TELEPHONE SEARCH WARRANT PROCEDURE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 5865

TELEPHONE SEARCH WARRANT PROCEDURE

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TELEPHONE SEARCH WARRANT PROCEDURE

FRIDAY, APRIL 22, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
San Francisco, Calif.

The subcommittee met in room 2007, Federal Building, 450 Golden Gate Avenue, San Francisco, Calif., at 3:15 p.m., Hon. James R. Mann, chairman of the subcommittee, presiding.

Present: Representatives Mann and Wiggins.

Staff present: Thomas W. Hutchison and Toni Lawson, counsel; and Raymond V. Smietanka, associate counsel.

Mr. MANN. This afternoon the subcommittee will take up telephone search warrant procedures.

In April of 1976, the Supreme Court proposed to amend the Federal Rules of Criminal Procedure to permit a Federal magistrate to issue a search warrant on the basis of oral testimony given to him by a Federal law enforcement agent who is not physically in his presence. Since that sort of testimony would most often be provided over the telephone, a warrant issued in that manner is sometimes referred to as a "telephone warrant."

The Supreme Court's proposed telephone warrant procedure was one of several amendments to the Federal Rules of Criminal Procedure promulgated in April 1976 and was to have taken effect on August 1, 1976.

However, Public Law 94-349 postponed its effective date for 1 year, to August 1, 1977. Public Law 94-349 also postponed for 1 year the effective date of several of the other proposed amendments to the Federal Rules of Criminal Procedure.

The Subcommittee on Criminal Justice earlier this year began looking at all of the proposed amendments whose effective date was postponed. Our work was carried out under serious time constraints. Since legislation has to be passed by both Houses of Congress prior to next August 1, and since we were taking the lead, we wanted to complete House action before May 1. That would give the Senate 3 months in which it could act.

I am happy to say that we beat our deadline. Just last Tuesday, by a vote of 376-3, the House passed legislation drafted and recommended by the subcommittee, H.R. 5864.

During the course of its work on H.R. 5864, the subcommittee's attention was drawn to two of the more controversial rules. We looked at the Supreme Court's proposed telephone warrant procedure, but were unable to gather enough information to answer some of the questions that concerned us.

Consequently, H.R. 5864, the bill passed by the House earlier this week, disapproves the proposed telephone warrant procedure.

This disapproval is not intended to be meant necessarily as disapproval of the concept. We wanted additional time to study the proposal, and by disapproving it we get that time.

[See appendix 2 for copies of H.R 5864, H.R 5865, and H.R. 7888.]

Two States—California and Arizona—presently have statutes establishing telephone warrant procedures. We are here to take testimony from persons familiar with the California procedure.

We want to find out from them in what circumstances the procedure has proven to be beneficial. We want to know what technological problems there are with a telephone warrant procedure.

We also want to find out whether the availability of a telephone warrant procedure has resulted in a decline in warrantless searches. I am sure that our witnesses this afternoon will be able to provide us with information that will help us answer some of those questions.

We are pleased to have as witnesses this afternoon Deputy Attorney General of California Eddie Keller, Deputy District Attorney Don Feld, Deputy District Attorney Jack Meehan, Chief of Police John Norton and Lt. Al Stevens.

They represent various subdivisions of the State of California: Mr. Keller representing the California attorney general, Mr. Feld the San Bernardino County district attorney, Mr. Meehan the Alameda County district attorney, Chief Norton the Foster City Police Department and Lieutenant Stevens of the Santa Cruz County Sheriff's Department.

Gentlemen, if you all five would come forward, we will have a panel discussion.

Suppose you identify yourselves for the record?

TESTIMONY OF EDDIE KELLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ON BEHALF OF CALIFORNIA ATTORNEY GENERAL EVELLE YOUNGER, DON FELD, ON BEHALF OF SAN BERNARDINO COUNTY DISTRICT ATTORNEY JAMES CRAMER, JOHN MEEHAN, ON BEHALF OF ALAMEDA COUNTY DISTRICT ATTORNEY LOWELL JENSEN, JOHN NORTON, CHIEF OF POLICE, FOSTER CITY, ON BEHALF OF CALIFORNIA POLICE CHIEFS AND PEACE OFFICERS ASSOCIATION, AND AL STEVENS, SANTA CRUZ COUNTY SHERIFF'S DEPARTMENT

Mr. KELLER. Yes. I am Eddie Keller. I am deputy attorney general of the State of California.

Mr. MANN. Thank you, Mr. Keller.

Mr. NORTON. I am Chief John Norton. I represent the California police chiefs and the California Peace Officers Association.

Mr. FELD. I am Don Feld, San Bernardino County deputy district attorney.

Mr. MANN. All right, Mr. Feld.

Mr. MEEHAN. I am John J. Meehan, assistant district attorney from Alameda County.

Mr. MANN. All right.

Mr. STEVENS. I am Al Stevens, Santa Cruz County Sheriff's Department.

Mr. MANN. Very good.

How many prepared statements to hear do we have? Do we have any?

(No response.)

All right. Suppose we start with Mr. Keller.

Mr. MANN. You are familiar with the bill and the Rule as promuloated by the Supreme Court?

Mr. KELLER. Yes; I am.

Mr. MANN. We are more interested with your experience than we are with our bill.

We are interested, of course, with the language of your act and whether or not you have any recommended changes in reference to it, and the like. Be as concise as you can and if you would, kick things off for us here.

Mr. KELLER. Well, I did have a prepared statement, Mr. Chairman, but I would be happy to digress from it, if you like.

Mr. MANN. You may digress or not, but we will accept it and make it, without objection, a part of our record. [See p. 21.]

Mr. KELLER. Fine, I will leave you with a copy of it.

Mr. MANN. Very good.

Mr. KELLER. Our office was asked to appear here to explain what the basic California statutory and case law is on this subject and I wish to initially say, please bear in mind that our office, the attorney general's office, is primarily involved with academic aspects of this question.

The occasions when our State narcotics agents or other criminal investigators might be involved with this procedure are rare and when that might occur, they would be working in conjunction with local prosecutors, and not with our State attorneys.

So, usually the situation where we would be involved with it would be at the appellate level, after the criminal conviction has occurred, and the like.

Mr. MANN. It would come to your attention, though, on a statewide basis, whether or not there has been substantial resistance from the bar, the criminal bar, or from the public generally.

What are your impressions in that respect?

Mr. KELLER. Well, since 1970 when our statutes were enacted, my research reveals that there have been only 12 reported appellate decisions that have even directly or indirectly touched on this subject.

In fact, only three of those cases have involved telephone issuance of search warrants and direct challenges to the procedures of our telephone search warrant statutes.

Mr. Mann. So, at the most, three went up on that primary——

Mr. KELLER. That's right. On a particular challenge to our procedures. The challenges have come to us as both constitutional claims and technical claims with the particular aspect of the statute.

In particular, one case made the claim that our statutes were unconstitutional because they allegedly permitted issuance of search warrants without adequate judicial supervision.

The court of appeal noted that neither the United States nor our own Constitution on search and seizure provisions call for the presentation of a written affadavit as a prerequisite to the issuance of a search warrant and concluded that our procedures were more than adequate to insure sufficient judicial control over the matter.

One additional claim that was rejected in that case that has relevance—particular relevance to your proposed statute—is that the court held that the officer who presents the telephonic affidavit does not have to show special or unusual facts to justify the issuance of the warrant.

Now, under your proposed statute, as I read it, your proposal would require the requesting officer to show why obtaining a written affidavit was not reasonable or possible. So, that's the difference in how the statutes operate.

Mr. MANN. Well, we had this question raised while we were considering this rule and that is, in this building, for example, an agent would find it inconvenient to go up to the 12th floor to get a magistrate just to issue a warrant. So, he would call up there.

That would seem to be possible under yours, but not ours.

Mr. KELLER. I think you will find that I am not familiar with—I realize that potential difficulty. I am not entirely familiar with all the practices of local prosecutors around the State, but of those of which I am familiar, their policies, and I am thinking of Los Angeles County right now—are restricted to applying for this kind of warrant procedure under emergency situations.

Mr. MANN. That is a policy, though?

Mr. KELLER. That is not written into our statute. That's correct.

Mr. MANN. Thank you.

Mr. KELLER. The other legal challenges which have arisen—well, one challenge is whether the oral statements have to be taken in the physical presence of the magistrate. This has been raised both on a strictly technical claim and a constitutional claim and has been rejected by our courts as invalid.

Some of our courts have very strictly interpreted our statutes. One in particular had a situation where an officer applied for a telephonic warrant—and I am using that term just for purposes of convenience.

He had plenty of probable cause. The magistrate, in fact, authorized him to conduct a search and authorized him to sign his name to a warrant, which our State procedure requires.

The problem was that the officer did not have a copy of a warrant with him and did not sign the judge's name prior to conducting a search. The court of appeal held that our procedures only provide for oral procedures for the obtaining of the search warrant affidavit itself, and not an oral authorization for the warrant. Consequently, they ruled the search unlawful and the evidence inadmissible.

So, you can see that our courts are not being lax in enforcing this particular statute. In some cases it is very strictly interpreted.

Mr. WIGGINS. Does California State law require the officer executing the warrant to have a copy of it in his possession?

Mr. KELLER. It is called a "duplicate original warrant."

Mr. WIGGINS. I realize that. Under this procedure—but even under the old procedure—must the officer have the piece of paper called a warrant in his possession when he makes an entry?

Mr. KELLER. That's correct.

Mr. WIGGINS. Ostensibly pursuant to a warrant. I realize that there are some circumstances where a warrant is not necessary.

OK, go ahead.

Mr. MANN. As I read the statute—maybe I was reading case notes or something—the officer usually fills out the warrant in quadruplicate. One, of course, he leaves with the premises. One is for his own return, I guess, on it. I don't know what happens to the other two.

Mr. FELD. When he makes out a search warrant, he leaves a copy with the judge and takes the original and two copies with him. He leaves a copy at the premises that was searched and he has to show them the original.

If there are two places to be searched, he leaves a copy at each place. One copy he can keep for himself.

Mr. MANN. Your procedure does not contemplate, as our rule does, that the officer 20 miles away at the end of the telephone can fill out the original——

Mr. FELD. Yes; he would. Under the telephone search warrant, he would type out or write out a search warrant and then label it "duplicate original."

Mr. MANN. And in that case, the original—he would sign the original for the——

Mr. FELD. He would sign the judge's name to that search warrant.

Mr. MANN. All right.

Mr. KELLER. And the judge himself must prepare the original warrant and sign it and file it, at the end of the search process, together with the duplicate original warrant.

Mr. MANN. All right.

Mr. KELLER. And the transcription of the recording of the oral affidavit.

Mr. WIGGINS. Is that a verbatim transcription?

Mr. KELLER. Yes. In fact, one case has expressed that it has to be verbatim.

Mr. MANN. It is the original transcription, is it not?

Mr. KELLER. Well, there are two——

Mr. MANN. Or disc, or tape.

Mr. KELLER. There are two procedures provided for in our statute. It is either recorded on the machine, presumably by the magistrate, or recorded by a certified court reporter and then the transcription of those statements has to be made and certified, depending on which system is used.

Mr. WIGGINS. The magistrate does not summarize the conversation in terms of his ultimate conclusions or summarize his reasons? In other words, this is verbatim, just like a deposition, meaning that it is recorded by a reporter and is ultimately available for counsel if they should wish to challenge the warrant.

Is that correct?

Mr. KELLER. That's correct.

In fact, one case has said that that's required, that it has to be a verbatim transcript.

Mr. WIGGINS. Does the attorney general here maintain statistics on the frequency of warrants being issued?

Mr. KELLER. No; we don't.

Mr. WIGGINS. Do any of the counties represented by you gentlemen?

Mr. Norton. I have some information.

Mr. WIGGINS. The major justification for an oral search warrant is that it makes a warrant more easily obtainable, and hence, more entries will be made pursuant to a warrant, rather than to some other claimed justification.

That serves a societal purpose, I guess, to have officers making entries with warrants.

My question is, has it worked out that way? Do you, in fact, have more warrants as a result of this procedure, or not?

