

Interim Judiciary Committee

August 25, 2016

Testimony of Sally A. Holewa State Court Administrator

Good morning Chairman Hogue and members of the interim judiciary committee. For the record, my name is Sally Holewa and I am the State Court Administrator. The Committee has invited me here today to discuss the Court's response to the *Birchfield vs. North Dakota* decision by the United States Supreme Court.

For those of you who may not be familiar with that decision, it requires law enforcement to obtain a search warrant for a blood draw if an individual suspected of driving under the influence refuses a breath test. I am aware of 3 search warrant requests for blood tests since the decision was released. However, it is likely that there have been other requests that have not been brought to my attention.

The Court convened a workgroup consisting of several district court judges, a municipal judge, a representative of the Association of Counties, Aaron Birst, who also serves as the executive director of the North Dakota State's Attorneys Association, two representatives from the North Dakota Peace Officers Association, and several court system employees. The workgroup met several times and is recommending that the court create a web-based solution that will allow law enforcement and the court to exchange search warrant documents related to DUI stops through a secure internet connection. This should expedite

the warrant process considerably. The programming for that is nearly complete and expected to go into the testing phase during the month of September and has an anticipated implementation date of mid-December. The work has been done in-house and at no additional cost to the state or the counties.

The workgroup reviewed only those statutes and rules related to issuance of search warrants. Rule 4.1 of the North Dakota Rules of Criminal Procedure already allows for the issuance of a search warrant by telephone or other reliable electronic means so no rule change is necessary for the use of a web-based solution. The Workgroup is recommending a change to Rule 41 of the North Dakota Rules of Criminal Procedure. The amendment would allow law enforcement officials to make an application under penalty of perjury, rather than swearing to the contents under oath. This change, if adopted by the Court, would eliminate the need to print documents for the sole purpose of having the officer's signature witnessed by a notary. That recommendation is part of a final report of the workgroup which has been drafted and is expected to be sent to the Chief Justice in early September.

While we recognize that there will need to be a change to the state's Implied Consent statute, we are unable to address that issue directly since the Court may be required to rule on the current statute or any amendment to it.

North Dakota Rules of Criminal Procedure

RULE 4.1 - COMPLAINT, WARRANT, OR SUMMONS BY TELEPHONE OR OTHER RELIABLE ELECTRONIC MEANS

(a) In General. The magistrate may consider information communicated by telephone or other reliable electronic means when reviewing a complaint or deciding whether to issue a warrant or summons.

(b) Procedures. If the magistrate decides to proceed under this rule, the following procedures apply:

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

(2) Creating a Record of the Testimony and Exhibits.

(A) Testimony Limited to Attestation. If the applicant does no more than attest to the contents of a written affidavit submitted by reliable electronic means, the magistrate must acknowledge the attestation in writing on the affidavit.

(B) Additional Testimony or Exhibits. If the magistrate considers additional testimony or exhibits, the magistrate must:

(i) ensure the testimony is recorded verbatim by an electronic recording device, by a court reporter or recorder, or in writing;

(ii) ensure any recording or notes are filed, transcribed on request, and any transcription is certified as accurate;

(iii) sign any other written record and ensure it is certified as accurate and filed; and

(iv) ensure the exhibits are filed.

(3) Preparing a Proposed Duplicate Original of a Complaint, Warrant, or Summons. The applicant must prepare a proposed duplicate original of a complaint, warrant, or summons, and must read or otherwise transmit its contents verbatim to the magistrate.

(4) Preparing an Original Complaint, Warrant, or Summons. If the applicant reads the contents of the proposed duplicate original, the magistrate must enter those contents into an original complaint, warrant, or summons. If the applicant transmits the contents by reliable electronic means, the transmission received by the magistrate may serve as the original.

(5) Modification. The magistrate may modify the complaint, warrant, or summons. The magistrate must then:

(A) transmit the modified version to the applicant by reliable electronic means; or

(B) file the modified original and direct the applicant to modify the proposed duplicate original accordingly.

(6) Issuance. To issue the warrant or summons, the magistrate must:

(A) sign the original documents;

(B) enter the date and time of issuance on the warrant or summons; and

(C) transmit the warrant or summons by reliable electronic means to the applicant or direct the applicant to sign the magistrate's name and enter the date and time on the duplicate original.

(c) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under this rule is not subject to suppression on the ground that issuing the warrant in this manner was unreasonable under the circumstances.

EXPLANATORY NOTE

Rule 4.1 was adopted, effective March 1, 2013.

Rule 4.1 is an adaptation of Fed.R.Crim.P. 4.1.

Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 22-25;
Fed.R.Crim.P. 4.1.

Cross Reference: N.D.R.Crim.P. 3 (The Complaint); N.D.R.Crim.P. 4 (Arrest Warrant or Summons Upon Complaint); N.D.R.Crim.P. 9 (Warrant or Summons Upon Indictment or Information); N.D.R.Crim.P. 41 (Search and Seizure).

PROPOSED AMENDMENTS

North Dakota Rules of Criminal Procedure

RULE 41 - SEARCH AND SEIZURE

1 (a) Authority to Issue a Warrant. A state or federal magistrate acting within
2 or for the territorial jurisdiction where the property or person sought is located, or
3 from which it has been removed, may issue a search warrant authorized by this
4 rule.

5 (b) Persons or Property Subject to Search and Seizure. A warrant may be
6 issued for any of the following:

- 7 (1) property that constitutes evidence of a crime;
- 8 (2) contraband, the fruits of crime, or things criminally possessed;
- 9 (3) property designed or intended for use, or which is or has been used as
10 the means of, committing a crime;
- 11 (4) a person for whose arrest there is probable cause, or who is unlawfully
12 restrained.

13 (c) Issuing the Warrant.

14 (1) Warrant on Affidavit or Sworn Recorded Testimony.

15 (A) In General. A warrant other than a warrant on oral testimony under
16 Rule 41 (c)(2) may issue only ~~on~~ when the grounds for issuing the warrant are

17 established in:

18 (i) a written declaration by a licensed peace officer made and subscribed

19 under penalty of perjury, or

20 (ii) an affidavit or affidavits sworn to or sworn recorded testimony taken

21 before a state or federal magistrate ~~and establishing the grounds for issuing the~~

22 ~~warrant.~~

23 (B) Examination. Before ruling on a request for a warrant, the magistrate

24 may require the affiant or other witnesses to appear personally and may examine

25 under oath the affiant and any witnesses the affiant may produce. This examination

26 must be recorded and made part of the proceedings.

27 (C) Probable Cause. If the state or federal magistrate is satisfied that

28 grounds for the application exist or that there is probable cause to believe they

29 exist, the magistrate must issue a warrant identifying the property or person to be

30 seized and naming or describing with particularity the person or place to be

31 searched. The finding of probable cause may be based upon hearsay evidence in

32 whole or in part.

33 (D) Command to Search. The warrant must be directed to a peace officer

34 authorized to enforce or assist in enforcing any law of this state. It must command

35 the officer to search, within a specified period of time not to exceed ten days, the

36 person or place named for the property or person specified.

37 (E) Service and Return. The warrant must be served in the daytime, unless

38 the issuing authority, by appropriate provision in the warrant, and for reasonable

39 cause shown, authorizes its execution at times other than daytime. It may designate
40 a state or federal magistrate to whom it must be returned.

41 (2) Warrant by Telephonic or Other Reliable Electronic Means. In
42 accordance with Rule 4.1, the magistrate may issue a warrant based on information
43 communicated by telephone or other reliable electronic means.

44 (3) Warrant Seeking Electronically Stored Information. A warrant under
45 Rule 41(c) may authorize the seizure of electronic storage media or the seizure or
46 copying of electronically stored information. Unless otherwise specified, the
47 warrant authorizes a later review of the media or information consistent with the
48 warrant. The time for executing the warrant refers to the seizure or on-site copying
49 of the media or information, and not to any later off-site copying or review.

(d) Execution and Return With Inventory.

51 (1) Execution. The person who executes the warrant must enter the date and
52 time of the execution on the face of the warrant.

53 (2) Inventory. An officer present during the execution of the warrant must
54 prepare and verify an inventory of any property seized. The officer must do so in
55 the presence of the applicant for the warrant and the person from whom, or from
56 whose premises, the property was taken. If either one is not present, the officer
57 must prepare and verify the inventory in the presence of at least one other credible
58 person. In a case involving the seizure of electronic storage media or the seizure or
59 copying of electronically stored information, the inventory may be limited to
60 describing the physical storage media that were seized or copied. The officer may

61 retain a copy of the electronically stored information that was seized or copied.

62 (3) Receipt. The officer taking property under the warrant must:

63 (A) give a copy of the warrant and a receipt for the property taken to the

64 person from whom or from whose premises the property was taken; or

65 (B) leave a copy of the warrant and receipt at the place from which the

66 officer took the property.

67 (4) Return. The officer executing the warrant must promptly return

68 it—together with a copy of the inventory—to the magistrate designated on the

69 warrant. The officer may do so by reliable electronic means. The magistrate on

70 request must give a copy of the inventory to the person from whom, or from whose

71 premises, the property was taken and to the applicant for the warrant.

