge or magistrate, has been added as subdivision (b) of Rule 3.9, Ala. R. Crim. P.

Note from the reporter of decisions: The order amending Rule 3.8 and Rule 3.9, Alabama Rules of Criminal Procedure, and adopting the

Committee Comments thereto, effective February 1, 2024, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.