Mr. NORTON. I have to disagree. That does not appear to be the policy, to have more warrants. The policies throughout this State in the various counties is strictly to use it as an emergency measure and an emergency measure not based on the user or the law enforcement officer, but on the district attorney's belief that an emergency exists.

In the beginning, telephonic search warrants were normally related to drug cases, where contraband would be destroyed if the search were not conducted immediately, or in some situations where a person was moving from the residence or the place that was to be searched and the immediacy was apparent.

That is pretty much the policy of why—or the rationale behind the emergency.

That has changed greatly in the years since it has been used. It is not just drug related cases today, but you know, more of other types of cases.

Mr. WIGGINS. Well, on that question there is a national policy that searches should be conducted pursuant to a warrant. You start from that as a bottom line.

And, if warrants are difficult or impossible in the eyes of either the officer or the district attorney—impossible to obtain—then two choices remain. You can make an entry and say, the heck with a warrant, and take your chances on a motion to suppress or you can try to justify your entry on exigent circumstances and exceptions to the warrant clause.

The other alternative is to give up the ghost and not make the search at all.

Now, there is no policy that searches should not be conducted if there is apparent probable cause. People have come forward and said, adopt the oral search warrant mechanism on a national level because it will mean that officers can more easily obtain warrants and we will have more lawful entries, rather than, perhaps, unlawful entries or fewer motions to suppress and all that business.

I guess what I want to know is, is there empirical data which tends to show that we have more warrants being issued than heretofore? Were there before this practice fewer warrants?

Is there any evidence at all as to the consequences of the new procedure?

Mr. NORTON. I would like somebody else to jump in. As far as our research throughout the State goes, there are very few counties in the State of California that are using the law and have policies to implement.

There is a great deal of resistance to——

Mr. WIGGINS. Why is that?

Mr. NORTON. I will speak as a user, or as a law enforcement officer.

Mr. WIGGINS. All right.

Mr. NORTON. The conversations are on tape. I feel there are quite a few jurists who don't care to have their decisions taped for posterity. That is a personal opinion.

Mr. WIGGINS. Resistance at the judicial level?

Mr. NORTON. Yes; I believe that from the user level, the law enforcement level, that it is an excellent tool. I think the law enforcement officers would obtain and could obtain a great deal more warrants and conduct more searches by warrants, as you described, if they had a procedure that did not take them 4 to 5 or 6 hours to get a warrant.

Mr. WIGGINS. Does the sheriff over here join in that observation that there is some resistance by the magistrates themselves?

Mr. STEVENS. No, sir. I have not noticed that resistance. I can speak very briefly about my experience with it in Santa Cruz County.

We have not used telephonic search warrants to a great extent. They are not used as a matter of routine and I have not noticed an increase in the number of search warrants that we obtain because of the facility of being able to get telephonic search warrants.

We get search warrants whenever we are required to have a search warrant in order to make a search and, under the present system, that is any time you want to make a search of a residence.

The telephonic search warrants that we do obtain are obtained primarily to convenience the officer and the district attorney and possibly to convenience the judicial system.

Also, something that has not been alluded to is the convenience of a defendant. Many times if you are trying to obtain a search warrant at 3 o'clock in the morning, it is going to take you quite a bit of time to write the affadavit, plus the time to contact the magistrate and get it signed and come back to the residence and conduct the search.

A telephonic search warrant can be obtained in a matter of 20 minutes to half an hour from the time it is initiated to the time you have the document. The search can be completed and you can be out of the person's house in a reasonable period of time.

Mr. WIGGINS. May I inquire further into the mechanics of this, Mr. Chairman, if you don't mind?

Mr. MANN. No.

Mr. WIGGINS. I guess the best way is to talk about a hypothetical case.

You have an officer in the field who is possessed of information which causes him—him being the officer—to believe that there is a need to search a premise. Now, does the officer first telephone the district attorney's office for guidance with respect to that or does he make his first contact directly with the magistrate?

Mr. STEVENS. I will explain how it is used in Santa Cruz County. I don't know if it is used throughout California in the same way or not.

If an officer finds himself in a premise and cannot make a search, but does have probable cause to believe that there is contraband or evidence of a crime that would give him cause to get a search warrant for the premise.

In the premise he can get a conference call, make a conference call which is three-way with the magistrate and one of the assistant district attorneys and himself. He has the tape-recording equipment with him and the assistant district attorney on call has a format that he follows for questions and the magistrate has the forms necessary to complete his end of the search warrant at his residence.

The conference call begins and everybody identifies himself. The assistant district attorney talks through the affidavit, with the officer and magistrate listening. At the completion of the conversation, the

magistrate will review the elements giving probable cause to search, what to search for, and identifying the premise and any strictures that would have probable cause for search are vehicles and they are all in there and named at the time.

The magistrate then gives the authority to the officer who signs his name to the duplicate original and he then conducts the search.

Mr. WIGGINS. Have you found in the course of this three-way conversation that the magistrate gets into the position of counseling and giving advice with respect to how to handle the situation?

Mr. STEVENS. That has not been my experience, no.

Mr. WIGGINS. Has that been the exerience of anyone else?

Mr. FELD. No.

Mr. NORTON. That is the experience of Los Angeles County.

Mr. WIGGINS. I'll tell you, it's practical and almost emotional—it's tough not to do that. These magistrates are all attorneys, former attorneys, and when you are not ruling upon a presentation, but you are present during the evolution of a case, it is awfully hard not to put on your advocate's hat.

That, of course, would be very unfortunate, if a person who is hired to be a magistrate and rule upon the sufficiency of evidence is almost a witness to the presentation of the evidence.

Mr. STEVENS. If I could make a comment about that last statement?

Mr. WIGGINS. Yes.

Mr. STEVENS. It has been my experience that that would happen—if it is going to happen on a written affidavit, it would happen the same way on a telephone affidavit.

Mr. WIGGINS. I suppose you could have the officer there with his written affidavit and as a result of examination by the magistrate—if effect, he is playing a role in counseling what needs to be done in order to——

Mr. STEVENS. Beef up the——

Mr. WIGGINS [continuing]. His signature on the warrant——

Mr. STEVENS. Yes.

Mr. WIGGINS. Is it not common for the officer to call the deputy district attorney first before setting up this conference call, or whether it is a conference call or not, to get his advice as to whether or not he should go ahead and get a warrant for the search?

Mr. FELD. Not in California. You can't make warrantless searches of residences in California.

Mr. WIGGINS. Under any circumstances?

Mr. FELD. Not of a residence or business.

Mr. WIGGINS. You can only make an arrest and I suppose that all of a sudden your decision in those emergency cases to make an arrest—you would characterize it as a lawful search incident to a lawful arrest——

Mr. FELD. Only of a person in the immediate vicinity.

Mr. WIGGINS. Of course, of course.

Well, that raises another question because not only did I read the example somewhere, but you spoke of it.

You talked about being on the confined premises when you make the call?

Mr. STEVENS. Yes. Usually that is the way that it happens. If I didn't explain clearly—an officer will be in the premises to make an arrest. Upon making his arrest, the *Chimel* decision keeps him from making a search of anything other than the lunge area of the defendant.

At that point, he may have developed probable cause to believe that there is contraband in other parts of the house, but he cannot make a warrantless search of the rest of the house at the time.

Then he would—instead of sealing the residence and calling in a lot of other officers to make sure that contraband is not destroyed over a long period of time while we run through the process of getting the affadavit and getting the magistrate to sign it, he would handle it on a conference call and it can be done in a fairly short period of time.

Mr. WIGGINS. If the toilet flushes upstairs——

Mr. MANN. Too late.

Mr. WIGGINS [continuing]. I persume something happens. I presume the officer doesn't say, hurry up, judge.

Mr. STEVENS. Well, we do check the house for confederates or other persons who could cause the officers harm while they are there. But that is not a search of the premises, just a check for somebody else that could be in the residence.

Mr. MANN. Well, you mentioned a circumstance that I am curious about.

The officer has the tape recorder——

Mr. STEVENS. Yes, sir.

Mr. MANN. The magistrate doesn't have it in his bedroom or office?

Mr. STEVENS. He may have it, but our system is not set up that way.

Mr. MANN. It is adequate for the officer to have it?

Mr. STEVENS. Yes.

Mr. FELD. We have another method of resolving the problem for the officer in the field. On a conference call you can call the sheriff's desk and they will have a tape recorder available, They will plug it into the telephone. He doesn't participate in the phone call. It is just that that is a telephone that can be used to receive the communication, along with the judge and the officer in the field.

Mr. WIGGINS. Does the State provide the judges with some standard equipment?

Mr. FELD. No. We would not like to trust that mechanism.

Mr. MANN. Well, is it pretty much up to the judge to have something——

Mr. FELD. The judge has nothing to do with the recording of the information.

Mr. MANN. Oh, I see. I see.

Mr. FELD. He doesn't do anything except say, yes, you have probable cause, go ahead and search.

Mr. MANN. I see. In this three-legged stool, the recording is made——

Mr. FELD. Anywhere.

Mr. MANN. Well, anywhere.

Mr. MEEHAN. If I may interject here, I think there is something important that should be stated right now and that is that there is not uniform procedures among the counties in the State of California.

For instance, you just heard two gentlemen talk about the police officers doing the recordings, either through the sheriff's office or by the officers on the scene.

There are a number of jurisdictions—I think primarily of San Diego, who you will hear from on Monday, and ourselves in Alameda County—we think that the integrity of the affidavit should be preserved judicially.

So, consequently, they have taken the approach that the recording device should be in some fashion in the hands of the magistrate at the scene or in San Diego, they have a telephone setup wherein the judicial district, in the locked chambers, are tape recorders. The tape recording takes place in that locked chamber and are transcribed by court employees or stenographers.

Mr. MANN. Well, I suppose I assumed that. But apparently, I was assuming too much. Under the procedures described heretofore, the sheriff's office transcribes the conversations, right?

Mr. FELD. That's right. But we have to—you don't have it in your bill, but we have to give the tape, with the machine, plus the transcribing material, to the judge. He listens to the tape, reads the transcript and then he can record it as true and correct——

Mr. WIGGINS. I see.

Mr. FELD [continuing]. Or not.

Mr. MANN. And then he files the transcript of the tape and the original——

Mr. FELD. That all stays with the court. Then counsel can come in and listen to it later, if he wants to.

Mr. WIGGINS. Mechanically, how does this work, now? I believe that it is proper that the transcript and the recording should be under judicial auspices, rather than under enforcement auspices. Mechanically how does it work?

Mr. MEEHAN. Well, I am invading San Diego a little bit, but I happen to be familiar with their procedure. They will outline it for you more clearly on Monday, but in Alameda County—and partially this might be responsible for the fact that we experienced a different type of success in the oral search warrant field—the way we initially set it up was that we had training bulletins that were published and training seminars and videotapes that were set up both with the police and with the various judicial magistrates from all the judicial districts.

First of all, we explained the bill to them—the 1970 bill—which they had never heard of. We explained the procedures and we tried to get uniform procedures established in Alameda County.

The procedure that was developed was that within the individual bailiwicks of the magistrates—that would be their judicial district—that they would have these tape recording devices available so that an onduty magistrate would have it present in his home.That would be after court hours, that type of thing.

Otherwise we would generally go to the magistrate in session and use his reporter, or whatever, in order to get a search warrant. But at nighttime or weekends, he would have the tape recorder. Without going into the mechanics of it, he would be the one who would have the tape recorder and cause it to be activated when an affidavit was going to be put forward.

He would then record the thing, which would have all the conversation of the officer and himself involved in this authorization. Then he would maintain the individual tape and put it into a box, you know, and label it.

Then, the next day he would deliver it to the court stenographer. There were safekeeping devices there in each of the judicial districts where they would keep them safely.

We were concerned with a lot of things at that time, namely, that magnets could be used to erase them and that the police could be accused of interfering with them. The integrity should be maintained by the court.

So, that tape was available and of course, the transcription would be made by a court employee and it would then be authenticated by the judge. He could listen to the tape and the tape would, of course, be available to the defendant and his counsel when they wanted to see it.