72 (e) Motion for Return of Property. A person aggrieved by an unlawful

73 search and seizure of property or by the deprivation of property may move the trial

74 court for the property's return. The court must receive evidence on any factual

75 issue necessary to decide the motion. If it grants the motion, the court must return

76 the property to the moving party, although the court may impose reasonable

77 conditions to protect access and use of the property in later proceedings. If a

78 motion for return of property is made or heard after an indictment, information, or

79 complaint is filed, it must be treated also as a motion to suppress under Rule 12.

80 (f) Motion to Suppress. A motion to suppress evidence may be made in the

81 trial court as provided in Rule 12.

82 (g) Return of Papers to Clerk. The magistrate to whom the warrant is

83 returned must attach to the warrant a copy of the return, inventory and all other
related papers and must file them with the clerk of the trial court.

85 (h) Scope and Definitions.

86 (1) Scope. This rule does not modify any statute regulating search or
87 seizure, or the issuance and execution of a search warrant in special circumstances.

88 (2) Definitions. The following definitions apply under this rule:

89 (A) "Property" includes documents, books, papers and any other tangible
90 objects.

91 (B) "Daytime" means the hours from 6:00 a.m. to 10:00 p.m. according to
92 local time.

93 EXPLANATORY NOTE

Rule 41 was amended, effective September 1, 1983; March 1, 1990; March
95 1, 1992 January 1, 1995; March 1, 2006; March 1, 2011; March 1, 2012; March 1,
96 2013;_____.

97 Rule 41 is an adaptation of Fed.R.Crim.P. 41 and is designed to implement
98 the provisions of Article I, Section 8, of the North Dakota Constitution and the
99 Fourth Amendment to the United States Constitution, which guarantee, "The right
100 of the people to be secure in their persons, houses, papers and effects against
101 unreasonable searches and seizures shall not be violated; and no warrant shall issue
102 but upon probable cause, supported by oath or affirmation, particularly describing
103 the place to be searched and the persons and things to be seized." To implement
104 this constitutional protection, an illegal search and seizure will bar the use of such

105 evidence in a criminal prosecution. The suppression sanction is imposed in order
106 to discourage abuses of power by law enforcement officials in conducting searches
107 and seizures.

108 Subdivision (a) provides that a search warrant be issued by a magistrate,
109 either state or federal, acting within or for the territorial jurisdiction. The provision
110 which permits a federal magistrate to issue a search warrant is the reciprocal of the
111 federal rule, which permits a state magistrate to issue a search warrant pursuant to
112 a federal matter. It is contemplated that a search warrant will be issued by a federal
113 magistrate only on the nonavailability of a state magistrate.

114 Subdivision (a) does not require that the individual requesting the search
115 warrant be a law enforcement officer. There appears to be common-law support
116 for the use of the search warrant as a means of getting an owner's property back.
117 The primary purpose of the rule, however, is the authorization of a search in the
118 interest of law enforcement and as a practical matter the request for issuance of a
119 search warrant by someone other than a law enforcement officer is virtually
120 nonexistent.

121 Subdivision (b) describes the property or persons which may be seized with
122 a lawfully issued search warrant. Issuance of a search warrant to search for items
123 of solely evidential value is authorized. There is no intention to limit the protection
124 of the Fifth Amendment against compulsory self-incrimination, so items that are
125 solely "testimonial" or "communicative" in nature might well be inadmissible on
126 those grounds.

127 Paragraph (c)(1) follows the federal rule except that North Dakota's rule
permits the issuance of a warrant on sworn recorded testimony without an
129 affidavit. Probable cause for the issuance of a search warrant should be assessed
130 under the totality-of-circumstances test.

131 Paragraph (c)(1) was amended, effective _____, to allow
132 grounds for issuance of a search warrant to be established in a written declaration
133 by a licensed peace officer made and subscribed under penalty of perjury.

134 The provision for examination of the affiant before the magistrate is
135 intended to assure the magistrate an opportunity to make a careful decision as to
136 whether there is probable cause based on legally obtained evidence. The
137 requirement that the testimony be recorded is to insure an adequate basis for
determining the sufficiency of the evidentiary grounds for the issuance of the
139 search warrant if a motion to suppress is later filed.

140 The language of subparagraph (c)(1)(E), "for reasonable cause shown," is
141 intended to explain the necessity for executing the warrant at a time other than the
142 daytime. This provision is intended to be a substantive prerequisite to the issuance
143 of a warrant that is to be executed at a time other than daytime, although it is not
144 necessary that the quoted language ("for reasonable cause shown") be defined in
145 subdivision (h).

