

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) Request Made by Applicant In the Presence of the Issuing Judge or Magistrate. 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. If the judge or magistrate is satisfied that probable cause to believe that grounds for issuing the warrant exists, the judge or magistrate shall issue a warrant naming or describing the person and particularly describing the property and 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 the 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) Request Made by Applicant Outside the Presence of the Issuing Judge or Magistrate. A judge or magistrate who is authorized to issue search warrants may issue a warrant based upon oral testimony, affidavit testimony, or a combination thereof, communicated by telephone or other reliable electronic means by an applicant who is not in the presence of the judge or magistrate.

(1) *Procedures.* If the judge or magistrate decides to proceed under this subdivision, the following procedures apply:

(A) *Taking Testimony Under Oath.* The judge or magistrate must place under oath -- and may examine -- the applicant and any person on whose testimony the application is based.

(B) *Creating a Record of the Testimony.* If the applicant does no more than attest to the contents of a written affidavit submitted by reliable electronic means, the judge or magistrate must acknowledge the attestation in writing on the affidavit. If the judge or magistrate considers only oral testimony, or oral testimony in addition to affidavit testimony, the judge or magistrate shall either record the testimony by a voice recording device or make a stenographic or longhand verbatim record of the testimony. If a voice

recording device is used or a stenographic record is 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 transcription with the court. If a longhand verbatim record is made, the judge or magistrate shall file a signed copy with the court.

(C) Preparing a Duplicate Original Warrant. The applicant must prepare a duplicate original warrant and must read its contents verbatim, or transmit by reliable electronic means a copy of the duplicate original warrant, to the judge or magistrate.

(D) Preparing an Original Warrant. If the applicant reads the contents of the duplicate original warrant to the judge or magistrate, the judge or magistrate shall enter what is so read into a document to be known as the original warrant. If the applicant transmits by reliable electronic means a copy of the duplicate original warrant to the judge or magistrate, the copy of the duplicate original warrant received by the judge or magistrate may serve as the original warrant.

(E) Modifying the Warrant. The judge or magistrate may modify the warrant. If the judge or magistrate modifies the warrant, he or she must either (i) transmit by reliable electronic means a copy of the modified warrant to the applicant or (ii) file with the court the modified original warrant and direct the applicant to modify the duplicate original warrant accordingly.

(F) Issuing the Warrant. To issue the warrant under this subdivision, the judge or magistrate must (i) sign the original warrant, (ii) enter the date and time of issuance on the original warrant, and (iii) transmit by reliable electronic means a copy of the original warrant to the applicant or direct the applicant to sign the judge's or magistrate's name and enter the date and time on the duplicate original warrant.

(G) Executing the Warrant. The person who executes the warrant issued under this subdivision shall enter the exact time of execution on the face of

the copy of the original warrant that has been transmitted by reliable electronic means or on the face of the duplicate original warrant, whichever is applicable.

(2) *Limitation on Motions to Suppress.* Absent a finding of bad faith, evidence obtained pursuant to a warrant issued pursuant to this subdivision is not subject to a motion to suppress on the ground that issuing the warrant in the manner permitted by this subdivision was unreasonable under the circumstances.

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

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

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.

**Committee Comments to Amendment of Rule 3.9
Effective February 1, 2024**

Current subdivision (b) has been added to this rule, essentially replacing what was formerly subdivision (b) of Rule 3.8, Ala. R. Crim. P. Rule 3.9(b), which is based upon Rule 4.1, Fed. R. Crim. P., permits 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.

Due to the fast pace of change in the digital sphere, the phrase "reliable electronic means," which appears throughout subdivision (b), has not been specifically defined; however, such means include, but are not limited to, email and video-conferencing technology. The forms of electronic means permitted by the rule are limited only by the requirement of reliability.

Former subdivision (b) is now subdivision (c).

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.