Now, San Diego County is different. I think that their procedure was much better than ours turned out to be. There the judge is in no way involved in the recordings. However, it is still under the auspices of the court inasmuch as they have established in their main judicial district down there—the San Diego judicial district—a locker-type affair, where they have two tape recorders, each having 3-hour tapes.

It's a fail-safe. If one fails, the other one will activate. They have backup units to them so that if the tape can run down because of prolonged sessions, they can go onto the other tapes. It's a locked system.

So, when they establish the conference call with as many officers as they desire—they have the deputy district attorney and the magistrate on the line. All this has, of course, been approved prior to this. The telephone company has set up this conference call, which is activated by the sheriff's office, who has the button to press to turn it on.

The recording mechanism is not in the judge's possession—although it is under his control—because it is in this locked room in the judicial district. The next morning they have the legal stenographers go in—they are in the employ of the court—and they will transcribe the tapes.

So, they have the tapes available, and they also have the warrants available. Now, that's the two ways——

Mr. MANN. Has it worked?

Mr. MEEHAN. San Diego feels that it has been quite successful. In Alameda County we have experienced another kind of success. If you can bear with me, I will tell you what it is.

Chimel, of course, was the prime motivation for all of this. In California—if you are not familiar with the law here—the constraints against us because of *Chimel* in California are almost to the point that you—well, if the defendant can't reach it, forget it, you aren't allowed to search it.

You can search the home, but you need a search warrant to do it, unless there is an exigent circumstance. You talked about the case with the flush of the toilet. We can legitimately present to the court that evidence is being destroyed and they would allow us to move forward to preserve it without a warrant.

But at any rate, because of that, we knew we needed a lot more warrants in order to proceed. Before, you could arrest a man in his home and then search his home incident to that arrest if it was consistent with the nature of the offense for which he was arrested.

Now we needed more warrants. So, the oral search warrant law came out as a result of that. In implementing it, we found out that we had a lot of problems. We didn't have available magistrates. You know, when you wanted to get a search warrant before, you would say, "Who should we call?" And the judges, of course, did not like being

called at 1, 2 o'clock in the morning. So, it was a helter-skelter type of affair.

We made the judges aware that the legislature had put this out and that we had to comply with *Chimel* and that the judges had to be available. So, they initially gave it a try, but they didn't like working with the tape recorders. Fiscally, they didn't have the funds to provide tape recorders.

We found ourselves—the district attorney's office—providing it to them, where we had them available, so that they could use them. They saw the need for extra personnel, like stenographers. I talked already about the safekeeping procedures. It got into budgetary concerns. They revolted at all these types of things.

To make a long story short, even though they understood and could cope with it, they decided that they would like to see an alternative procedure. One of the things I have to say was a primary concern of the magistrates was that they did not like their voices on the tape in the early morning hours when they had been taken out of a sleep or had come home from a party, or whatever the situation was. In reviewing them, they might not sound as articulate or as intellectual as they might like to sound.

So, what they said was, OK, we have six judicial districts in Alameda County which cover the whole county. We will have an on-duty magistrate in each judicial district available to you 24 hours a day. You provide a deputy D.A. in that district and we will work with the police.

Now, the effect of that was that it made magistrates available. Geographically, it knocked us down so that we could get an affidavit of this type in a short amount of time and go up to the judge's house within 10 minutes. He could look at a written document, sign it, and we could then execute a search warrant.

That became very practical for us in Alameda County. So, we didn't have to use the oral search warrant so much. The law and this oral search warrant law caused this result, which made these magistrates available to us. That proved to be quite fruitful to us.

Now, that is fine in Alameda County, where we are a large county with a lot of people and have a lot of courts available. For large counties on the Federal Government level, I would think that that would become very impractical. I think that distance is a great concern in larger counties and especially on the Federal level.

But I thought you should just be acquainted with what is happening in Alameda County. Right now we are not using the oral search warrant that much.

Mr. WIGGINS. Our committee, as you know, has had some experience with tapes. And if we learned nothing else from them, we learned that they are difficult to understand without a high level of sophistication in improving the quality of the tapes.

It could be that the tapes that we were listening to were clandestinely placed about the room and were not direct communications into a phone, but tell me something about the quality of the reception.

Does it permit—has it been shown to permit a high quality and accurate reproduction of the conversation by the girls with their earphones listening to the tape, backing it up, typing a few words, going on—I'm sure that is the mechanism.

Are they able to reproduce accurately the conversation as it occurred?

Mr. MEEHAN. We thought we could get an accurate reproduction. Sometimes it was very difficult, as you explained. Speaking for Alameda County, we don't use it so much anymore at all.

Perhaps the gentlemen that are actively using it could give you their opinions better than I.

Mr. FELD. We do it a lot. A lot? Well, maybe 10 or 12 times a year. On the east end of our county—our county is 21,000 square miles, and the major part of the business is—of the court system—in San Bernardino. That controls a lot of area, the desert, the mountains and it may be 250 miles to where the offices are.

It's really impractical for an officer to drive 4 hours, type up a search warrant and affadavit for 2 hours, take it to a judge and then drive back 4 hours. We have not had a really difficult time with tape-recording equipment, just insisting that they use good tape recorders, probably no different from the tape-recording machine at the end of the table. With an induction coil that you stick in the telephone, you avoid a lot of interference from outside noises.

I have found in our situation that most of the search warrants that we had were for either murders, grand theft, burglaries, robberies and such, where the officers were instigating the investigation that night when they finally arrived at the suspect's house or location and made an arrest.

They know the evidence is there, but they can't get it and the only way to get it is with a search warrant, whether it be by telephone or taking the resources of pesrsonnel to drive them back to the judge.

When we first started in 1970, we were up around number 500 search warrant from the beginning of time, from the beginning of using search warrants in the county. We are now up in the neighborhood of 3,000. My experience has been that——

Mr. WIGGINS. And only 9 or 10 of these were telephonic search warrants?

Mr. FELD. A year, that's right. The officers would rather type them up, because you miss things when you are talking over the telephone. You assume that you have on the affidavit all of the information. If you read it, it may not be there and there is therefore a risk involved in doing it over the telephone.

Mr. WIGGINS. Well, in general, we have two major kinds of situations. One situation involves a planned search of the premises. It may not even have a defendant in it. You have got time to think about it, and in those cases I take it that it is your practice and the preferred practice, to get a written search warrant?

Mr. FELD. That's right.

Mr. WIGGINS. But in the kind of situations where you have an arrest and you have an entry—and a lawful entry—for the purpose of making the arrest, but your search is confounded because of *Chimel*——

Mr. FELD. It could be with an arrest warrant, by the way.

Mr. WIGGINS. Yes; it could be pursuant to an arrest warrant. But now you would like—quite understandably—you would like to pick up evidence which is just beyond the reach of the defendant and you feel that you might be subject to a successful motion to suppress or to exclude that evidence if you do so.

So, you've got a defendant in custody and the evidence almost in sight, but out of reach. And in that kind of situation, that is when you use the oral search warrant?

Mr. FELD. Yes; but there is a third kind of situation that we haven't talked about.

We have gone to residences with search warrants and you describe the articles to be seized in the warrant. Very frequently, you find that those things are easily accessible. You find those things right away, but while you are finding those items—I'll give you an example.

We had a warrant to seize two stolen rifles and as we got into the bedroom where the rifles were located, there were 16 rifles stacked up, one against another. We checked the serial numbers of those rifles and they came back from other burglaries.

So, I got on the telephone and called the judge and asked him for a search warrant to search for other property which was taken in the same burglaries as some of these rifles. Plus, we had also found the silencer for the weapon and some narcotics.

We really wanted to look over the house very carefully. It would have taken quite a while to go from the residence back to the judge and then back to the residence, which would have been a needless waste of time. We had a lot of personnel there to do the search, because we didn't want to take any chances on that occasion.

The search resulted in the seizure of about 60 stolen weapons, a lot of other kinds of stolen property, narcotics, the silencer and a lot of other things that——

Mr. WIGGINS. Did you feel that you didn't have the authority to take custody of objects in plain view?

Mr. FELD. We could have taken those 16 rifles that were in that room and that's it. The search would have been over.

Mr. WIGGINS. Even though your warrant only described two?

Mr. FELD. That's right.

Mr. WIGGINS. OK. I agree with that.

Mr. FELD. But there were things in other rooms of the house that we eventually seized in that situation.

Mr. WIGGINS. I see.

Mr. FELD. This is not an infrequent happening. I drafted a warrant for some Treasury agents on a counterfeiting case and they could only describe one particular kind of counterfeit money. They went to this guy's house and he had all kinds of things in the house that would lead them to search for more evidence.

We had no telephone procedure in those days. They said: "Forget it, we'll just take the stuff." I think that if we had the telephone procedure, we would have called them up and got an authorization to go through the house.

Mr. WIGGINS. I would like to look at this procedure from the standpoint of defense counsel or the defendent for a moment.

This, in general, is a fourth amendment problem, the admissibility of evidence problem. California has something like a motion to suppress. You might call it something else, it is a pretrial motion.

It is normally based upon the counsel examining affidavits and—just what is in the file available to counsel when a telephone warrant has been issued?

Mr. FELD. Every word that is said between the judge, the district attorneys on the line, the sheriff, or the police officer.

He has available to him the tape and the transcription. He would have available to him a tape recorder so that he could listen to it. He has the duplicate originals of the search warrant, which is signed

by the officer in the field. He has the typewritten search warrant prepared the following day for the judge's original signature, and he also has the return of search warrant and the inventories material taken with regard to the search warrant.

Mr. WIGGINS. Does it tell the defendant and the defendant's counsel more than you would like to tell them?

Mr. FELD. Sometimes.

Mr. WIGGINS. I am talking about that part of the conversation between the district attorney and the officer, which conceivably could lead into—well, a lot of ways.

Mr. FELD. No; the only thing would be that sometimes the judges say he has some doubts about parts of the search warrant. I am not afraid of the defense learning that because it is on the tape. It's probably more helpful to them than the typewritten affidavit that we give the judge and he signs——

Mr. MEEHAN. I think there might be something that you are getting at, here.

What happens is that before the magistrate is ever contacted, the district attorney and officer have gone over the existence of probable cause and they, for the most part, have their script together, so to speak, before the magistrate is contacted.

Mr. WIGGINS. Well, somebody else said that is invariably the case, that three-way conversation——

Mr. FELD. If it's an easy warrant. There are a lot of situations where it's easy to establish probable cause. The officer can call the judge on his own and do it. And in most of the situations we have had, that has been the case. The officer would call the judge directly.

If it is a little bit beyond his expertise, then he can call the district attorney and get some assistance. In other words, have the D.A. ask the right questions at the right time.

Mr. WIGGINS. Well, your police cars now are not only stocked with good supplies of *Miranda* cards, but I take it that they also have blank search warrants?

Mr. FELD. Yes.

Mr. WIGGINS. Maybe even duplicating equipment to make the necessary copies?

Mr. FELD. Well, no. We haven't gotten that far.

Mr. WIGGINS. How have the officers reacted to this?

Mr. FELD. We had a road show in 1970, teaching them how to prepare the affidavits, and I got a load of hooting and hollering from them. In my studies I have found that the good agencies will use search warrants all the time. The farther away you get from a court, the less apt you are to have search warrants at all, or arrest warrants at all, and the farther away you get, you are not going to get telephone search warrants either.

This device is a good method for good officers to do a good job, without undue delay. It won't help the bad officer who doesn't really care anyway. You get way out in the desert and the officer is pretty much the law. They don't get any convictions, but they are the law.

Mr. WIGGINS. You know, the history of the fourth amendment in the United States was that it grew out of a revulsion for the practice under the British of writs of assistance, where you literally had a blank warrant issued for a year perhaps, giving you carte blanche authority to enter anywhere, any place, as long as you had the necessary piece of paper in your hand issued sometime previously

Some elements of the academic community who are interested in history and nothing else have visions of this amounting to a floating warrant being carried around by the police officer. That he simply makes a quick telephone call and gets an OK to execute it. That scares them. What should I tell them besides——

Mr. FELD. I don't see how that is possible because the officer has to give factual information which will develop this concept of probable cause for the magistrate to listen to and say, yes, you have good reason to go in and search. Unless he has either personal knowledge or knowledge from a reliable person who has knowledge, he can't get a warrant or approval from the magistrate.