146 Former paragraphs (c)(2) and (c)(3) were deleted and a new paragraph
147 (c)(2) was added, effective March 1, 2013, to allow the magistrate to issue a
148 warrant based on information communicated by telephone or other reliable

149 electronic means under the procedure set out in Rule 4.1.

150 Paragraph (c)(3) was added and paragraph (d)(1) was amended, effective
151 March 1, 2012, to provide guidelines for warrants authorizing the seizure of
152 electronic storage media and electronically stored information and for the
153 inventory of seized electronic material. The amendments were based on the
154 December 1, 2009, amendments to Fed.R.Crim.P. 41.

155 Subdivision (d) is intended to make clear that a copy of the warrant and an
156 inventory receipt for property taken shall be left at the premises at the time of the
157 lawful search or with the person from whose premises the property is taken if he is
158 present.

159 Paragraph (d)(4) was amended, effective March 1, 2013, to allow an officer
160 to make a return by reliable electronic means.

161 Subdivision (e) requires that the motion for return of property be made in
162 the trial court rather than in a preliminary hearing before the magistrate who issued
163 the warrant. It further provides for a return of the property if: (1) the person is
164 entitled to lawful possession, and (2) the seizure is illegal. However, property
165 which is considered contraband does not have to be returned even if seized
166 illegally. The last sentence of subdivision (e) provides that a motion for return of
167 property, made in the trial court, shall be treated as a motion to suppress under
168 N.D.R.Crim.P. 12. The purpose of this provision is to have a series of pretrial
169 motions disposed of in a single appearance, such as at a Rule 17.1 (Omnibus
170 Hearing), rather than in a series of pretrial motions made on different dates causing

171 undue delay in administration.

Subdivisions (a), (b), and (c) were amended in 1983, effective September 1,
173 1983, to add persons as permissible objects of search warrants. These amendments
174 follow 1979 amendments to Fed.R.Crim.P. 41 and are intended to make it possible
175 for a search warrant to issue to search for a person if there is probable cause to
176 arrest that person; or that person is being unlawfully restrained.

Subdivisions (c) and (d) were amended, effective March 1, 1990. The
178 amendments are technical in nature and no substantive change is intended.

Subdivision (e) was amended, effective March 1, 1992, to track the federal
180 rule.

Rule 41 was amended, effective March 1, 2006, in response to the
December 1, 2002, revision of the Federal Rules of Criminal Procedure. The
183 language and organization of the rule were changed to make the rule more easily
184 understood and to make style and terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of January 26-27, 2012,
186 pages 26-27; April 28-29, 2011, page 17; September 23-24, 2010, page 32; April
187 29-30, 2010, page 20, 25-26; April 28-29, 2005, pages 5-8; January 27-27, 2005,
188 pages 33-34; April 28-29, 1994, pages 22-23; November 7-8, 1991, page 4;
189 October 25-26, 1990, pages 15-16; April 20, 1989, page 4; December 3, 1987,
190 page 15; October 15-16, 1981, pages 12-15; December 7-8, 1978, pages 23-26;
191 October 12-13, 1978, pages 15-19; April 24-26, 1973, page 14; December 11-15,
192 1972, pages 31-37; November 18-20, 1971, pages 3-9; September 16-18, 1971,

193 pages 11-32; March 12-13, 1970, page 3; November 20-21, 1969, pages 19-24;
194 May 15-16, 1969, pages 21-23; Fed.R.Crim.P. 41.

195 STATUTES AFFECTED:

196 SUPERSEDED: N.D.C.C. §§ 29-29-02, 29-29-03, 29-29-04, 29-29-05,
197 29-29-06, 29-29-07, 29-29-10, 29-29-11, 29-29-12, 29-29-13, 29-29-14, 29-29-15,
198 29-29-16, 29-29-17.

199 CONSIDERED: N.D.C.C. §§ 12-01-04(12), 12-01-04(13), 29-01-14(3),
200 29-29-01, 29-29-08, 29-29-09, 29-29-18, 29-29-19, 29-29-20, 29-29-21, 31-04-02.
201 N.D.C.C. ch. 28-29.1. N.D.C.C. ch.19-03.1.

202 CROSS REFERENCE: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or
203 Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 12
204 (Pleadings and Pretrial Motions); N.D.R.Crim.P. 17.1 (Omnibus Hearing and
205 Pretrial Conference); N.D.R.Ct. 2.2 (Facsimile Transmission); N.D. Sup. Ct.
206 Admin. R. 52 (Interactive Television).