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Memorandum

Alaska Court System

TO: Arthur H. Snowden, II
Administrative Director

DATE : April 12, 1982

FROM: Karla L. Forsythe ^{KF}
General Counsel

SUBJECT: SB 687, "An Act Relat-
ing to the Issuance of
Search Warrants and
Changing Rule 37, Rules
of Criminal Procedure"

This bill permits the issuance of a search warrant upon sworn oral testimony communicated by telephone. As you know, the bill has passed the Senate and is scheduled for hearing this week before the House Judiciary Committee.

Although the court system supports the concept behind SB 687, the bill as passed by the Senate creates several implementation problems.

Transcription

The bill requires that the judicial officer issuing the search warrant shall, without unnecessary delay, have the voice recording of the proceeding transcribed, shall certify the accuracy of the transcript, and shall file the original recording and the transcript with the court.

Transcription is required by Federal Criminal Rule 41, upon which SB 687 is based. However, federal requirements are not always appropriate or practical in Alaska. There are no transcription facilities in many of the rural locations from which these warrants will issue. The court system will need additional staff and equipment if it must transcribe every oral search warrant proceeding. Deleting this requirement will still permit preparation of a transcript when the need arises.

On February 15, 1982, I discussed with Kevin Bruce of Senator Rodey's staff the possibility of deleting the transcription requirement. He indicated that an amendment to this effect should not pose any problems.

Language which amends proposed section 12.35.015(b) to delete the transcription requirement is attached.

Fiscal Impact

Implementation of the bill will require telephone recording apparatus in each location and for each person who will be called upon to issue warrants.

The Senate Judiciary Committee did not request a fiscal note from the court system, in the belief that the necessary equipment was already available throughout the state. This is not the case, and the proposed bill has a fiscal impact to the extent that additional equipment must be acquired.

The court system submitted a fiscal note to the House Judiciary Committee on February 22, 1982, projecting a total cost of \$78,000. This figure is based upon the following assumptions and calculations, provided by John Stechman, electronics engineer.

At the time the fiscal note was submitted, telephonic voice recording equipment was available in only a few locations. To meet the intent of the legislation, all persons who may be called upon to issue telephonic warrants must have access to the equipment. All judges and magistrates must be provided with this equipment in their offices, and all judges, magistrates and acting magistrates must be provided with equipment in their homes, since it is anticipated that many search warrant applications will be made after normal working hours. Magistrates in Anchorage are not included, since a committing magistrate is available in person around the clock and telephonic voice recording equipment is already available.

Since submission of the fiscal note, the court system has installed equipment in fifteen additional locations at the request of those judges who are encountering numerous requests for telephonic hearings pursuant to Criminal Rule 5 (preliminary proceedings before a judge or magistrate). Under SB 687, all judicial officers will be subject to telephonic search warrant requests and an appropriation is necessary to insure telephonic coverage throughout the court system. The recent installations reduce to 185 the number of equipment setups required as a result of SB 687. An amended fiscal note has been submitted to reflect this reduction.

The cost of an individual setup is based upon the current cost of equipment to the court system. A voice coupler (required by FCC regulations) costs approximately \$35, and a cassette recorder approximately \$100, with a balance of \$255 for a speaker. The speaker is the primary cost component, and is required to permit the judicial officer to take notes and to complete the original search warrant (as required by sections 12.35.015(c) and (d)) without having to hold a receiver.

Equipment could be leased, but greater long-term cost efficiency is achieved by ownership. The cost of a coupler is equivalent to a ten-month lease; the cost of a speaker is equivalent to a fifteen-month lease. The maintenance costs associated with this type of equipment are minimal, so ownership will result in lowered costs over time.

I also discussed the fiscal ramifications of SB 687 with Kevin Bruce, and he indicated that he understands the basis for the court system's estimate.

Action Requested

If the transcription requirement is deleted, the court system supports SB 687. An appropriation of \$72,500 is required for implementation.

KLF/jb
attachment

Proposed Amendment to SB 687

* Sec. 2.

(b) A judicial officer shall place under oath each person whose testimony forms a basis of the application and each person applying for the search warrant. The judicial officer shall record the proceeding by using a voice recording device. [THE JUDICIAL OFFICER SHALL, WITHOUT UNNECESSARY DELAY, HAVE THE RECORDING TRANSCRIBED, SHALL CERTIFY THE ACCURACY OF THE TRANSCRIPTION, AND SHALL FILE THE ORIGINAL RECORDING AND THE TRANSCRIPTION WITH THE COURT.]

STATE OF ALASKA
THE LEGISLATURE

25681
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

October 27, 1981

SUBJECT: Telephonic search warrants
(Work Order No. 12-1960)

TO: Senator Patrick M. Rodey

FROM: James H. Lear
Legislative Counsel *JHL*

You have requested a bill to provide for telephonic search warrants so that rural officers may increase the speed of searches and seizures. Rule 37, Rules of Criminal Procedure promulgated by the Supreme Court of Alaska covers the subject of search warrants. According to Article IV, sec. 15 of the Constitution of Alaska this rule may be changed only by a two-thirds vote of the members elected to each house of the legislature. The enclosed draft would amend AS 12.35.010 which also covers the subject of issuance of search warrants. If this type of legislation were successful, then the onus would be on the Supreme Court to conform Rule 37 to the language in this bill.

The same legislative procedure was followed in 1969 when the Sixth Legislature enacted Chapter 17, SLA 1969, amending, interestingly enough, Alaska State Supreme Court Rule 37(a). As you see, this legislative procedure is not without precedent. Be assured that the subject matter proposed by this bill is also not without precedent. The new language in the proposed bill is taken almost verbatim from Rule 41, Federal Rules of Criminal Procedure (Title 18, U.S.C.A.).

The states of California and Arizona have already enacted language similar to Rule 41(c)(2) and other states are contemplating similar enactments.

By patterning your bill after the provisions contained in Rule 41(c)(2), the courts of Alaska will have the benefit of interpretations given by the federal courts. The subject of

Senator Patrick M. Rodey
Page 2
October 27, 1981

telephonic search warrants was addressed by the Sixth Circuit Court of Appeals in U.S. v. Shorter, 600 F.2d 585 (1979, C.A. 6 Ohio); the Ninth Circuit Court of Appeals in U.S. v. Johnson, 641 F.2d 652 (1980); and the Second Circuit Court of Appeals in U.S. v. Turner, 558 F.2d 46 (2d Circuit, 1977). These cases, as well as earlier United States Supreme Court decisions, uphold the constitutionality of the provisions that appear in the proposed bill draft.