If he did, the court of appeal would set it aside and say, you are wrong, Judge. But actually, even before you get to the court of appeal, in our system you have already had three hearings to suppress that evidence.

Mr. KELLER. Yes, Congressman. It doesn't change any of the constitutional requirements, particularity of the description, the statement under oath, and probable cause and all that has to be satisfied. So, I don't see how there is a danger, particularly under our law where the time of issuance has to be noted on the original warrant and the time of execution of the warrant in the possession of the officer. That limits the scope of time. I don't share the concern that they have.

Mr. WIGGINS. Another argument that has been made is that in our system we attach a great importance to face-to-face testimony. The trier of the fact can judge the demeanor of the witnesses before him. So, the argument goes that that is impossible in the case of telephone communication. I would be interested in anyone's response to that. That is a real argument and one that will be made again, I am sure.

I take it that the consensus here is that you don't feel that argument is meritorious. But why not?

Mr. FELD. When an officer is going to a judge to get a warrant, under the usual procedure he hands him a piece of paper and says, this is my affidavit. The judge sits down and reads it and if he has any questions, he will ask the officer.

Mr. WIGGINS. Does he swear the officer?

Mr. FELD. They swear him ahead of time. But that's all he does. He reads the affidavit and he asks any questions and if he likes the affidavit, he will sign it and then sign the warrant.

There isn't any by-play that is recorded actually, between the officer and the judge, that anybody will ever hear about. You get more of the interplay over the telephone than you do by this affidavit.

We prefer just giving him the piece of paper and having him sign it, but there are situations that will lead to warrantless searches unless we have the telephone available to us. I don't see that there is any advantage to face-to-face passing on of information with a piece of paper.

Mr. MEEHAN. Quite a bit of information that is on the affidavit is not firsthand knowledge of the officer anyway. A lot of it has been given to him from reliable sources, from police reports from fellow officers, things like that. He is the compiler of the information. He serves as the conduit all the way from the beginning as to its reliability.

So, as far as demeanor is concerned, I mean,—well, it's not a question of if he's lying—well, if he is lying about his source of material that could be demeanor, but if it was the source himself lying, you wouldn't have that source before the magistrate at all to discover demeanor.

Mr. KELLER. Plus, the defendant will always have the opportunity to call that officer in court as a witness and get an evaluation at that time. So the only denial of an opportunity to the defense of evaluating demeanor of the affiant, if any, occurs at the time the search warrant is obtained.

Mr. WIGGINS. That's true.

Mr. FELD. Can I comment on something?

Mr. WIGGINS. Yes.

Mr. FELD. In our county, we have two FBI agents in Barstow. The next place down the line that you have to go is in Riverside, and the distance is over 100 miles. There is a magistrate in Barstow, a magistrate in San Bernardino, one in Riverside and you've got some judges in Los Angeles.

But if the FBI agents are at a residence in their county area, it's probably 300 miles to Los Angeles. Now, if your local magistrate is not there, the next one is going to be 3 or 4 hours away, at least, and I think it is very unfair to require them to go to the magistrate and then go back.

Mr. WIGGINS. What do they do?

Mr. FELD. They don't have the personnel in the FBI system to do that. You are going to lose your cases because they were not able to safeguard the evidence which is present in the house while the other one goes to the magistrate, wherever he happens to be.

Mr. WIGGINS. The central district is hardly the largest one in the country. I suppose the problems you just described are exacerbated——

Mr. FELD. I think it's everywhere in the country with the FBI. They are spread out too thin. Then there are the sheriffs.

Mr. WIGGINS. Sure. But it's not new to them. How have they been living with this?

Mr. FELD. Not very well.

Mr. NORTON. Having been an FBI agent, the way that you obtain warrants is through personal rapport. The magistrate knows the agents that produce good cases and those that don't. Those that produce good cases—and I think that's true not just in the FBI, but in most police agencies as a whole.

The magistrate or judge or district attorney is much less apt to probe deeply into an affidavit if he knows the reputation of the person who is before him. If he is unsure of the reputation—things go much quicker when you have the reputation for pretty quality cases and not putting the jurist or the district attorney on the spot with half-baked information or what have you.

In cases as have been described with distance, I think the FBI in many cases has to hold back until they are in a position of having manpower. The FBI rarely gets in there quick. It's mostly as a result of a good period of time and having everything done before they even go to a search situation. I think the FBI doesn't have the same problems as most local police agencies do.

Mr. WIGGINS. It doesn't have as many emergency situations?

Mr. NORTON. That's right.

Mr. FELD. That's true, but they do run into cases where they would like to search more and they have to just try to get a consent search.

Mr. NORTON. They have to phone back the office and have another agent go back.

Mr. WIGGINS. Well, I guess that every consent search is going to result in a motion to suppress.

Mr. FELD. We have the motion to suppress anyway, but you are more likely to win on a consent search from a defense standpoint, than you are with a warrant. They don't—they just don't get the warrants if they have to drive 4 hours to get a judge.

Mr. WIGGINS. Well, we have a decision to make. The ultimate decision to make is whether to recommend a change in the Federal Rules of Criminal Procedure to authorize this on a national basis. We have to make the decision on the basis of empirical evidence and the place it can be found is in California and Arizona right now.

Mr. Chairman, I gather that there is nobody sitting at the witness table right now that counsels us not to adopt it.

Mr. NORTON. If I could just say—I feel and I think I am speaking for the police chiefs, we feel that it is a useful tool, and strictly a tool. I think that it gives the users, the law enforcement officers, the ability to handle the job in a better manner.

I don't think that it should be considered anything else, but another tool. The only difference that I would state, as Attorney General Keller said before, clerical errors should not benefit the person who is searched, such as the exclusionary rule.

The Federal law is written in such a way that, you know, a straight clerical error, such as the case of an officer who went through the entire procedure and did everything right, but forgot to write the judge's name on the warrant and had the case thrown out based on that clerical error.

I think if you were writing the law, that those types of things should be taken into consideration as not hurting the validity of the warrant.

Mr. WIGGINS. The warrant is the original. The officer never has "the original" in his possession. I think this probably was an application of the rule as to whether or not there had to be some delivery of the copy of the warrant——

Mr. NORTON. That's right.

Mr. WIGGINS [continuing]. To the premises. They were not able to do so in the conforming part of the statute.

Mr. NORTON. The officer is directed by the judge. The district attorney asks him to decide whether Officer Jones may sign his name to the warrant. The judge says, yes, he may sign my name. You sign his name to the bottom of the duplicate warrant that you are going to carry with you at the time of issuance.

There was one case that held that because the officer did not sign the judge's name, that the search was invalid and we submit that we think that that goes beyond the intent of the law.

Mr. MEEHAN. If I am not mistaken, wasn't that a case where the officer did not have the form——

Mr. KELLER. Yes.

Mr. MEEHAN [continuing]. And he was unable to even complete a warrant and the judge didn't have one at home to do it. So, the issue was—he had an oral affidavit, but the law in California does not allow an oral warrant, ergo, they had no warrant.

Mr. WIGGINS. Sure.

Mr. MEEHAN. That's the point.

Mr. KELLER. It was the absence of the warrant, not the failure to sign it.

Mr. MEEHAN. There is another thing that for warrants, at least the preparation of our warrants, we prepared, it's quite possible that the officer who is the affiant on the case, who is doing the oral affidavit and then completes the warrant, may not be the officer who executes that warrant.

So, we have made provisions at least on our forms, so that the affiant officer signs his name, signs the magistrate's name at his direction and the time that the authorization was made.

Of course, he would also sign the executing portion of it if he himself was also the executor. But if somebody else executed—showing the warrant and leaving its receipt and so forth—he himself would individually sign it and also sign the time that it was executed, which is requited by our statute.

So, let's say that on the Federal setup it might be a situation of one agent actually the affiant, funneling in a lot of information in to the magistrate on oral affidavit. The search warrant is authorized, the duplicate original, and maybe he gives it to somebody else to execute because he has to maintain his post and the individual goes out and executes it. It would be a different officer than the affiant.

Mr. MANN. You have made virtually no warrantless searches?

Mr. NORTON. I think just in the circumstances of emergencies when you are not sure that you are going to be conducting a search. You might be led to a place in the course of an investigation where all of a sudden you must make an arrest that you have not planned on at a place that you had not planned on.

Then you would be doing it without a search warrant at that premise. That is in many cases the time that you are going to have to come back and I think that that is a fairly common practice, mainly in narcotics investigations and in investigations of burglary, any kind of investigations that go from one jurisdiction to another.

You are operating on a task force and when you start you are not sure exactly where the thing is going to wind up and you have a district attorney that is waiting by the phone to find out, you know, where you are going to be and finally when your burglar goes into a residence in another city, then your case starts coming together.

So, yes. We all get search warrants when we have the opportunity when we know what is going to be happening. But, in a continuing investigation and in an emergency situation, a great deal of the time you are just stuck there all of a sudden with a place to search with a defendant suspect and that is the first time that you are able to start your paperwork.

Mr. MANN. And you are telling me that you go ahead with your search and you don't bother with this telephone procedure?

Mr. NORTON. No, no; I think the point is being made that in California every county and district attorney has made his own policy as to how this procedure will work.

Mr. MANN. Yes.

Mr. NORTON. I really feel that it probably should be one policy for the entire State. Some counties say that police officers cannot phone the judge, you must phone the district attorney. The district attorney phones the judges and then there is the conference call.

As we hear from other counties, the officer can sometimes phone the judge directly. There are as many different ways of handling our law as there are counties in California.

But sure. We obtain the warrant or be satisfied that the fruits of the crime are going to be inadmissable.

Mr. MANN. Do any of you have any other information that you think will be helpful to us?

Mr. MEEHAN. I might mention that I think that there has been tremendous increase in the use of warrants in California and I think that that is primarily caused by *Chimel* and in particular in California, the way our Supreme Court has interpreted *Chimel*.

California has even come up with another case last year which is called the *Ramey* case, where they require us where we have probable cause when we go to a home, we must have a warrant in existence. So, the constraints on us even being in the home are quite heavy.

So, obviously, they are going to make officers do their preliminary work relative to warrants in the arrest vein. When they do it in the arrest vein, they also do it in the search vein. Subsequently, when they go to a home, many officers are armed with search warrants, mostly written.

Therefore, statistically, you will find a tremendous number of warrants now being issued, whereas they would not have issued those back before 1970.

Mr. MANN. Mr. Smietanka?

Mr. SMIETANKA. I have one question. The California statute does not require, as I understand it, that the circumstances make it reasonable for the issuance of an oral warrant as opposed to an affidavit search warrant? Is that correct?

Mr. FELD. Correct, sir.

Mr. SMIETANKA. And if there is a policy it is worked out on a hit-or-miss basis from case to case. Correct? There is a policy established but it is more related to practical circumstances rather than to anything that is set down?

Mr. FELD. We acknowledge the fact that the best warrants are produced by someone sitting in the office and thinking about it and if you have that situation you are going to type it out ahead of time.

If you can't, then you use the emergency telephone procedure.

Mr. SMIETANKA. Given that, the——

Mr. FELD. If you had that thing in there, then before you even start the conversation you have to say, Judge, I need this telephone warrant because—but if you——

Mr. SMIETANKA. Looking at the first three lines of the proposed Federal rule, is it useful to require a certain set of circumstances that make it reasonable to proceed by way of oral affadavit or should that be left to the circumstances as they arise?

Mr. FELD. I don't think it is necessary.

Mr. MEEHAN. Not necessary.

Mr. WIGGINS. Well, it is stated backwards, but at least it is stated on line three and four of our proposed statute, "When it is reasonable to do so, in the absence of a written affadavit, you can proceed with an oral affidavit." What I think is intended is that when it is unreasonable to get a written affidavit that you can proceed with an oral affidavit. Presumptively, it is always reasonable to get a written affidavit, or an oral affidavit.

Mr. FELD. Right.

Mr. STEVENS. One exception would be that in my experience it is unreasonable to take time when the judges are in court. Then it's difficult to get an oral affidavit. We are better off getting it typed and catching a judge between recesses, because they are willing to spend the time on the telephone during court time.

Mr. MANN. Yes.

