

# The emergence of the e-Warrant

## I. Have you read the rule?

### ***(l) Remotely communicated search warrants.***

(1) *Means of communication.* **When reasonable under the circumstances**, a search warrant may be issued upon sworn or affirmed testimony of a person who is not in the physical presence of the magistrate, **provided the magistrate is satisfied that probable cause exists for the issuance of the warrant.** All communication between the magistrate and the peace officer or prosecuting attorney requesting the warrant may be remotely transmitted by voice, image, text, or any combination of those, or by other means.

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

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

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

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

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

## II. What does “when reasonable under the circumstances” mean?

- Is it restrictive language?
- Or does it simply mean that an eWarrant can be used when practical under the circumstances?
- Advisory Committee Note: “Terms used are intended to be interpreted liberally in order to facilitate remote communications as a means of applying for and issuing search warrants while at the same time preserving the integrity of the probable cause application and the terms of warrants that are authorized.”

### III. eWarrant is ideal for situations where time is of the essence.

- E.g., DUI accident with injuries
- But is it always the right way to go?

### IV. Potential pitfalls of an eWarrant

1. It might jeopardize the probable cause showing:
  - Affidavit template may not fit the particular circumstances
  - Tendency not to include as much detail
  - No face-to-face contact, which might discourage communication with magistrate
2. Password specific – what if an officer cannot log into her account and must use the account of another officer?

### V. eWarrant & Automobile Searches

A. *State v. Rigby*, 2016 UT App 42, 369 P.3d 127

Should Utah continue to track the federal automobile exception or chart its own path under the Utah Constitution?

The court of appeals chose to track the federal constitution.

- B. The case is now on certiorari before the Utah Supreme Court.
- C. Why is it a bad idea to abandon the automobile exception in favor of requiring eWarrants for automobile searches?

### VI. A word on *Riley v. California*.

- Holding: What must police do before searching a cell phone seized incident to arrest? “[G]et a warrant.”
- The *Riley* holding is likely to be applied to the automobile exception as well.
- Although police may search “containers” found in an automobile, the Court in *Riley* signaled that it did not equate cell phones with containers:
- “Treating a cell phone as a container whose contents may be searched incident to arrest is a bit strained...”
- What must police do before searching a cell phone seized in an automobile search? ***Get a warrant.***