The enclosures will provide you with good background material on the subject of telephonic search warrants. At page 589 of U.S. v. Shorter, you will find a good summary in layman's terms of the procedure contemplated by Rule 41(c)(2). There is also good background material following Rule 41(c)(2) in the form of Notes of Advisory Committee on Rules under the heading 1977 Amendment. Also read Notes of Committee on the Judiciary, Senate Report No. 95-354. Amendments Proposed by the Supreme Court in the Rule 41 material.

If I may be of further assistance, do not hesitate to contact me.

JHL:ljb

Enclosures



Official Business

Alaska State Legislature

Senate

Committee on Judiciary

SECTIONAL ANALYSIS OF SB 687

Pouch V
State Capitol
Juneau, Alaska 99811

* Sec. 1 - Amends 12.35.010 to allow for warrants to be telephonically conveyed.

* Sec. 2

(A) - Allows a judge or magistrate to issue a warrant by telephone if there is probable cause to believe that requiring a law enforcement officer to appear before him/her would delay the issuance of the warrant and that delay could result in the loss or destruction of evidence.

(B)-(E) Sets out the procedure for issuing a telephonic warrant: Requires that the applicant who requests the warrant on the telephone prepare a document to be known as a "duplicate original warrant" and shall read its verbatim to the judicial officer. Requires the judicial officer on the other end of the line to have before him from the beginning the "original warrant" and to enter, verbatim, what is so read to him on the original warrant.

After the officer on one end of the line gives the information from the warrant to the judicial officer on the other end, and if the judicial officer decides to issue the warrant, the procedure is for him to direct the person requesting the warrant to sign the judicial officer's name on the duplicate original warrant and for the judicial officer then to immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued.

(F) states that, absent a finding of bad faith, warrants issued under (A) of this section are not subject to suppression.

* Sec. 3 - Amends 12.35.120, definition of a search warrant.

* Sec. 4 - Notification of the amendment to Rule 37, Rules of Criminal Procedure.

M E M O R A N D U M

TO: Members of the House Judiciary Committee

FROM: Karla L. Forsythe
General Counsel, Alaska Court System

SUBJECT: SB 687, "An act relating to the issuance of search warrants and changing Rule 37, Rules of Criminal Procedure"

The Alaska Court System respectfully requests that the House Judiciary Committee amend the language of proposed Sec. 12.35.015(b), SB 687, relating to transcription of search warrant proceedings.

The bill as passed by the Senate creates several implementation problems for the court system:

1. The bill requires that the judicial officer issuing the search warrant shall, without unnecessary delay, have the recording transcribed, shall certify the accuracy of the transcript, and shall file the original recording and the transcript with the court.

Transcription is required by Federal Criminal Rule 41, upon which SB 687 is based. However, federal requirements are not always appropriate or practical in Alaska. There are no transcription facilities in many of the rural locations from which these warrants will issue. The court system will need additional staff and equipment if it must transcribe every oral search warrant proceeding. Deleting this requirement will still permit preparation of a transcript when the need arises.

2. Implementation of the bill will require telephonic recording apparatus in each location and for each person who will be called upon to issue warrants. The financial ramifications are substantial, and the court system is in the process of preparing a fiscal note.

Language which amends proposed Sec. 12.35.015(b) to delete the transcription requirement is attached.

Memorandum
SB 687
February 15, 1982
Page Two

* Sec. 2.

(b) A judicial officer shall place under oath each person whose testimony forms a basis of the application and each person applying for the search warrant. The judicial officer shall record the proceeding by using a voice recording device. [THE JUDICIAL OFFICER SHALL, WITHOUT UNNECESSARY DELAY, HAVE THE RECORDING TRANSCRIBED, SHALL CERTIFY THE ACCURACY OF THE TRANSCRIPTION, AND SHALL FILE THE ORIGINAL RECORDING AND THE TRANSCRIPTION WITH THE COURT.]



Official Business

Alaska State Legislature

Senate

Committee on Judiciary

Pouch V
State Capitol
Juneau, Alaska 99811

MINUTES OF THE SENATE JUDICIARY COMMITTEE

OF

FEBRUARY 3, 1982

Butrovich Committee Room, State Capitol Juneau, Alaska

Legislation Before Committee:

SB 688 - "An Act making special appropriation to the Department of Public Safety for a computerized fingerprint system; and providing for an effective date."

SB 687 - "An Act relating to the issuance of search warrants; and changing Rule 37, Rules of Criminal Procedure."

SB 299 - "An Act relating to elections."

The meeting of the Senate Judiciary Committee was called to order by Chairman Rodey at 1:45 P.M. Committee members present were: Senators Rodey, Ray, Parr, and Bennett. Senator Hohman was absent.

The first item on the agenda was SB 687. Barry Stern, representing the Department of Law was called before the committee to testify. Mr. Stern expressed the Department's support for this SB 687 and suggested an amendment to this bill which would require persons who request warrants to first contact the District Attorney to avoid any warrants be inappropriately issued.

Mr. Bruce responded to Mr. Stern's suggested amendment, stating that he had spoken to several District Attorney's and they had expressed concern that by having to contact the District Attorney, it would delay the issuance of the warrant.

The committee declined to adopt Mr. Stern's amendment.

Chairman Rodey next called Mr. Korhonen, representing the State Troopers, before the committee. Mr. Korhonen testified, expressing the State Troopers support for SB 687.

Senator Ray moved that SB 687 be moved from committee with individual recommendations. There was no objection, and the bill was passed. Senator Rodey, Ray, Parr, and Bennett all signed do pass.

Senator Bennett was excused from the committee due to Finance Committee responsibilities.

The next item on the agenda was SB 688.

Chairman Rodey recalled Mr. Korhonen before the committee. Mr. Korhonen expressed the State Troopers support for SB 688 and gave a detailed explanation of the system's capabilities.

After brief discussion of the bill, Senator Ray moved that SB 688 be passed from committee with individual recommendations. There was no objection and the bill was passed. Senators Rodey, Ray, and Parr all signed do pass.

The last item before the committee was SB 299. Chairman Rodey called Patty Ann Polley, Division of Elections, to testify. She spoke in favor of three specific sections of the bill; Sec. 6, Sec. 9, and Sec. 20, and asked that the committee consider moving these three sections through the committee as expeditiously as possible to allow for them to be in effect for the 1982 election.