Mr. STEVENS. Just as——

Mr. WIGGINS. Even now under this setup?

Mr. MANN. He is talking about during the day when the—when he follows the judge's breaks.

Mr. MEEHAN. When I say "24 hours", we consider the judges to be available when they are on the bench. Of course, when they are on the bench, we will go with written affidavits. I think most jurisdictions will. This is only for weekends and after hours that we we are talking about oral search warrants.

San Diego will tell you that they have a standing rule there that any time you get a search warrant that is oral in nature, it calls for immediate execution, because obviously the reason you wanted it was because there was an emergency situation. Otherwise, you get a written warrant where you have got a 10-day execution clause.

Mr. MANN. Anyone else?

Mr. WIGGINS. No.

Mr. MANN. Thank you very much, gentleman. You have been very helpful to us.

[The prepared statement of Eddie T. Keller follows:]

STATEMENT OF EDDIE T. KELLER, OFFICE OF THE ATTORNEY GENERAL, SACRAMENTO, CALIF.

Mr. Chairman and fellow committee members, our office was asked to appear today and present the California statutory and case law which applies to our State procedures for obtaining search warrants via telephone or other similar means. Please bear in mind that the Attorney General's Office is primarily involved with the academic aspect of this question. We have little practical need to resort to the use of such procedures. The occasions when our State narcotics agents and other criminal investigators might have need to utilize such procedures are few and when these situations do occur the agents would nearly always be working in conjunction with local prosecutors, not our State attorneys. Thus our primary familiarity with this issue occurs on appeal, after a criminal conviction, when a defendant is raising legal challenges to the search which occurred in his case.

The law in California related to obtaining search warrants by telephone and other such means is contained in Penal Code sections 1526(b), 1528(b) and 1534(b). Prior to enactment of these laws in 1970, our statutes provided that search warrant affidavits had to be either in written form or sworn testimony which is reduced to written affidavits, and all search warrants had to be personally signed by the issuing magistrate.

Our new statutes state that instead of a written affidavit, a magistrate may take an oral statement under oath. This statement must be recorded by the magistrate or by a certified court reporter.

If the magistrate believes that probable cause has been established, he may orally authorize the officer to sign his name on a duplicate original warrant which shall be deemed a search warrant.

The magistrate must enter the exact time of issuance on the face of an original warrant and sign his name on it, and the officer must enter the exact time of its execution on the duplicate original warrant.

The oral statement must be transcribed and, once done, will be deemed an affidavit for search warrant purposes. When the statement is recorded by the magistrate, he alone certifies the recording and the transcription. When the recording is done by a court reporter, both he and the magistrate certify the transcribed statement.

Finally, the magistrate must file with the clerk of the court the sworn oral statement, the transcription, the original warrant and duplicate original warrant.

These are the basic provisions of our statutory law.

Since these statutes were enacted in 1970, only twelve cases touching directly or indirectly on this subject have reached the appellate court level in the form of a reported or published decision. Of this number, only five cases have directly involved search warrants obtained by means of a telephone and only three of these cases have specifically considered legal challenges to our statutory procedures.

In one of these cases, (*People* v. *Peck*, 3 Cal.App.3d 993 (1974)), the defendant claimed that our statutes on this subject were unconstitutional because they allegedly permitted issuance of search warrants without adequate judicial supervision or protective measures. The Court of Appeal rejected this claim noting that neither the United States nor the California Constitution search and seizure provisions require the presentation of a warrant affidavit as a prerequisite to the issuance of a search warrant. The court then reviewed the safeguards and close supervision by magistrates which our statutes provide and concluded that the constitutional challenge was invalid.

In this case the court also settled other important legal claims. It held that the language of the statute did not require the oral statement to be transcribed before the search warrant issued. It indicated that the transcription may be done at a later time if done promptly and so that it is available for an accused to challenge.

The court also held that no special or unusual facts over and above normal probable cause need be shown to justify issuance of such a warrant. This appears to differ with your proposed federal statute. Your proposal apparently would require the requesting officer to show why obtaining a written affidavit is not reasonable or possible.

In another case on appeal, (*People* v. *Aguirre*, 26 Cal.App.3d Supp. 7 (1972)), the defendant claimed that our statutes on this subject intended to provide only for the taking of oral statements in the physical presence of the magistrate. The Court of Appeal rejected this view and held that the oral statements contemplated by these statutes may be taken by telephone, two-way radios, or face-to-face confrontation. The court also held that the magistrate's failure to administer an oath to the officer until after he had related the information used to support issuance of the warrant was not prejudicial error.

The third case which has dealt directly with telephonic search warrants, (*Bowyer* v. *Superior Court*, 37 Cal.App.3d 151 (1974)), illustrates that our statutes on this subject are being very strictly construed by our courts. In that case a police officer sought search warrant authorization by telephone. The information he related supplied abundant probable cause to search and the magistrate orally authorized him to conduct a search and sign his name to a search warrant. The problem was that the officer did not have a search warrant with him and did not sign the magistrate's name on any warrant prior to the search. The Court of Appeal ruled that our statutes on this subject authorize an oral procedure for the search warrant affidavit, not oral issuance of the warrant itself. Therefore, since there was no written search warrant in existence prior to the search, the evidence seized was inadmissible.

These are the only reported appellate cases which have dealt directly with search warrants which are obtained telephonically. However, other related case law has supplied legal guidance in this area. These cases primarily involve the situation where an officer or informant personally appears and gives sworn testimony before a magistrate to secure a warrant. These cases established the following legal rules.

The Fourth Amendment to the United States Constitution does not require the magistrate who issues a search warrant to personally take the affidavit of the officer seeking the warrant. Due process of law under both federal and state constitutions is satisfied in such a situation if the magistrate has the opportunity to examine the affiant should questions arise. (*People* v. *Chavez*, 27 Cal. App. 3d 883 (1972).)

A magistrate may not prepare his own addendum to a search warrant affidavit by questioning the affiant, signing it himself, and indicating the affiant has sworn to its truth. Such affidavits must be sworn to by the affiant himself and either prepared in written form or recorded and transcribed verbatim (*Charney* v. *Superior Court*, 27 Cal. App. 3d 888 (1972)).

Sworn testimony from an affidavit which is not recorded and transcribed as required by section 1526(b) may not be considered to determine probable cause (*People* v. *Hill*, 12 Cal. 3d 731 (1974)). However, a magistrate may utilize such a procedure to assess the demeanor and credibility of an informant in support of

otherwise legally sufficient affidavits (*Theodor* v. *Superior Court*, 8 Cal. 3d 77 (1972)).

Aside from the foregoing, I can represent that our office believes that these search warrant procedures are a valuable tool for law enforcement, particularly where time is of the essence. At the same time, we are confident that our statutory procedures on this subject adequately safeguard a defendant's rights and interests. None of his constitutional guarantees to probable cause, a sworn statement, particularity of description of place and property to be seized, and a neutral magistrate are affected or diminished by these laws. All these requirements still must be satisfied before such a warrant can issue telephonically. Also, our statutory procedures adequately provide a defendant with an adequate record on which to challenge the search made in his case.

Mr. MANN. The subcommittee will recess these hearings until Monday morning, 8:30 a.m., April 25, 1977, in the same place.

[Whereupon, the subcommittee meeting adjourned, to reconvene at 8:30 a.m., Monday, April 25, 1977, at the same place.]

TELEPHONE SEARCH WARRANT PROCEDURE

MONDAY, APRIL 25, 1977

HOUSE OF REPRESENTATIVES,
OF THE COMMITTEE ON THE JUDICIARY,
San Francisco, Calif.

The subcommittee met, pursuant to adjournment in Room 2007, Federal Building, 450 Golden Gate Avenue, San Francisco, California, at 11:05 a.m., Hon. James R. Mann [chairman of the subcommittee] presiding.

Present: Representatives Mann and Hyde.

Staff present: Thomas W. Hutchison and Toni Lawson, counsel; and Raymond V. Smietanka, associate counsel.

Mr. MANN. The Subcommittee on Criminal Justice will now convene for the purpose of consideration of H.R. 5865, telephone search warrant procedures, and related matters.

Our witness this morning on telephone search warrant procedures is Chief Deputy District Attorney Richard Huffman. Mr. Huffman will testify on behalf of San Diego County's district attorney, Edward Miller, who is the author of an article on telephonic search warrant procedures which appeared in "The Prosecutor."

At this time, if there is no objection, a copy of that article will be made a part of the record. [See app. 1 at p. 33.]

TESTIMONY OF RICHARD HUFFMAN, DEPUTY DISTRICT ATTORNEY FOR SAN DIEGO COUNTY, ON BEHALF OF SAN DIEGO COUNTY DISTRICT ATTORNEY EDWIN L. MILLER, JR.

Mr. MANN. Welcome, Mr. Huffman.

Mr. HUFFMAN. Thank you, Mr. Chairman.

Mr. MANN. You may proceed as you wish.

Mr. HUFFMAN. Thank you.

Mr. MANN. I wish to say that I read the article. I know Mr. Miller's enthusiasm for the procedure. I will ask one preliminary question. What does it cost for the mechanical, electronic setup that you have?

Mr. HUFFMAN. Our initial investment was $2,000.

Mr. MANN. That is all?

Mr. HUFFMAN. For the electric equipment.

Mr. MANN. I see.

Mr. HUFFMAN. I might at this point explain the equipment which we have.

Mr. MANN. Yes, please do.

Mr. HUFFMAN. We have arranged, through the county sheriff, a modification of the switchboard to provide for conference call capability. All of our telephonic search warrants are arranged through the sheriff's office, by means of conference calls.

The sheriff, therefore, is able to activate the recorders, which are lodged—not in the possession of law enforcement—but in the possession of the court, in the main courthouse in our town.

Mr. MANN. Let me interrupt you at this time. Mr. Hyde was not here Friday and didn't hear some of the alternate methods that are being used, one being that the law enforcement officer in the field has a tape recorder in his possession, on which he records the conversations with the judge, the magistrate. So, it is in his hands and suspect.

In this case it is in a sealed room, a room in the courthouse or the sheriff's office——

Mr. HUFFMAN. The recorders are actually in the custody of the municipal court. They are locked in a room under the control of the clerks of the court.

Mr. MANN. And the conference calls come through the sheriff's switchboard or through the central operator?

Mr. HUFFMAN. Through the sheriff's switchboard.

Mr. MANN. Through the sheriff's switchboard, and hooked into that is a recorder in a locked room?

Mr. HUFFMAN. Right.

Mr. HYDE. Interesting.

Mr. MANN. I am curious about one other thing. These conversations that are being recorded, these three-ways calls between law enforcement officers, the deputy district attorney and the judge, are they recording the whole conversation, or do they agree when to start recording after they have solved the little wrinkles in the matter and have talked them out? Of course, that could be completed by a prior phone call by the officer and the DA before they get to the magistrate on the phone, but is the whole byplay among the three recorded?

Mr. HUFFMAN. Once the officer is on the phone with the court. the entire conversation is recorded.

Mr. MANN. Once he is with the court. He can have any conversation with the deputy district attorney prior to that conversation with the judge that is recorded?

Mr. HUFFMAN. Yes, sir. I might tell you that the normal procedure we follow is that, first of all, we assign two deputy district attorneys on a rotating basis. They are equipped with pager devices so if they leave their home they can be contacted at any hour of the night.

An officer who finds himself in need of a search warrant contacts the sheriff's business office and it either contacts the deputy at home—so that we don't spread their home telephone numbers about the whole county—or it pages them using the paging device.

The deputy then contacts the police officer to determine what the problem is, whether he needs legal advice or if he needs a search warrant. The deputy then would go over with the officer the question of probable cause and in many instances directs him to do additional investigation. In some instances the deputy will refuse the issuance of the search warrant.

If the deputy determines to issue a search warrant, he makes sure the officer has the necessary search warrant form, which you have to have in order to comply with California law. The deputy then goes over the description of the premises, the material to be searched for and goes over the familiarity of the officer with the telephonic search warrant procedure. The deputy pretty much works out with the officer what they are going to do.

Then the deputy contacts a judge. Depending on the hour, he either contacts a judge in that particular judicial district or a duty judge who the courts provide for us after certain hours in the evening, or particularly on the weekends. The judges have duty to be available.

