IN THE SUPREME COURT OF THE STATE OF UTAH

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Proposed Amendments to
Rule 40 of the Utah Rules of
Criminal Procedure

Case No. 20140421-SC

ORDER

IT IS HEREBY ORDERED that the proposed amendments to Rule 40 of the Utah Rules of Criminal Procedure are adopted and promulgated effective November 1, 2014.

FOR THE COURT:

10-30-14
Date

Matthew B. Durrant
Chief Justice

Rule 40. Search Warrants

(a) Definitions.

As used in this rule:

(a)(1)"Daytime" means the hours beginning at 6 a.m. and ending at 10 p.m. local time.

(a)(2)"Recorded "or "recording" includes the original recording of testimony, a return or other communication or any copy, printout, facsimile, or other replication that is intended by the person making the recording to have the same effect as the original.

(a)(3) "Search warrant" is an order issued by a magistrate in the name of the state and directed to a peace officer, describing with particularity the thing, place, or person to be searched and the property or evidence to be seized and includes an original written or recorded warrant or any copy, printout, facsimile or other replica intended by the magistrate issuing the warrant to have the same effect as the original.

(b) Grounds for issuance.

Property or evidence may be seized pursuant to a search warrant if there is probable cause to believe it:

(b)(1) was unlawfully acquired or is unlawfully possessed;

(b)(2) has been used or is possessed for the purpose of being used to commit or conceal the commission of an offense; or

(b)(3) is evidence of illegal conduct.

(c) Conditions precedent to issuance.

(c)(1) A search warrant shall not issue except upon probable cause, supported by oath or affirmation, and shall particularly describe the person or place to be searched and the person, property, or evidence to be seized.

(c)(2) If the item sought to be seized is evidence of illegal conduct, and is in the possession of a person or entity for which there is insufficient probable cause shown to the magistrate to believe that such person or entity is a party to the alleged illegal conduct, no search warrant shall issue except upon a finding by the magistrate that the evidence sought to be seized cannot be obtained by subpoena, or that such evidence would be concealed, destroyed, damaged, or altered if sought by subpoena. If such a finding is made and a search warrant issued, the magistrate shall direct upon the warrant such conditions that reasonably afford protection of the following interests of the person or entity in possession of such evidence:

(c)(2)(A) protection against unreasonable interference with normal business;

(c)(2)(B) protection against the loss or disclosure of protected confidential sources of information; or

(c)(2)(C) protection against prior or direct restraints on constitutionally protected rights.

(d) Search warrant served in readable form.

A copy of a search warrant shall be served in a readable form upon the person or place to be searched.

(e) Time for service -- Officer may request assistance.

(e)(1) The magistrate shall insert a direction in the warrant that it be served in the daytime, unless the affidavit or recorded testimony states sufficient grounds to believe a search is necessary in the night to seize the property prior to its being concealed, destroyed, damaged, altered, or for other good reason; in which case the magistrate may insert a direction that it be served any time of the day or night.

(e)(2) The search warrant shall be served within ten days from the date of issuance. Any search warrant not executed within this time shall be void and shall be returned to the court or magistrate as not executed.

(e)(3) An officer may request other persons to assist in conducting the search.

(f) Receipt for property taken.

The officer, when seizing property pursuant to a search warrant, shall give a receipt to the person from whom it was seized or in whose possession it was found. If no person is present, the officer shall leave the receipt in the place where the property was found.

(g) Return -- Inventory of property taken.

The officer, after execution of the warrant, shall promptly make a signed return of the warrant to a magistrate of the issuing court and deliver a written or recorded inventory of anything seized, stating the place where it is being held.

(h) Safekeeping of property.

The officer seizing the property shall be responsible for its safekeeping and maintenance until the court otherwise orders.

(I) Magistrate to retain and file copies - Documents sealed for twenty days -Forwarding of record to court with jurisdiction.

(i)(1) At the time of issuance, the magistrate shall retain and seal a copy of the search warrant, the application and all affidavits or other recorded testimony on which the warrant is based and shall, within a reasonable time, file those sealed documents in court files which are secured against access by the public. Those documents shall remain sealed until twenty days following the issuance of the warrant unless that time is extended or reduced under Section (m). Unsealed search warrant documents shall be filed in the court record available to the public.

(i)(2) Sealing and retention of the file may be accomplished by:

(i)(2)(A) placing paper documents or storage media in a sealed envelope and filing the sealed envelope in a court file not available to the public;

(i)(2)(B) storing the documents by electronic or other means under the control of the court in a manner reasonably designed to preserve the integrity of the documents and protect them against disclosure to the public during the period in which they are sealed; or

(i)(2)(C) filing through the use of an electronic filing system operated by the State of Utah which system is designed to transmit accurate copies of the documents to the court file without allowing alteration to the documents after issuance of the warrant by the magistrate.