Senator Ray moved that the committee delete all sections from SB 299 except Sec. 6, Sec. 9, and Sec. 20. There was no objection and the amendment was adopted.

Senator Ray moved that the committee move SB 299 from committee. There was no objection and the bill was passed. Senators Rodey and Parr signed do pass. Senator Ray signed no recommendation.

Chairman Rodey adjourned the meeting at 2:30 P.M.

Rural Alaska Community Action Program, Inc.

The counselors and Elders attending the Rural CAP Community Action Alcoholism Education workshop recommend that participants in the workshop:

1. Support efforts by the Alaska State Troopers and public safety officers to intercept illegal drugs at urban and hub city airports, and offer their full cooperation in this effort.
2. Encourage and provide assistance on request to agencies providing training to village professionals (VPSOs, counselors, etc.) so that training will include sensitivity to existing local cultural values and the stress of ongoing cultural change.
3. Human Services and Public Safety staff based in hub villages be encouraged to meet on a regular basis to provide mutual support and exchange information about villages with which they work.
4. Support continuation of statewide Rural Alcohol/Drug Community Action Education workshops.
5. Encourage coverage of such workshops and meetings by appropriate local and statewide news media.
6. Encourage Rural CAP to continue to notify village alcohol/drug abuse workers of legislation and legislative action that may affect them and their work.
7. Support formation of a statewide organization of village alcohol/drug abuse workers.
8. Support passage of SB 687, providing for telephonic search warrants, so that alcohol and other drugs may be more easily intercepted before they are brought in to our villages.
9. Support passage of HB 112, raising to 21 the legal age for purchase and/or consumption of alcoholic beverages.
10. Encourage passage of legislation providing stiffer penalties for sale and use of illegal drugs, with provision for adequately funded education, treatment, and rehabilitation, especially for young first offenders.
11. Support legislation amending Title 4 to prohibit minors from entering a bar or drinking establishment under any circumstances, and offer assistance to legislators in writing such legislation.
12. Support legislation amending Title 4 so that if application for a liquor license is denied, a new application may not be submitted for one year, and offer assistance to legislators in writing such legislation.

SUPPORT OF
SB 687 →



RURAL ALASKA COMMUNITY
ACTION PROGRAM
ALCOHOLISM PROGRAM

Peg Engwall, Director
Alcoholism Department

P. O. BOX 33908
327 EAGLE STREET
ANCHORAGE, ALASKA 99501

SB 687 PLEASE
notify
(907) 279-2311

13. Support legislation amending Title 4 so that formal notification of local government bodies is required when application for a liquor license is made, and offer assistance to legislators in writing such legislation.

We further recommend that these recommendations be presented to the full workshop, for discussion, acceptance, and distribution as the group directs.

Respectfully submitted by the Recommendations Committee

Dennis Trefon, Nondalton

Mary Jane Derendoff, Galena/Huslia

David Teborek, Dillingham

Sam Smith, Mekoryuk

Ann Goesell, Stevens Village

<u>NAME</u>	<u>VILLAGE</u>	<u>DATE</u>
○ Louie Weyapak	Wales, AK. 99783	1/21/82
Dorothy Stelman	Nulato, AK. 99765	1-21-82
Yvonne Stelman	Kotzebue AK. 99752	1-21-82
Lynne Aganack	Port Graham AK 99603	1-21-82
Dorcas Jalovim	Sand Point. AK 99661	1-21-82
Guy Adams	Kotzebue AK 99752	1-21-82
Blaine Short	Kotzebue AK	1-21-82
Kathleen OTO	Kotzebue AK	1-21-82
Sharon Nelson-Ogata	Sand Point AK.	1-21-82
Samuel Smith	Mikayuk, AK. 99630	1-21-82
Nick Schuman	Saksok Bay AK 99637	1/21/82
Dale Rife	Karluk Alaska 99608	1/21/82
Mary Jane Kaleak	Barrow, Alaska 99723	1/21/82
Quinn Figgins	Barrow Alaska 99723	1/21/82
Annie May Peterson	Old Harbor Alaska 99643	1/21/82
Lois Smith	Mekoryuk, AK 99630	1/21/82
Betty Lind	Karluk	1-21-82
Clara Julius	Saksok Bay AK. 99637	1-21-82
Donna Fiedoroff	Box 12 Old Harbor, AK 99643	1-21-82
○ Arnie Nagark	Box 127 Barrow Alaska 99723	1-21-82
Boxa Smith	Box 484 Northway, Alaska 99764	1/21/82
Loren		

<u>Name</u>	<u>Village</u>	<u>Date</u>
Wennis Trefon	Nondalton	1-21-82
Mary Jane Kurndoff	Holena (Huslia)	1-21-82
Kelid Aduet	Sleasine	1-21-82
Jennie Cirklikoff	Nondalton	1-21-82
Miss Wallace Eyster	Anchorage	Jan 21, 82
Lucy Apatiki	Hambell	1/21/82
Emily Aukenevak	Golovin	1/21/82
Dinah Ewan	Shaktokli	1/21/82
Rita Jackson	99771	1/21/82
Shirley M. Daniels	Shaktokli Alaska 99771	1/21/82
	Elim	1-21-82
Daria Krueger	St. Paul Island	1-21-82
Connie Bourlakis	Saint Paul Island -99660-	1-21-82
Gunn Gessel	Stevens Village Alaska 79774	1-21-82
Agnes Menerva	Selawik, AK Kotzebue, AK	1-21-82
Bessie Downey	Kotzebue AK.	1-21-82
Laura Taylor	Kotzebue AK.	1-21-82
Debbie Kulpa	Klukwan, AK	1-21-82
Patrick Peden	AKIACHAK AK	1-21-82

<u>Name</u>	<u>Village</u>	<u>Date</u>
David Tebock	Dillingham	1-21-82
○ Andy Sharp	Quinhagak	1-21-82
Peter Matthew	Quinhagak	1-21-82
Dorlene Malchoff	Port Graham	1-21-82
Natalie Simonoff	Kodiak Alaska	1-21-82
Oleinka George	Akrachuk Ak	1-21-82
Estelle Royvaseuk	Lambert Ak	1-21-82
Florence Wiltona	Golovin Alaska 99762	1-21-82
Deborah George	Stevens Village ^{Alaska} 99774	1-21-82

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE (amended 4/12/82)

I. REQUEST
 Bill/Resolution No. SB 687
 Title An Act relating to the Issuance of Search Warrants
 Requested by _____ Date _____

II. FISCAL DETAIL
 Agency Affected Alaska Court System
 Program Category Affected Administration of Justice
 BRU, Program, Or Subprogram(s) Affected Trial Courts
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT		72.5				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		72.5	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND		72.5	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

SB 687 permits the issuance of a search warrant upon the sworn oral testimony of a person communicated by telephone. The judicial officer is required to record the proceedings by using a voice recording device. This bill will necessitate the installation of a cassette recorder with voice coupler and a speaker phone in each judge and magistrate chamber, as well as in most judicial officers' homes, since requests for a search warrant can occur any time of day or night. The cost of these setups will be \$390 each, and it is estimated that 185 of them will be needed statewide as a direct result of this legislation. This will generate an initial cost of \$72,500 for equipment (reduced from an original estimate of \$78,000 for 200 setups). There are no major ongoing costs associated with this part of the bill.