The deputy will then talk to the judge, explain that he needs a search warrant and basically what it is about and arrange for the conference call to actually take place.

Once the conference call takes place, the recorder is activated and a signal beeps every 15 seconds, so that we know that the machine is operating. Incidentally, we have two sets of recorders with backups for each one, so that we have two recorders running on each line as they are activated, in case one of them malfunctions.

The court then swears the officer in and testimony is taken at that time. As I indicated, once the conference call starts, everything is recorded thereafter.

At the conclusion of the conference call, the court issues a warrant, instructs the officer to sign his name to the warrant and instructs the officer as to whether or not he will approve night time service.

Our county is probably the only county in the State which makes extensive use of the telephonic warrant.

Mr. MANN. How many counties in the State?

Mr. HUFFMAN. Fifty-eight.

Mr. MANN. Yours is certainly the only one that has this very sophisticated procedure.

Mr. HUFFMAN. Yes, it is. And I might indicate that I have looked at some of the judicial council's statistics. Since 1971 when the procedure was put into effect, we have issued 870 telephonic search warrants.

Mr. MANN. How many have the other 57 counties used, if you know?

Mr. HUFFMAN. Oh, I'm sure they haven't used that many combined. I looked at Los Angeles County and it is down to 10 or 11 a year.

I might incidentally point out that we have not reduced the number of written search warrants. In 1970, we issued about 400 written search warrants and 30 telephonic warrants. In 1973, we had written a little more than 400 search warrants and about 200 telephonic search warrants. Those numbers vary because of changes in State law.

In 1976, the marijuana laws were made misdemeanors, and that cut the number of telephonic search warrants as narcotics is one of the primary areas for searches. Also, the California law changed on financial records, which essentially require search warrants in check cases for us to obtain the necessary bank records to prosecute them. So, the number of written warrants has gone up rather dramatically and the number of telephonic warrants has dropped, but only because of the changes in the substantive law.

I want to project the feeling of enthusiasm about telephonic search warrants, recognizing, however, that there are a number of mechanical problems.

We have found, first of all, that the magistrates actually, I think, participate more in the issuance of the warrant by this process, than they did or do with the written process. Many warrants have to be written because the facts are complicated and it takes a lot of time to work out probable cause.

But we find that what we have done is filled a void here, between the written warrants and those searches that just were going to be conducted without warrants at all.

We took an informal poll of our officers for 1 year and found that they candidly admitted that about 70 percent of the telephonic warrants which they obtained would have resulted in a search without a warrant. And if the search wasn't valid we would not have issued the case.

Mr. MANN. We had a somewhat contrary set of statistics on Friday when two district attorneys were here and indicated that a warrantless search in California was almost a thing of the past.

Mr. HUFFMAN. Well, it may be that they are not issuing cases as a result of bad searches, but the searches are going on. What happens is the watch commander will reject the case at the police department and it doesn't surface in the district attorney's office.

For example, an officer makes an arrest at a house and he sees evidence there, some within plain view, and enough to give him probable cause to search; he is out, for example, in our county which is a large geographic area, in our desert area, or up in the north portion of the county and he is 50 miles from the courthouse and it is 10 o'clock at night; he is probably not going to drive all the way down to some population center, wake up the deputy district attorney, get the warrant typed up, then go find a judge, wake him up, get him to sign the warrant and then go back up for the search.

We found that they will, however, pick up the phone and call. I suspect, very frankly, that is one of the problems why counties have not done what we have done with the telephonic search warrant—and I might say that we are not losing telephonic search warrants in a court of appeal in California; the courts have upheld the validity of the warrants coming out of our county.

If you are at all familiar with California law, this State is probably the strictest of all the States in application of fourth amendment standards.

Mr. MANN. Well, one of the more attractive features of the rule—and you perhaps understand the background of what we——

Mr. HUFFMAN. Yes, sir.

Mr. MANN. And it resulted in the support of the ACLU, as a matter of fact. That was the notion that it would cut down on the number of warrantless searches, and that, of course, is a very attractive prospect.

I had somewhat thought that we had wound up in the wrong State to discuss this matter. On Friday I learned that you all didn't have warrantless searches, but apparently that information was not exactly correct.

Mr. HUFFMAN. Well, I think someone is not being completely candid with you because there are warrantless searches going on in the State and we have found that we have avoided them in our jurisdiction only by an aggressive approach to law enforcement.

We put out a publication for police officers. We print manuals for police officers. We send deputies over to discuss it with them and we have invested a lot of time in getting a system that works. If we have a complaint from an officer that it took too long to get a warrant, we immediately investigate it and find out—you know, deputy district attorneys are just like other people and they goof off just like everyone

else does—but we have found by getting in and actually pushing the project, that the police are coming to the point now where we are getting patrolmen familiar with the operation of the warrant process and even patrolmen are calling and making application for telephonic search warrants.

We thereby get the magistrate involved in a situation where he never would be before. You take a district, a Federal district like Utah where you have large distances involved between where the office might be and where the commissioner or magistrate might be and you have had situations where we have brought—we have gotten together on the affidavit. An officer from Laguna Beach, Calif., which is in a different county, and an officer from our county and a judge and a deputy district attorney were involved. The judge took the testimony of both officers to make up the affidavit for the search warrant.

Now, physically Laguna Beach is 70 miles from the center of San Diego. It would not be possible, realistically, to bring the officer down to get the affidavit. The officer either would have foregone the search or he would have searched and tried to figure out some probable cause later on.

I think telephonic search warrant capability is an important feature for law enforcement to have. It is not going to be easy to implement. As you have seen from your hearings, most countries have just thrown up their hands. We have not only done it at night, but we have arranged for a daytime telephonic process for emergencies only. However, the officer has to do some good selling to us to explain why, because obviously we have to get a magistrate off the bench to hear it.

But we have had homicide situations or robbery situations in which the officer finds himself on a scene in the middle of the day and he is either going to have to get a squad of officers and barricade the building while he comes downtown and goes through the laborious process of writing one out, or obtain the telephonic search warrant. Our magistrates are so interested in this that they will take a judge off the bench. Our process indicates to us that the average time runs from 45 minutes to 1½ hours. That's on an average. Our record time was 9 minutes on one where we issued a warrant to search an automobile.

Now, under *Chambers*, we probably could have searched without one, but we had the capability and we instructed our people to obtain a warrant, a telephonic daytime warrant. It was an important case to us. We didn't want to leave anything to chance and why take the chance that the California court might decide that *Chambers* doesn't apply in California? So we obtained a telephonic search warrant.

The judge was in a hurry. We had a deputy that is an expert. It took 9 minutes.

So, that's about all I can say about telephonic warrants. I have read the rules. My only observation is that the system, I think, has to have the safeguards built into it that we have—that is, that the recording device not be under the control of the law enforcement agency.

I think it should be centralized in a district court, or some Federal court establishment, so that you don't have to litigate the integrity of the affidavit.

Also, it requires or will require of U.S. attorneys—if you approve this measure—to establish some form of training for the Federal officers. You will have to start slowly and try to standardize. We

have much of the language—because otherwise you would have some awful things put out by way of affidavits. The object from the law enforcement perspective is to get valid searches.

Those are my observations. The district attorney would like to have been here, but this is California's victims week, as the Senator told you, and he is in Sacramento today chairing a panel on that particular subject.

Mr. MANN. Would you like to try your hand at some language in our rule?

Mr. HUFFMAN. I would be happy to take a look at your rule and send you any comments we have.

Mr. MANN. Please do that.

Mr. HUFFMAN. Certainly.

Mr. MANN. We thought we had left a lot of questions unanswered and the reason we have tentatively disapproved the promulgation of the rule is on the idea that we try to refine it.

So, your opinions would be very helpful to us. I know one difference—our language, I think, includes some language of showing a reasonable necessity for the procedure. Your language doesn't include that——

Mr. HUFFMAN. That's right. California law does not require the showing of any necessity or good cause. In fact, that was specifically raised in a case out of our county and our court determined that if the legislature meant good cause then it would have said so.

Frankly, gentleman, I think that if our practice is any experience and obviously we are only one county out of one State—I think the telephonic search warrant provides some considerable additional protections really.

When you get right down to it——

Mr. MANN. Well, obviously, if you lay that sheet in front of the magistrate, he is going to sign it.

Mr. HUFFMAN. That's right. You take a 10-page search warrant down and get it signed in 5 minutes.

Mr. MANN. Right.

Mr. Hyde, do you have anything?

Mr. HYDE. No; I do not.

Mr. MANN. You have given us a very concise summary of the way you use it in San Diego County. We are concerned about the logistical application as well. The Federal court setup—in South Carolina we have one Federal district. I don't know how many commissioners there are scattered around the State, but I guess we could have a central recording arrangement that you tie into at the State capitol.

Mr. HUFFMAN. Well I suppose—I don't know where the district court is located.

Mr. MANN. Well, it is basically located in the State capitol.

Mr. HUFFMAN. Well, I don't see why in that instance, even though you have a number of magistrates, you couldn't locate the recording equipment at the district court——

Mr. MANN. And some controlled means of kicking it off.

Mr. HUFFMAN. Certainly. Through the State police, or some central directory. If I were designing one for a State, we would pick the most centralized law enforcement point and——

Mr. MANN. I don't think we have a 24-hour switchboard in the Federal system.

Mr. HUFFMAN. Well, of course, part of the problem is prosecutors. A lot of them don't like the telephonic warrant, you see, because——

Mr. MANN. You have to be on duty.

Mr. HUFFMAN. That's right. It all comes down to the question of management of that particular office.

Mr. MANN. Well, it can be solved.

Thank you so much.

Mr. HUFFMAN. Yes, sir.

Mr. MANN. You have been very helpful.

Mr. HYDE. Yes. Thank you.

Mr. HUFFMAN. You are quite welcome, gentlemen.

Mr. MANN. This hearing is now adjourned subject to the call of the Chair and these hearings in San Francisco are adjourned.

[Whereupon, at 11:20 a.m., the meeting of the subcommittee was adjourned subject to the call of the Chair.]

APPENDIXES

APPENDIX 1

TELEPHONIC SEARCH WARRANTS: THE SAN DIEGO EXPERIENCE

(By Edwin L. Miller, Jr., District Attorney [1])

In 1970, the California Legislature enacted an amendment to the Penal Code which authorized issuance of search warrants based upon oral statements under oath which are recorded and transcribed.[2]

This revoluntary legislation held out the promise of search warrants issued in minutes rather than hours and a flexibility in law enforcement procedure not possible with the cumbersome search warrant supported by written affidavit. In less than three years this promise has become a reality in San Diego County.

The mechanical aspects of preparing search warrants depend upon written affidavits as employed in San Diego prior to 1971 were time consuming and awkward under even the best circumstances. A police officer desiring a search warrant during the daytime was required to contact a deputy in the District Attorney's Office. Busy trial schedules often made this a difficult chore. Once located, the deputy would prepare an affidavit in long hand which would, in turn, be prepared in final form by secretaries in the office. More time was consumed while both officer and deptuy attempted to locate a magistrate who could break away from his judicial duties in court to review the affidavit and order the issuance of a search warrant. Finally, once the officer had obtained the search warrant, much more time was lost while the officer was in transit to the place to be searched.

Officers who desire to obtain search warrants at night found that the time delays in the normal daytime procedure were greatly magnified. As a result, few officers ever made the attempt.

When the United States Supreme Court handed down its opinion in *Chimel v. California*, 395 U.S. 752 (1959), which limited the scope of searches incident to an arrest to the area immediately surrounding the arrestee, the need for search warrants increased to such a degree that the antiquated system reached the breaking point.[3]

Even before the effective date of the new legislation in January of 1971, the San Diego County District Attorney's Office was taking steps to prepare for a pilot program to study the feasibility of search warrants issued over the telephone. A liaison committee composed of a representative of the San Diego Judicial District Municipal Court, the San Diego District Attorney's Office, and the San Diego Sheriff's Department was established. Procedures for implementing the new law were established, equipment was set up, and a small number of personnel was schooled in the use of a pilot telephonic search warrant system. Over the course of the next two years, that small corps of personnel was expanded until today the program is in county-wide operation and is used by more than ten separate law enforcement agencies.

