

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) ISSUANCE. A search warrant authorized by this rule 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 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.

(b) WARRANT UPON ORAL TESTIMONY.

(1) *General Rule.* If circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a judge or magistrate who is authorized to issue search warrants may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission.

(2) *Application.* The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant verbatim to the issuing judge or magistrate. The judge or magistrate shall enter what is so read on a document to be known as the original warrant. The issuing judge or magistrate may direct that the warrant be modified.

(3) *Issuance.* If the judge or magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and the grounds for the application exist or that there is probable cause to believe that they exist, the judge or magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the judge's or magistrate's name on the duplicate original warrant. The judge or magistrate shall immediately sign the original warrant and enter on the face of the original warrant

the exact time the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(4) *Recording and Certification of Testimony.* When a telephone caller informs the judge or magistrate that the purpose of the telephone call is to request a warrant, the judge or magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for the warrant. If a voice recording device is available, the judge or magistrate shall record by means of such device all of the call after the caller informs the judge or magistrate that the purpose of the call is to request a warrant. Otherwise, a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the judge or magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the judge or magistrate shall file a signed copy with the court.

(5) *Contents.* The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(6) *Additional Rule for Execution.* The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(7) *Motion to Suppress Precluded.* Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

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

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.