IV. DATE 4/12/82 PREPARED BY Richard P. Barrier
 AGENCY Alaska Court System
 Original: Legislative Finance PHONE 264-0541
 cc: Budget and Management

III. ANALYSIS (Continued)

SB 687 also requires the transcription of each recorded search warrant proceeding. The Court System is not equipped to produce this number of transcripts statewide, and to achieve the required level of transcription would cost a tremendous but unknown sum of money. The Court System opposes the automatic transcription requirement, since any warrants that are challenged can always be transcribed upon request. If this bill passes with this provision still in, it will be necessary for the Court System to provide an accurate estimate of the fiscal impact of the transcript production.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. _____ Senate Bill No. 687
Title "An Act relating to the issuance of search warrants..."
Requested by _____ Date _____

II. FISCAL DETAIL

Agency Affected Department of Public Safety
Program Category Affected Administration of Justice/Public Protection
BRU, Program, Or Subprogram(s) Affected Alaska State Troopers
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						
	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						
	-0-	-0-	-0-	-0-	-0-	-0-

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

No fiscal impact.

IV. DATE February 2, 1982

PREPARED BY Francis C. Allan
AGENCY Department of Public Safety
PHONE 269-5691

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev. 12/81)

Sec. 12.30.070. Contempt. Nothing in this chapter shall prevent a court from exercising its power to punish for contempt. (§ 1 ch 20 SLA 1966)

Stated in *White v. State*, Sup. Ct. Op. No. 946 (File No. 1907), 514 P.2d 814 (1973).

Sec. 12.30.080. Definitions. In AS 12.30.010 — 12.30.070

- (1) "judicial officer" means a person authorized to release a person pending trial, sentencing, or pending appeal;
- (2) "offense" means any criminal offense. (§ 1 ch 20 SLA 1966)

Chapter 35. Search and Seizure.

Section

10. Issuance of search warrant
 20. Grounds for issuance
 25. Seizure of property
 30. [Repealed]
 40. Authority of officer executing warrant
 50. Disposition of property taken
 60. Malicious procurement of search warrant

Section

70. Search of defendant in presence of judge or magistrate
 80. Judge, magistrate or officer to hold property allegedly stolen or embezzled
 90. Delivery of property to owner
 100. Property not delivered to owner
 110. Disposal of unclaimed property
 120. Definition of search warrant

Sec. 12.35.010. Issuance of search warrant. A judicial officer may issue a search warrant upon a showing of probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the thing to be seized. (§ 4.01 ch 34 SLA 1962; am § 13 ch 69 SLA 1970)

Cross references. — See Cr. R. 37(a). For constitutional provisions as to searches and seizures, see Alaska Const., art. I, § 14.

Legislative history report. — For report on ch. 69, SLA 1970 (HB 564), see 1970 House Journal Supplement No. 2, p. 7 (February 10, 1970).

For discussion of when an affidavit contains sufficient facts to establish probable cause for the issuance of a search warrant, see *Keller v. State*, Sup. Ct. Op. No. 1221 (File No. 2330), 543 P.2d 1211 (1975).

Am. Jur. 2d and ALR references. — 68 Am. Jur. 2d, Searches and Seizures, § 16.

Supporting affidavit, disputing matters stated in, 5 ALR2d 394.

Propriety and legality of issuing only one search warrant to search more than one place or premises occupied by same person, 31 ALR2d 864.

Sufficiency of description of automobile or other conveyance to be searched, 47 ALR2d 1444.

Sufficiency of description of person to be searched, 49 ALR2d 1209.

• Interest in, or connection with, premises searched as affecting standing to attack legality of search, 78 ALR2d 246.

Propriety or lawfulness of seizure, not incident to arrest, of papers, documents, letters, books, and records not described in warrant, 79 ALR2d 1005.

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest, 89 ALR2d 715.

Sufficiency of showing as to time of occurrence of facts relied upon, 100 ALR2d 525.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant, 10 ALR3d 359.

Sufficiency of description, in search warrant, of apartment or room to be searched in multiple-occupancy structure, 11 ALR3d 1330.

Modern status of rule as to validity of nonconsensual search and seizure made

without warrant: after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search, 19 ALR3d 727.

Propriety of execution of search warrant at night time, 26 ALR3d 951.

Sec. 12.35.020. Grounds for issuance. A search warrant may be issued if the judicial officer reasonably believes any of the following:

- (1) that the property was stolen or embezzled;
- (2) that the property was used as a means of committing a crime;
- (3) that the property is in the possession of a person who intends to use it as the means of committing a crime, or in possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered;
- (4) that the property constitutes evidence of a particular crime or tends to show that a certain person has committed a particular crime;
- (5) that either reasonable legislative or administrative standards for conducting a routine or area inspection with regard to air pollution are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle. (§ 4.02 ch 34 SLA 1962; am §§ 1, 2 ch 198 SLA 1968; am § 4 ch 86 SLA 1969; am § 14 ch 69 SLA 1970)

Cross reference. — See Cr. R. 37(a).
Legislative history report. — For report on ch. 69, SLA 1970 (HB 564), see 1970 House Journal Supplement No. 2, p.

7 (February 10, 1970).

C.J.S. reference. — 79 C.J.S. Searches and Seizures §§ 63-64, 91-97, 112-117.