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[1] B.A. Dartmouth College, 1947, L.L.B., U.C.L.A. School of Law, 1957. Mr. Miller joined the staff of the San Diego City Attorney's Office in 1959, and was appointed Assistant City Attorney in 1964. In 1966, Mr. Miller was appointed U.S. Attorney for the San Diego and Imperial Counties, and was thereafter elected District Attorney for the County of San Diego in 1970.

[2] "In lieu of the written affidavit . . . (a), the magistrate may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter. In such cases, the recording of the sworn, oral statement and the transcribed statement shall be certified by the magistrate receiving it, and shall be filed with the Clerk of the Court." Cal. Penal Code § 1526(b), (West, 1970).

[3] The statutory scheme for governing the issuance of search warrants, as it existed to 1970, was contained in California Penal Code §§ 1523 through 1542. The statutory scheme generally comported with the constitutional requirements that the search warrant (1) describe with particularity the place to be searched, (2) describe the persons or things to be seized, (3) be based upon the existence of probable cause to search, and (4) be based upon sworn oath or affirmation that such probable cause exists. Furthermore, former Penal Code § 1526 set forth the typical requirement that the affidavit be in writing.

Today, after two years of development, the telephonic search warrant system operates in a quick and simple manner. A law enforcement officer, having knowledge of what he believes to be probable cause to search, telephones a deputy district attorney and discusses the probable cause evidence with the deputy. In most cases, the officer places his call from the residence he desires to search. The deputies in the District Attorney's Office are selected on a rotating basis to be on duty for telephonic search warrants during the day and during off-duty hours. The names and home telephone numbers of the duty deputies are distributed to law enforcement officers throughout the County. During the nighttime the duty deputies carry paging devices in order that they may be contacted even while away from their home phone.

Once contacted, if the duty deputy district attorney agrees that there is probable cause for the issuance of a search warrant, the deputy then contacts a magistrate, discusses the probable cause information with the magistrate, and if the latter agrees a search warrant should issue, the duty deputy district attorney then contacts the police officer who initiated the request, and a conference call is set up between the district attorney, the police officer, and the magistrate. In San Diego County, the switchboard in the San Diego County Sheriff's Department, downtown office, has been modified to handle the conference call. Once all participants to the conference call are on the line, the Sheriff's switchboard operator then activates tape recorders which record the conversation between the police officer affiant, the district attorney deputy, and the magistrate. At the conclusion of the conference call, the magistrate directs the police officer to fill out a simple search warrant form, setting forth the place and the property to be searched and seized, and the officer is directed to sign the judge's name on the warrant form. At the end of the call, the officer, with warrant in hand, executes it as he would any other search warrant.

The final step in the operation of the system takes place after the warrant is executed. The following day a secretary in the municipal court prepares a transcription of all the previous day's search warrant affidavits from the recorded tapes. After the transcriptions have been prepared, officers who have obtained search warrants are notified. These officers then come to court and take the transcriptions, the tape, the receipt and inventory, and the search warrant filled out the previous evening, to the judge who authorized the search warrant. The judge then reads the transcription to insure its accuracy and signs his name to the transcription. The original search warrant and the receipt and inventory are then filed with the municipal court. In the meanwhile, the judge will have filled out his own search warrant form and affixed his signature to it. The search warrant filled out by the magistrate will go on file in the municipal court along with the tapes and the transcriptions. When more than one affidavit is on a tape, case files are merely cross-referenced.

The recording equipment employed in the San Diego system consists of four reel-to-reel tape recorders, each capable of three hours of continuous recording. There are two primary recorders with two backup units. Both the primary recorder and its backup recorder operate simultaneously to record each conference calll The tape from the primary recorder is used for transcription purposes; the backup unit has completely separate wiring which insures recording of the conference cal. in the event of mechanical failure of the primary unit. A timer automatically activates the second bank of primary and backup recorders after two hours and forty-five minutes of recordation. The system is designed so that if in the future the volume of search warrants requires additional recording equipment, the system can be expanded simply by merely adding sequential taping equipment or using extended lengths of tape. The recorders, selected on the basis of their dependability, are of the electromechanical type. They are located in a secure area of the County Courthouse. Once the recorders are activated, a recording beep is emitted every fifteen seconds which alerts the parties to the fact they are being recorded and that the system is in proper operation.

The telephonic search warrant system required the development of new printed forms. Of primary importance is the search warrant form itself. The telephonic search warrant form is similar in all respects to an ordinary search warrant form except that at the end of the form there is provision for insertion of the magistrate's name which is to be entered by the officer in the field at the magistrate's direction when the warrant is issued. The form is prepared in quadruplicate with the original to be returned to the court, the second copy to the District Attorney, the third copy to the affiant officer, and the fourth copy to be left with the person or premises searched. The form used for inventorying items seized need not be altered for the telephonic search warrant, nor is there any need for a special form

for the officer's oral affidavit, since the entire conversation is completely transcribed on the day following the issuance of the search warrant.

It is, of course, necessary for all parties to the conference call to have before them a copy of the telephonic search warrant form. We have also found it necessary to develop two training manuals for use by the district attorney and by the officer in the field. The manual used by the police officers sets forth first, the procedures in contacting the duty deputy district attorney; second, it sets forth scripts which are to be used as samples in applying for search warrants. These scripts cover such frequently encountered situations: (1) the confidential, reliable informant; (2) probable cause as developed by plain sight observation by the officer; and (3) probable cause developed from information from a victim or eyewitness to a crime. The officer's manual is intended to give guidance in selecting the proper language used by the affiant and is updated as frequently as case law necessitates. Samples of language necessary for describing the premises, describing the property, and requesting night service are also set forth. The manual used by the duty deputy district attorney contains all the information in the police officer's manual plus a more detailed description of the procedures which the deputy district attorney must use to set up the conference call and to activate the recording equipment.

One of the main features of the telephonic system is its flexibility. In San Diego the system has been used for everything from a search of a stolen Van Gogh painting to a search for weapons used in a multiple slaying. In one instance, two affiants working on the same case were separated by some 60 miles from one another and yet were able to get their search warrant without delay. The use of multiple affiants is not uncommon; equipment is the only limitation. There have also been cases of use of the system by untrained, out-of-county officers who got their first look at the telephonic search warrant form at the time they were phoning to the deputy district attorney for a search warrant.

Speed and ease of operation is another great benefit of the telephonic search warrant system. The saving of time has been remarkable. In a recent survey, it was determined that 65 percent of all telephonic search warrants take one hour or less from the time when the officer in the field decides he wants a search warrant until the time of its issuance. Most of the remaining 35 percent are completed in less than 2 hours. Frequently, the delay can be attributed to lack of the necessary information to establish probable cause when the police officer first calls a depty district attorney. Investigations of unusual complexity such as pornography cases also account for our longer telephonic search warrants.

The flexibility and efficiency with which search warrants can be obtained by telephone has greatly expanded the total number of search warrants issued. There has been an approximate five-fold increase in the number of search warrants issued between 1970 and 1972.

The telephonic search warrant system as used in San Diego County has been upheld in several appellate decisions. In the first reported case dealing with this system, it was held that the oral statement provided for in Penal Code §1526(b) need not be made face-to-face between the affiant and the magistrate, and that two-way communications by telephone or two-way radio were equally permissible.[4]

The telephonic system is also commented upon in *People* v. *Coleman*,[5] but the Court of Appeal in the *Coleman* case did not have to rule on the validity of the telephonic search warrant. A recent unreported decision approved the telephonic search warrant system as developed in San Diego, holding that the process of recording and transcribing the application, affidavit, and search warrant itself had all the safeguards required by the Fourth Amendment.[6] Furthermore, the Appellate Court found nothing wrong with the procedure authorizing the officer to sign the judge's name to a duplicate original of the search warrant.

San Diego's experience has demonstrated that an efficient effective system can be devised at a reasonable cost with adequate security and with high reliability.

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[4] *People* v. *Aguirre*, 26 Cal. App. 3d Supp. 7, 103 Cal. Rptr. 153 (Appellate Dept., Superior Court, 1972).
[5] 28 Cal. App. 3d 36, 104 Cal. Rptr. 363 (1972).
[6] *People* v. *Bucholz*, No. 5081 Cal. Court of Appeal Fourth App. Dist., Div. One, decided December 14, 1972, certified for nonpublication.

APPENDIX 2

Union Calendar No. 96

95TH CONGRESS
1ST SESSION

H. R. 5864 [1]

[Report No. 95–195]

IN THE HOUSE OF REPRESENTATIVES

MARCH 31, 1977

Mr. MANN (for himself, Ms. HOLTZMAN, Mr. HALL, Mr. GUDGER, Mr. EVANS of Georgia, Mr. WIGGINS, and Mr. HYDE) introduced the following bill; which was referred to the Committee on the Judiciary

APRIL 11, 1977

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

A BILL

To approve with modifications certain proposed amendments to the Federal Rules of Criminal Procedure, to disapprove other such proposed amendments, and for other related purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding the first section of the Act entitled "An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court" (Public Law 94–349, approved July 8, 1976) the amendments to rules 6(c), 23, 24, 40.1, and 41(c)(2) of the Rules of Criminal Procedure for the United

[1] H.R. 5864 was enacted (See Public Law 95–78) in the form it passed the Senate. Proposed Rule 41(c)(2) of the Federal Rules of Criminal Procedure promulgated by the Supreme Court, dealing with oral search warrants, was disapproved in H.R. 5864 as it passed the House. H.R. 5865 was introduced by Mr. Mann to give the Subcommittee on Criminal Justice a vehicle to further consider the matter.

States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, shall take effect only as provided in this Act.

SEC. 2. (a) The amendment proposed by the Supreme Court to rule 6(e) of such Rules of Criminal Procedure is approved in a modified form as follows: Such rule 6(e) is amended by striking out "The court may direct that an indictment shall be kept secret" and all that follows through "the clerk shall seal" and inserting in lieu thereof the following: "The federal magistrate to whom an indictment is returned may direct that it shall be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal".

(b) (1) The amendment proposed by the Supreme Court to rule 23(b) of such Rules of Criminal Procedure is approved.

(2) The amendment proposed by the Supreme Court to rule 23(c) of such Rules of Criminal Procedure is approved in a modified form as follows: Rule 23(c) of such Rules of Criminal Procedure is amended by striking out the first sentence and inserting in lieu thereof the following: "In a case tried without a jury the court shall make a general finding and in addition if the defendant is found guilty shall make a special finding as to the facts, unless such special finding is

waived by the defendant. Such general findings and special findings may be made orally.".

(c) The amendment proposed by the Supreme Court to rule 24 of such Rules of Criminal Procedure is disapproved and shall not take effect.

(d) The amendment proposed by the Supreme Court to such Rules of Criminal Procedure, adding a new rule designated as rule 40.1, is disapproved and shall not take effect.

(e) The amendment proposed by the Supreme Court to rule 41 (e) of such Rules of Criminal Procedure is disapproved and shall not take effect.

SEC. 3. (a) The first section of this Act shall take effect on the date of the enactment of this Act.

(b) Section 2 of this Act shall take effect October 1, 1977.