(j) Findings required for service without notice. If the magistrate finds upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given, the magistrate may direct that the officer need not give notice of authority and purpose before entering the premises to be searched.

(k) Violation of health, safety, building, or animal cruelty laws or ordinances -- Warrant to obtain evidence.

In addition to other warrants provided by this rule, a magistrate, upon a showing of probable cause to believe a state, county, or city law or ordinance, has been violated in relation to health, safety, building, or animal cruelty, may issue a warrant for the purpose of obtaining evidence of a violation. A warrant may be obtained from a magistrate upon request of a peace officer or state, county, or municipal health, fire, building, or animal control official only after approval by a prosecuting attorney. A search warrant issued under this section shall be directed to any peace officer within the county where the warrant is to be executed, who shall serve the warrant. Other concerned personnel may accompany the officer.

(l) Remotely communicated search warrants.

(l)(1) Means of communication. When reasonable under the circumstances, a search warrant may be issued upon sworn or affirmed testimony of a person who is not in the physical presence of the

magistrate, provided the magistrate is satisfied that probable cause exists for the issuance of the warrant. All communication between the magistrate and the peace officer or prosecuting attorney requesting the warrant may be remotely transmitted by voice, image, text, or any combination of those, or by other means.

(l)(2) Communication to be recorded. All testimony upon which the magistrate relies for a finding of probable cause shall be on oath or affirmation. The testimony and content of the warrant shall be recorded. Recording shall be by writing or by mechanical, magnetic, electronic, photographic storage or by other means.

(l)(3) Issuance. If the magistrate finds that probable cause is shown, the magistrate shall issue a search warrant.

(l)(4) Signing warrant. Upon approval, the magistrate may direct the peace officer or the prosecuting attorney requesting a warrant from a remote location to sign the magistrate's name on a warrant at a remote location.

(l)(5) Filing of warrant and testimony. The warrant and recorded testimony shall be retained by and filed with the court pursuant to Section (i). Filing may be by writing or by mechanical, magnetic, electronic, photographic storage or by other means.

(l)(6) Usable copies made available. Except as provided in Sections (i) and (m) of this rule, any person having standing may request and shall be provided with a copy of the warrant and a copy of the recorded testimony submitted in support of the application for the warrant. The copies shall be provided in a reasonably usable form.

(m) Sealing and Unsealing of Search Warrant Documents

(m)(1) Application for sealing of documents related to search warrants. A prosecutor or peace officer may make a written or otherwise recorded application to the court to have documents or records related to search warrants sealed for a time in addition to the sealing required by Subsection (i)(1). Upon a showing of good cause, the court may order the following documents to be sealed:

(m)(1)(A) applications for search warrants;

(m)(1)(B) search warrants;

(m)(1)(C) affidavits or other recorded testimony upon which the search warrant is based;

(m)(1)(D) the application, affidavits or other recorded testimony and order for sealing the documents.

(m)(2) Sealing of search warrant documents. Search warrant documents are public record that may be sealed in entirety or in part and not placed in the public file if all or part of the information in them would:

(m)(2)(A) cause a substantial risk of harm to a person's safety;

(m)(2)(B) pose a clearly unwarranted invasion of or harm to a person's reputation or privacy; or

(m)(2)(C) pose a serious impediment to the investigation.

Sealed documents shall be maintained in a file not available to the public. If a document is not sealed in its entirety, the court may order a copy of the document with the sealed portions redacted to be placed in the public file and an un-redacted copy to be placed in the sealed file. Except as required by Section (i), no document may be designated as "Filed under Seal" or "Confidential" unless it is accompanied by a court order sealing the document.

(m)(3) Unsealing of documents. Any person having standing may file a motion to unseal search warrant documents with notice to the prosecutor and law enforcement agency. If the prosecutor or law enforcement agency files an appropriate and timely objection to the unsealing, the court may hold a hearing on the motion and objection. Where no objection to unsealing the documents is filed, the defendant may prepare an order for entry by the court. The court may order the unsealing of the documents or order copies of the documents to be delivered to a designated person without unsealing the documents and require the person receiving the documents not to disclose the contents to any other person without the authorization of the court.

(m)(4) Length of time documents may remain sealed.

(m)(4)(A) The documents may remain sealed ~~until the court finds, for good cause, that the records should be unsealed.~~ for a period of up to six months. Prior to the end of the six month period, the prosecutor, peace officer, or a person with a direct interest in the records may apply to the court to seal the documents for an additional period of up to six months. Upon a finding that conditions for sealing remain, the court may order the documents to be sealed for up to six additional months. The prosecutor, peace officer, or a person with standing may seek, and the court may grant, additional six month extensions provided conditions for sealing remain.

(m)(4)(B) If search warrant documents have remained sealed for at least three years, the prosecutor, peace officer, or a person with standing may apply to the court to seal the documents indefinitely. Upon a finding that the conditions for sealing remain, the court may order that the documents be sealed indefinitely, pending further order from the court.