Sec. 12.35.025. Seizure of property. Property described in AS 12.35.020 may be taken on a warrant from:

- (1) a house or other place in which it is concealed or may be found;
- (2) the possession of the person by whom it was stolen, embezzled, or used in the commission of a crime;
- (3) a person who is in possession of the property;
- (4) the possession of a person to whom the property has been delivered for the purpose of concealing it or preventing its being discovered, or from a house or other place occupied by him or under his control. (§ 15 ch 69 SLA 1970)

Legislative history report. — For report on ch. 69, SLA 1970 (HB 564), see 1970 House Journal Supplement No. 2, p. 7 (February 10, 1970).

ALR references. — Authority to

consent for another to search or seizure, 31 ALR2d 1078.

Validity of consent to search given by one in custody of officers, 9 ALR3d 858.

Sec. 12.35.030. Showing of probable cause.

Repealed by § 16 ch 69 SLA 1970.

Editor's note. — The repealed section report on ch. 69, SLA 1970 (HB 564), see derived from § 4.03, ch. 34, SLA 1962. 1970 House Journal Supplement No. 2, p. Legislative history report. — For 7 (February 10, 1970).

Sec. 12.35.040. Authority of officer executing warrant. In the execution or service of a search warrant, the officer has the same power and authority in all respects to break open any door or window, to use the necessary and proper means to overcome forcible resistance made to him, or to call any other person to his aid as he has in the execution or service of a warrant of arrest. (§ 4.04 ch 34 SLA 1962)

Cross reference. — For discussion of AS 12.25.100 and this section operate knock and announce requirement, see note jointly to establish the procedure required to AS 12.25.100. for the lawful execution of a search

AS 12.25.100, in conjunction with this warrant. Lockwood v. State, Sup. Ct. Op. section, establishes the procedure for No. 1809 (File No. 3356), 591 P.2d 969 forcing entry in executing both a search (1979).
warrant and an arrest warrant. Davis v. State, Sup. Ct. Op. No. 1070 (File No. 1973), 525 P.2d 541 (1974).

Sec. 12.35.050. Disposition of property taken. When the property is delivered to the judge or magistrate, he shall, if it was stolen or embezzled, dispose of it as provided in AS 12.35.090 and AS 12.35.100. If it was taken on a warrant issued on the grounds stated in AS 12.35.020(2) and (3), he shall retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or any other court in which the crime in respect to which the property was taken is triable. (§ 4.05 ch 34 SLA 1962)

Sec. 12.35.060. Malicious procurement of search warrant. A person who maliciously and without probable cause causes a search warrant to be issued and executed is guilty of a misdemeanor. (§ 4.06 ch 34 SLA 1962)

Sec. 12.35.070. Search of defendant in presence of judge or magistrate. When a person charged with a crime is believed by the judge or magistrate before whom he is brought to have on his person a dangerous weapon, or anything which may be used as evidence of the commission of the crime, the judge or magistrate may direct the accused to be searched in his presence, and the weapon or other thing be retained subject to his order or the order of the court in which the defendant may be tried. (§ 4.07 ch 34 SLA 1962)

Sec. 12.35.080. Judge, magistrate or officer to hold property allegedly stolen or embezzled. When property alleged to have been stolen or embezzled comes into the custody of a judge, magistrate or peace officer, he shall hold it subject to the order of the judge or

magistrate who examines the charge against the person accused of stealing or embezzling the property. (§ 4.08 ch 34 SLA 1962; am § 11 ch 8 SLA 1971)

Cross reference. — See Cr. R. 37(b). report on ch. 8, SLA 1971 (HB 15), see 1971 Legislative history report. — For House Journal, p. 52.

Sec. 12.35.090. Delivery of property to owner. On satisfactory proof of ownership of the property, the judge or magistrate who examines the charge against the person accused of stealing or embezzling it shall order it to be delivered to the owner or his duly authorized agent, on his paying the reasonable and necessary expenses incurred in its preservation, to be certified by the judge or magistrate. The order entitles the owner to demand and receive the possession of the property but does not affect the rights of third persons. (§ 4.09 ch 34 SLA 1962; am § 12 ch 8 SLA 1971)

Legislative history report. — For report on ch. 8, SLA 1971 (HB 15), see 1971 House Journal, p. 52.

Sec. 12.35.100. Property not delivered to owner. If the property stolen or embezzled has not been delivered to the owner, the court before which the trial is had for the theft or embezzlement of the property may order its delivery to the owner or his agent under the conditions of AS 12.35.090. (§ 4.10 ch 34 SLA 1962)

Sec. 12.35.110. Disposal of unclaimed property. If property stolen or embezzled is not claimed by the owner within 60 days after the conviction of the person for stealing or embezzling it, the judge, magistrate or other officer having it in custody shall, if it is money, deposit it in court, or if it is other property, sell it in the same manner as a sale upon an execution. After paying the expenses of the sale and preservation of the property as certified by the court, the proceeds shall be disposed of in the same manner as money collected upon judgments in favor of the state. (§ 4.11 ch 34 SLA 1962; am § 13 ch 8 SLA 1971)

Cross reference. — See Cr. R. 37(b). report on ch. 8, SLA 1971 (HB 15), see 1971 Legislative history report. — For House Journal, p. 52.

Sec. 12.35.120. Definition of search warrant. A search warrant is an order in writing, signed by a judge or magistrate, directed to a peace officer, commanding him to search for personal property and bring it before the judge or magistrate. (§ 4.01 ch 34 SLA 1962; am § 14 ch 8 SLA 1971)

PART VIII. SPECIAL PROCEEDINGS

Rule 37. Search and Seizure.

(a) Search Warrant—Issuance and Contents.

(1) A search warrant authorized by law shall issue only on

(i) (aa) affidavit sworn to before a judge or magistrate or any person authorized to take oaths under the law of the state, or

(bb) sworn testimony taken on the record in court, and

(ii) establishing the grounds for issuing the warrant.

(2) If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant

(i) identifying the property, and

(ii) naming or describing the person or place to be searched.

(3) The warrant

(i) shall be directed to a peace officer of the state authorized to enforce or assist in enforcing any law thereof, and

(ii) shall state the ground or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof, and

(iii) shall command the officer to search forthwith the person or place named for the property specified, and

(iv) shall direct that it be served between 7:00 a.m. and 10:00 p.m., but if an affiant is positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time, and

(v) shall designate the judge or the magistrate to whom it shall be returned.

(b) Execution and Return With Inventory. The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant

(1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a

copy of the supporting affidavits, and receipt for the property taken, or

(2) shall leave the copies and the receipt at the place from which the property was taken.