Calendar No. 330

95TH CONGRESS
1ST SESSION

H. R. 5864

[Report No. 95–354]

IN THE SENATE OF THE UNITED STATES

APRIL 20 (legislative day, FEBRUARY 21), 1977
Read twice and referred to the Committee on the Judiciary

JULY 20 (legislative day, MAY 18), 1977
Reported by Mr. ROBERT C. BYRD (for Mr. MCCLELLAN), with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

AN ACT

To approve with modifications certain proposed amendments to the Federal Rules of Criminal Procedure, to disapprove other such proposed amendments, and for other related purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That notwithstanding the first section of the Act entitled "An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court" (Public Law 94-349, approved July 8, 1976) the amendments to rules 6(e), 23, 24, 40.1, and~~

~~41(c)(2) of the Rules of Criminal Procedure for the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, shall take effect only as provided in this Act.~~

~~SEC. 2. (a) The amendment proposed by the Supreme Court to rule 6(c) of such Rules of Criminal Procedure is approved in a modified form as follows: Such rule 6(c) is amended by striking out "The court may direct that an indictment shall be kept secret" and all that follows through "the clerk shall seal" and inserting in lieu thereof the following: "The federal magistrate to whom an indictment is returned may direct that it shall be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal".~~

~~(b)(1) The amendment proposed by the Supreme Court to rule 23(b) of such Rules of Criminal Procedure is approved.~~

~~(2) The amendment proposed by the Supreme Court to rule 23(c) of such Rules of Criminal Procedure is approved in a modified form as follows: Rule 23(c) of such Rules of Criminal Procedure is amended by striking out the first sentence and inserting in lieu thereof the following: "In a case tried without a jury the court shall make a general finding and in addition if the defendant is found guilty shall make a special finding as to the facts, unless such special finding is~~

~~waived by the defendant. Such general findings and special findings may be made orally.".~~

~~(c) The amendments proposed by the Supreme Court to rule 24 of such Rules of Criminal Procedure is disapproved and shall not take effect.~~

~~(d) The amendment proposed by the Supreme Court to such Rules of Criminal Procedure, adding a new rule designated as rule 40.1, is disapproved and shall not take effect.~~

~~(e) The amendment proposed by the Supreme Court to rule 41(e) of such Rules of Criminal Procedure is disapproved and shall not take effect.~~

~~SEC. 3. (a) The first section of this Act shall take effect on the date of the enactment of this Act.~~

~~(b) Section 2 of this Act shall take effect October 1, 1977.~~

That notwithstanding the first section of the Act entitled "An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court" (Public Law 94-349, approved July 8, 1976) the amendments to rules 6(e), 23, 24, 40.1, and 41(c)(2) of the Rules of Criminal Procedure for the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, shall take effect only as provided in this Act.

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SEC. 2. (a) The amendment proposed by the Supreme Court to subdivision (e) of rule 6 of such Rules of Criminal Procedure is approved in a modified form as follows: Such subdivision (e) is amended to read as follows:

"(e) SECRECY OF PROCEEDINGS AND DISCLOSURE.—

"(1) GENERAL RULE.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

"(2) EXCEPTIONS.—

"(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) an attorney for the government for use in the performance of such attorney's duty; and

"(ii) such government personnel as are deemed necessary by an attorney for the govern-

ment to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

"(3) SEALED INDICTMENTS.—The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.".

(b) The amendments proposed by the Supreme Court to subdivisions (b) and (c) of rule 23 of such Rules of Criminal Procedure are approved.

(c) The amendment proposed by the Supreme Court to rule 24 of such Rules of Criminal Procedure is disapproved and shall not take effect.

(d) The amendment proposed by the Supreme Court to such Rules of Criminal Procedure, adding a new rule designated as rule 40.1, is disapproved and shall not take effect.

(e) The amendment proposed by the Supreme Court to subdivision (c) of rule 41 of such Rules of Criminal Procedure is approved in a modified form as follows: Such subdivision (c) of the Federal Rules of Criminal Procedure is amended—

(1) by striking out

"(c) ISSUANCE AND CONTENTS.—A warrant shall"

and inserting in lieu thereof the following:

"(c) ISSUANCE AND CONTENTS.—

"(1) WARRANT UPON AFFIDAVIT.—A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall"; and

(2) by adding at the end the following:

"(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 or 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 caller informs the Federal magistrate that the purpose of the call is to 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.".

SEC. 3. Section 1446 of title 28 of the United States Code is amended as follows:

(a) Subsection (c) is amended to read as follows:

"(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever

is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

"(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

"(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

"(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

"(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hear-

ing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.".

(b) Subsection (e) is amended by striking out "such petition" and inserting "such petition for the removal of a civil action" in lieu thereof.

SEC. 4. (a) The first section of this Act shall take effect on the date of the enactment of this Act.

(b) Sections 2 and 3 of this Act shall take effect October 1, 1977.

Passed the House of Representatives April 19, 1977.

Attest: EDMUND L. HENSHAW, JR.,
Clerk.

95TH CONGRESS
1ST SESSION

H. R. 5865

IN THE HOUSE OF REPRESENTATIVES

MARCH 31, 1977

Mr. MANN introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18 of the United States Code to provide a procedure for obtaining search warrants on the basis of oral testimony.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 205 of title 18 of the United States Code is amended by striking out all that follows

"Chapter 205.—SEARCHES AND SEIZURES"

and precedes section 3103a, and inserting in lieu thereof the following:

"Sec.
"3101. Alternate procedure for obtaining warrants, oral testimony.
"3102. Method of issuance of warrants obtained under section 3101.
"3103. Return of warrants obtained under section 3101.
"3103a. Additional grounds for issuing warrant.

Sec.
"3104. Issuance of search warrant; contents—Rule.
"3105. Persons authorized to serve search warrant.
"3106. Officer authorized to serve search warrant—Rule.
"3107. Service of warrants and seizures by Federal Bureau of Investigation.
"3108. Execution, service, and return—Rule.
"3109. Breaking doors or windows for entry or exit.
"3110. Property defined—Rule.
"3111. Property seizable on search warrant—Rule.
"3112. Search warrants for seizure of animals, birds, or eggs.
"3113. Liquor violations in Indian country.
"3114. Return of seized property and suppression of evidence; motion—Rule.
"3115. Inventory upon execution and return of search warrant—Rule.
"3116. Records of examining magistrate; return to clerk of court—Rule.

"§ 3101. Alternate procedure for obtaining warrants; oral testimony

"When the circumstances make it reasonable to do so in the absence of a written affidavit, a search warrant may be issued upon sworn oral testimony of a person who is not in the physical presence of a Federal magistrate provided the magistrate is satisfied that probable cause exists for the issuance of the warrant. The sworn oral testimony may be communicated to the magistrate by telephone or other appropriate means and shall be recorded and transcribed. After transcription the statement shall be certified by the magistrate and filed with the court. This statement shall be deemed an affidavit for the purposes of the rules relating to search and seizure in the Federal Rules of Criminal Procedure.

"§ 3102. Method of issuance of warrants obtained under section 3101

"(a) The grounds for issuance and contents of a warrant issued under section 3101 of this title shall be the same as the grounds for issuance and content of a warrant for search or seizure under the Federal Rules of Criminal Procedure.

"(b) Prior to approval, the magistrate shall require the Federal law enforcement officer or the attorney for the Government who is requesting a warrant under section 3101 of this title to read to the magistrate, verbatim, the contents of the warrant. The magistrate may direct that specific modifications be made in the warrant.

"(c) Upon approval, the magistrate shall direct the Federal law enforcement officer or the attorney for the Government who is requesting the warrant to sign the magistrate's name on the warrant. This warrant shall be called a duplicate original warrant and shall be deemed a warrant for the purposes of this section, sections 3101 and 3103 of this title, and rules relating to search and seizure in the Federal Rules of Criminal Procedure. In such cases, the magistrate shall cause to be made an original warrant. The magistrate shall enter the exact time of issuance of the

duplicate original warrant on the face of the original warrant.

"§ 3103. Return of warrants obtained under section 3101

"Return of the duplicate original warrant and the original warrant obtained under sections 3101 and 3102 of this title shall be in conformity with rules relating to search and seizure in the Federal Rules of Criminal Procedure. Upon return, the magistrate shall require the person who gave the sworn oral testimony establishing the grounds for issuance of the warrant, to sign a copy of it.".

95TH CONGRESS
1ST SESSION

H. R. 7888 [2]

IN THE HOUSE OF REPRESENTATIVES

JUNE 20, 1977

Mr. MANN (for himself and Mr. HYDE) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Federal Rules of Criminal Procedure to establish a method for the issuance of search warrants upon oral testimony.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That rule 41 (c) of the Federal Rules of Criminal Procedure is amended—

(1) by striking out

"(c) ISSUANCE AND CONTENTS. A warrant shall"

and inserting in lieu thereof the following:

"(c) ISSUANCE AND CONTENTS.

"(1) WARRANT UPON AFFIDAVIT. A warrant,

[2] H.R. 7888 was reported favorably by the Subcommittee on Criminal Justice on June 16, 1977. H.R. 5864, as it passed the Senate on July 25, 1977, reinstated a provision dealing with oral search wararnts similar to H.R. 7888. The House concurred in the Senate amendments to H.R. 5864 (see Congressional Record of July 27, 1977 at H7865 et. seq.) clearing the way for final passage of H.R. 5864 and obviating the need for H.R. 7888.

other than a warrant upon oral testimony under paragraph (2) of this subdivision shall"; and

(2) by adding at the end the following:

"(2) WARRANT UPON ORAL TESTIMONY.

"(A) GENERAL RULE. If the circumstances make it unreasonable to require 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 grounds for the application exist or 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 sort of evidence as is sufficient for a warrant upon affidavit.

"(D) RECORDING AND CERTIFICATION OF TESTIMONY. When a caller informs the Federal magistrate that the purpose of the call is to 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. The Federal magistrate shall record by means of a voice recording device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. The Federal magistrate shall have the recorded call transcribed, shall certify the accuracy of the transcription, and shall file a copy of the recording and the transcription 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 have

possession of the duplicate original warrant at the time of the execution of the warrant and shall enter the exact time of execution on the face of the duplicate original warrant.".

Public Law 95-78
95th Congress

An Act

To approve with modifications certain proposed amendments to the Federal Rules of Criminal Procedure, to disapprove other such proposed amendments, and for other related purposes.

July 30, 1977
[H.R. 5864]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding the first section of the Act entitled "An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court" (Public Law 94-349, approved July 8, 1976) the amendments to rules 6(e), 23, 24, 40.1, and 41(c)(2) of the Rules of Criminal Procedure for the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, shall take effect only as provided in this Act.

Federal Rules of Criminal Procedure, proposed amendments.
18 USC 3771 note.
28 USC 2071 note.
18 USC app.

SEC. 2. (a) The amendment proposed by the Supreme Court to subdivision (e) of rule 6 of such Rules of Criminal Procedure is approved in a modified form as follows: Such subdivision (e) is amended to read as follows:

"(e) SECRECY OF PROCEEDINGS AND DISCLOSURE.—

"(1) GENERAL RULE.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

"(2) EXCEPTIONS.—

"(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) an attorney for the government for use in the performance of such attorney's duty; and

"(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

"(3) SEALED INDICTMENTS.—The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.".

18 USC app.

(b) The amendments proposed by the Supreme Court to subdivisions (b) and (c) of rule 23 of such Rules of Criminal Procedure are approved.

(c) The amendment proposed by the Supreme Court to rule 24 of such Rules of Criminal Procedure is disapproved and shall not take effect.

(d) The amendment proposed by the Supreme Court to such Rules of Criminal Procedure, adding a new rule designated as rule 40.1, is disapproved and shall not take effect.

(e) The amendment proposed by the Supreme Court to subdivision (c) of rule 41 of such Rules of Criminal Procedure is approved in a modified form as follows: Such subdivision (c) of the Federal Rules of Criminal Procedure is amended—

(1) by striking out

"(c) ISSUANCE AND CONTENTS.—A warrant shall" and inserting in lieu thereof the following:

"(c) ISSUANCE AND CONTENTS.—

"(1) WARRANT UPON AFFIDAVIT.—A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall"; and

(2) by adding at the end the following:

"(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 or 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 caller informs the Federal magistrate that the purpose of the call is to 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.".

SEC. 3. Section 1446 of title 28 of the United States Code is amended as follows:

(a) Subsection (c) is amended to read as follows:

"(c) (1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time. Removal petition.

"(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

"(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

"(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

"(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of Hearing.

the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.".

(b) Subsection (e) is amended by striking out "such petition" and inserting "such petition for the removal of a civil action" in lieu thereof.

Effective dates.

SEC. 4. (a) The first section of this Act shall take effect on the date of the enactment of this Act.

(b) Sections 2 and 3 of this Act shall take effect October 1, 1977.

Approved July 30, 1977.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-195 (Comm. on the Judiciary).
SENATE REPORT No. 95-354 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 123 (1977):
Apr. 19, considered and passed House.
July 25, considered and passed Senate, amended.
July 27, House concurred in Senate amendment.

O

END