The return shall be made promptly and shall be accompanied by a written inventory of any property taken as a result of the search pursuant to or in conjunction with the warrant. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be signed by the officer under the penalty of perjury pursuant to AS 09.65.012. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(c) **Motion for Return of Property and to Suppress Evidence.**

A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

(d) **In Camera Hearing.** A person who challenges the validity of a search and seizure predicated on information gained from an informant used either in

(1) support of an application for a warrant, or

(2) as the basis of a search without warrant

may move the court for disclosure of the identity of the informant pursuant to Rule 16. In the event the court determines that disclosure of the identity of the informant is not required under Rule 16, the court shall conduct an in camera recorded hearing in which it shall investigate and take evidence so as to determine whether or not a search based on the informant's information was justified. Following the in

camera hearing, the court shall grant or deny the motion to suppress on the record, and shall make written findings concerning the validity of the search based on the informer's information. The written findings, together with the record of the hearing, shall be sealed, and if the validity of the search is upheld the sealed testimony and findings shall, on appeal of a conviction in which evidence of the search was admitted, be transmitted to the supreme court for automatic review of the motion to suppress. (Amended by Chapter 17 SLA 1969 effective June 25, 1969 and by Supreme Court Order 157 effective February 15, 1973)

(a) CROSS REFERENCES: AS 12.35.010; AS 12.35.020; AS 12.35.030; Crim. Forms 46, 47

(b) CROSS REFERENCES: AS 12.35.050; AS 12.35.080; AS 12.35.090; AS 12.35.100; AS 12.35.110; Crim. Form 48

(c) CROSS REFERENCE: Crim. Form 49

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(b) **Property or Persons Which May Be Seized with a Warrant.**—A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is lawfully restrained.

(c) **Issuance and Contents.**

(1) **Warrant Upon Affidavit.**—A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) **Warrant upon oral testimony.**

(A) **General Rule.**—If the circumstances make it reasonable to dispense with a written affidavit, a Federal Magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) **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 Federal magistrate. The Federal magistrate shall enter verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

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

(D) **Recording and certification of testimony.**—When a call is made to a Federal magistrate to issue a warrant, the Federal magistrate shall inform the Federal magistrate that the purpose of the call is

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request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal 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 Federal 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 Federal magistrate shall file a signed copy with the court.

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

(F) 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.

(G) 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.

[See main volume for text of (d) to (h)]

As amended Apr. 26, 1976, eff. Aug. 1, 1976; July 30, 1977, Pub.L. 95-78, § 2(e), 91 Stat. 320; Apr. 30, 1979, eff. Aug. 1, 1979.

Notes of Advisory Committee on Rules

1979 Amendment

This amendment to Rule 41 is intended to make it possible for a search warrant to issue to search for a person under two circumstances: (i) when there is probable cause to arrest that person; or (ii) when that person is being unlawfully restrained. There may be instances in which a search warrant would be required to conduct a search in either of these circumstances. Even when a search warrant would not be required to enter a place to search for a person, a procedure for obtaining a warrant should be available so that law enforcement officers will be encouraged to resort to the preferred alternative of acquiring "an objective predetermination of probable cause," *Katz v. United States*, 389 U.S. 367, 38 S. Ct. 507, 19 L.Ed.2d 576 (1967). In this instance, that the person sought is at the place to be searched.

That part of the amendment which authorizes issuance of a search warrant to search for a person unlawfully restrained is consistent with A.L.I. Model Code of Pre-Arraignment Procedure § 210.3(1)(d) (Proposed Official Draft, 1975), which specifies that a search warrant may issue to search for "an individual . . . who is unlawfully held in confinement or other restraint." As noted in the Commentary thereto, *id.* at p. 507. Ordinarily such persons will be held against their will and in that case the persons are, of course, not subject to "seizure." But they are, in a sense, "evidence" of crime, and the use of search warrants for these purposes presents no conceptual difficulties. Some state search warrant provisions also provide for issuance of a warrant in these circumstances. See, e.g., Ill. Res. Stat. ch. 26, § 108-3 ("any person who

has been kidnapped in violation of the laws of this State, or who has been kidnapped in another jurisdiction and is now concealed within this State").

It may be that very often exigent circumstances, especially the need to act very promptly to protect the life or well-being of the kidnap victim, would justify an immediate warrantless search for the person restrained. But this is not inevitably the case. Moreover, as noted above there should be available a process whereby law enforcement agents may acquire in advance a judicial determination that they have cause to intrude upon the privacy of those at the place where the victim is thought to be located.

That part of the amendment which authorizes issuance of a search warrant to search for a person to be arrested is also consistent with A.L.I. Model Code of Pre-Arraignment Procedure § 210.3(1)(d) (Proposed Official Draft, 1975), which states that a search warrant may issue to search for "an individual for whose arrest there is reasonable cause." As noted in the Commentary thereto, *id.* at p. 507, it is desirable that there be "explicit statutory authority for such searches." Some state search warrant provisions also expressly provide for the issuance of a search warrant to search for a person to be arrested. See, e.g., Del. Code Ann. tit. 16, § 2205 ("Persons for whom a warrant of arrest has been issued"). This part of the amendment to Rule 41 covers a defendant or witness for whom an arrest warrant has theretofore issued, or a defendant for whom grounds to arrest exist even though no arrest warrant has theretofore issued. It also covers the arrest of a deportable alien under 8 U.S.C. § 1222, whose presence at a certain place

probable cause determination made by a neutral and detached magistrate in advance of the entry.

1977 Amendment

Rule 41(c)(2) is added to establish a procedure for the issuance of a search warrant when it is not reasonably practicable for the person obtaining the warrant to present a written affidavit to a magistrate of a state judge as required by subdivision (c)(1). At least two states have adopted a similar procedure. Ariz.Rev.Stat. Ann. § 13-144(c)-144(d) (Supp.1973); Cal.Pen. Code § 1526(b), 1528(b) (West Supp.1974), and comparable amendments are under consideration in other jurisdictions. See Israel, Legislative Regulation of Searches and Seizures: The Michigan Proposals, 73 Mich.L.Rev. 231, 259-61 (1973); Sakell, Proposed Revisions of North Carolina's Search and Seizure Law, 52 N.Car.L.Rev. 277, 306-11 (1973). It has been strongly recommended that "every State enact legislation that provides for the issuance of search warrants pursuant to telephoned affidavits and affidavits from police officers." National Advisory Commission on Criminal Justice Standards and Goals, Report on Police 95 (1973). Experience with the procedure has been most favorable. Miller, Telephonic Search Warrants: The San Diego Experience, 9 The Prosecutor 385 (1974).

The trend of recent Supreme Court decisions has been to give greater priority to the use of a search warrant as the proper way of making a lawful search: it is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants whenever reasonably practicable.

This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. Trupiano v. United States, 334 U.S. 699, 705 (1948), quoted with approval in Chimel v. California, 395 U.S. 752, 759 (1969).

See also Coolidge v. New Hampshire, 403 U.S. 443 (1971); Note, Chambers v. Maaney: New Dimensions in the Law of Search and Seizure, 16 Indiana L.J. 257, 2 (1971).

Use of search warrants can best be encouraged by making it administratively possible to obtain a warrant when one is needed. One reason for the nonuse of a warrant has been the administrative difficulties involved in getting a warrant, particularly at times of the day when a judicial officer is ordinarily unavailable. L. Tiffany, D. McIntyre, and D. Rothenberg, Detection of Crime 105-116 (1971); LaFare, Improving Police Performance Through the Exclusionary Rule, Mo.L.Rev. 391, 411 (1964). Federal law enforcement officers are not infrequently confronted with situations in which the circumstances are not sufficiently "exigent" to justify the serious step of conducting a warrantless search of private homes, but yet there is a significant probability that critical evidence would be lost in the time it would take to obtain a search warrant by traditional methods. E. g., United States v. Johnson, 51-1 U.C.L.A. June 16, 1976.

Subdivision (c)(2) provides that a warrant may be issued on the basis of an affidavit made by a person not in the physical presence of the federal magistrate. Telephonic affidavits or other electronic methods of communication are contemplated for the warrant to proposed 1977 requirements must be

(1) The applicant—a federal law enforcement officer or an attorney for the government, as required by subdivision (a)—must persuade the magistrate that the circumstances of time and place make it reasonable to request the magistrate to issue a warrant on the basis of oral testimony. This restriction on the issuance of a warrant recognizes the inherent limitations of an oral warranted procedure, the lack of demeanor evidence, and the lack of a written record for the reviewing magistrate to consider before issuing the warrant. See Comment, Oral Search Warrants: A New Standard of Warrant Availability, 21 U.C.L.A. Law Review 691, 701 (1974). Circumstances making it reasonable to obtain a warrant on oral testimony exist if delay in obtaining the warrant might result in the destruction or disappearance of the property [see Chimel v. California, 395 U.S. 752, 773-774 (1969) (White, dissenting); Landynski, The Supreme Court's Search for Fourth Amendment Standards: The Warrantless Search, 45 Conn. B.J. 2, 25 (1971)]; or because of the time when the warrant is sought, the distance from the magistrate of the person seeking the warrant, or both.

(2) The applicant must orally state facts sufficient to satisfy the probable cause requirement for the issuance of the search warrant. (See subdivision (c)(1).) This information may come from either the applicant federal law enforcement officer or the attorney for the government or a witness willing to make an oral statement. The oral testimony must be recorded at this time so that the transcribed affidavit will provide an adequate basis for determining the sufficiency of the evidence if that issue should later arise. See Klipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv.L.Rev. 825 (1971). It is contemplated that the recording of the oral testimony will be made by a court reporter, by a mechanical recording device, or by a verbatim contemporaneous writing by the magistrate. Recording a telephone conversation is no longer difficult with many easily operated recorders available. See 86:2 L.A. Daily Journal 1 (1973); Miller, Telephonic Search Warrants: The San Diego Experience, 9 The Prosecutor 385, 386 (1974).

(3) The applicant must read the contents of the warrant to the federal magistrate in order to enable the magistrate to know whether the requirements of certainty in the warrant are satisfied. The magistrate may direct that changes be made to the warrant. If the magistrate approves the warrant as requested or as modified by the magistrate, he then issues the warrant by directing the applicant to sign the magistrate's name to the duplicate original warrant. The magistrate then causes to be made a written copy of the approved warrant. This constitutes the original warrant. The magistrate enters the time of issuance of the duplicate original warrant on the face of the original warrant.

(4) Return of the duplicate original warrant and the original warrant must conform to subdivision (d). The transcript of the sworn oral testimony setting forth the grounds for issuance of the warrant must be signed by affiant in the presence of the magistrate and filed with the court.

Because federal magistrates are kept to be accessible through the use of telephonic or other electronic devices, it is unnecessary to authorize state judges to issue warrants under subdivision (c)(2).

Although the procedure set out in subdivision (c)(2) contemplates resort to technology which did not exist when the Fourth Amendment was adopted, the Advisory Committee is of the view that the procedure complies with all of the requirements of the Amendment. The telephonic search warrant process has been upheld as constitutional by the courts, e. g., People v. Peck, 38 Cal.App.3d 993, 113 Cal.Rptr. 908 (1974), and has consistently been so viewed by commentators. See Israel, Legislative Regulation of Searches and Seizures: The Michigan Proposals, 73 Mich.L.Rev. 231, 260 (1975); Sakell, Proposed Revisions of North Carolina's Search and Seizure Law, 52 N.Car.L.Rev. 277, 310 (1973); Comment, Oral Search Warrants: A New Standard of Warrant Availability, 21 U.C.L.A. Rev. 691, 697 (1973).

Reliance upon oral testimony as a basis for issuing a search warrant is permissible under the Fourth Amendment. Campbell v. Minnesota, 457 F.2d 1 (8th Cir. 1973); United States ex rel. Gaugler v. Briertley, 477 F.2d 516 (3d Cir. 1973); Tahasko v. Barton, 472 F.2d 871 (6th Cir. 1972); Frazier v. Roberts, 411 F.2d 1221 (8th Cir. 1971). Thus, the procedure authorized under subdivision (c)(2) is not objectionable on the ground that the oral statement is not transcribed in advance of the issuance of the warrant. People v. Peck, 38 Cal.App.3d 993, 113 Cal.Rptr. 908 (1974). Although it has been questioned whether oral testimony will suffice under the Fourth Amendment if some kind of contemporaneous record is not made of that testimony, see dissent from denial of certiorari in Christofferson v. Washington, 393 U.S. 1090 (1969), this problem is not present under the procedure set out in subdivision (c)(2).

The Fourth Amendment requires that warrants issue "upon probable cause, supported by Oath or affirmation." The significance of the oath requirement is "that someone must take the responsibility for the facts alleged, giving rise to the probable cause for the issuance of a warrant." United States ex rel. Pugh v. Pate, 401 F.2d 6 (7th Cir. 1968). See also Frazier v. Roberts, 411 F.2d 1221 (8th Cir. 1971). This is accomplished under the procedure required by subdivision (c)(2); the need for an oath under the Fourth Amendment does not "require a face to face confrontation between the magistrate and the affiant." People v. Chavez, 27 Cal.App.3d 883, 104 Cal.Rptr. 247 (1972). See also People v. Aguirre, 26 Cal.App.3d 7, 103 Cal.Rptr. 153 (1972), noting it is unnecessary that "oral statements [be] taken in the physical presence of the magistrate."

The availability of the procedure authorized by subdivision (c)(2) will minimize the necessity of federal law enforcement officers engaging in other practices which, at least on occasion, might threaten to a greater extent those values protected by the Fourth Amendment. Although it is permissible for an officer in the field to rely his information by radio or telephone to another officer who has more ready access to a magistrate and who will thus act as the affiant. Lopez v. United States, 370 F.2d 3 (5th Cir. 1966); State v. Banks, 290 N.C. 722, 110 S.E.2d 222 (1959), that procedure is less desirable than that permitted under subdivision (c)(2) for it deprives the magistrate of the opportunity to examine the affiant at the scene, who is in a much better position to answer questions that may be prompted and the reliability of the search. Israel, Legislative Regulation of Searches and Seizures: The Michigan Proposals, 73 Mich.L.Rev. 231, 260 (1975).

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221, 280 (1973). Cf. in the absence of the subdivision (c)(2) procedure, officers might take "protective custody" of the premises and occupants for a significant period of time while a search warrant was sought by traditional means. The extent to which the "protective custody" procedure may be employed consistent with the Fourth Amendment is uncertain at best; see *Griswold*, *Criminal Procedure*, 1969—Is It a Means or an End?, 29 *Md.L.Rev.* 307, 317 (1969). The unavailability of the subdivision (c)(2) procedure also makes more tempting an immediate resort to a warrantless search in the hope that the circumstances will later be found to have been sufficiently "exigent" to justify such a step. See Miller, *Telephonic Search Warrants: The San Diego Experience*, 9 *The Prosecutor* 335, 338 (1974), noting a dramatic increase in police utilization of the warrant process following enactment of a telephonic warrant statute.

Notes of Committee on the Judiciary, Senate Report No. 95-334, Amendments Proposed by the Supreme Court. The committee agrees with the Supreme Court that it is desirable to encourage Federal law enforcement officers to seek search warrants in situations where they might otherwise conduct warrantless searches by providing for a telephone search warrant procedure with the basic characteristics suggested in the proposed Rule 41(c)(2). As the Supreme Court has observed, "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants whenever reasonably practicable. After consideration of the Supreme Court version and a proposal set forth in H.R. 7885, the committee decided to use the language of the House bill as the vehicle, with certain modifications.

A new provision, as indicated in subparagraph (c)(2)(A), is added to establish a procedure for the issuance of a search warrant where the circumstances make it reasonable to dispense with a written affidavit to be presented in person to a magistrate. At least two States have adopted a similar procedure—Arizona and California—and comparable amendments are under consideration in other jurisdictions. Such a procedure has been strongly recommended by the National Advisory Commission on Criminal Justice Standards and Goals and State experience with the procedure has been favorable. The telephone search warrant process has been upheld as constitutional by the courts and has consistently been so viewed by commentators.

In recommending a telephone search warrant procedure the Advisory Committee notes on the Supreme Court proposal points out that the preferred method of conducting a search is with a search warrant. The note indicates that the rationale for the proposed change is to encourage Federal law enforcement officers to seek search warrants in situations when they might otherwise conduct warrantless searches. "Federal law enforcement officers are not infrequently confronted with situations in which the circumstances are not sufficiently 'exigent' to justify the serious step of conducting a warrantless search of private premises, but yet there exists a significant possibility that critical evidence would be lost in the time it would take to obtain a search warrant by traditional means."

Subparagraph (c)(2)(B) provides that the person requesting the warrant shall prepare a "duplicate original warrant" which will be read and recorded verbatim by the magistrate on an "original warrant." The magistrate may direct that the warrant be modified.

Subparagraph (c)(2)(C) provides that, if the magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or there is probable cause to believe that they exist, he shall order the issuance of the warrant by directing the requestor to sign the magistrate's name on the duplicate original warrant. The magistrate is required to sign the original warrant and enter the time of issuance thereon. The finding of probable cause may be based on the same type of evidence appropriate for a warrant upon affidavit.

Subparagraph (c)(2)(D) requires the magistrate to place the requestor and any witness under oath and, if a voice recording device is available, to record the proceeding. If a voice recording is not available, the proceeding must be recorded verbatim stenographically or in longhand. Verified copies must be filed with the court as specified.

Subparagraph (c)(2)(E) provides that the contents of the warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

Subparagraph (c)(2)(F) provides that the person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant. Unlike H.R. 7888, this subparagraph does not require the person who executes the warrant to have physical possession of the duplicate original warrant at the time of the execution of the warrant. The committee believes this would make an unwise and unnecessary distinction between execution of regular warrants issued on written affidavits and warrants issued by telephone that would limit the flexibility and utility of the procedure for no useful purpose.

Finally, subparagraph (c)(2)(G) makes it clear that, absent a finding of probable cause by the government, the magistrate's judgment that the circumstances made it reasonable to dispense with a written affidavit—a decision that does not go to the core question of whether there was probable cause to issue a warrant—is not ground for granting a motion to suppress evidence.

Congressional Modification of Proposed Amendment. Section 2(a) of Pub.L. 95-57 provided in part that the amendment by the Supreme Court [in its order of Apr. 20, 1976] to subdivision (c) of rule 41 of the Federal Rules of Criminal Procedure [subd. (c) of this rule] is approved in modified form.

Effective Date of 1977 Amendment. Amendment of this rule by order of the United States Supreme Court on Apr. 2, 1976, modified and approved by Pub. 95-75, effective Oct. 1, 1977, see section of Pub.L. 95-75, set out as a note under section 5771 of this title.

Effective Date of 1976 Amendment. Amendment of subsec. (c)(1) of this rule effective Aug. 1, 1976, see Pub.L. 94-349, 1, July 8, 1976, 90 Stat. 822, set out as note under rule 6 of these rules.