



ALAN WILSON
ATTORNEY GENERAL

March 30, 2018

The Honorable John Dean Shillinglaw
Municipal Judge
City of York
PO Box 500
York, South Carolina 297452

Dear Judge Shillinglaw:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

I am seeking an opinion on whether an affiant can be “sworn electronically”, via email, text message, phone message, etc.

As I read State v. Herring ... it appears that an affiant does not have to be physically present, that he just has to be sworn (as over the telephone) for a warrant. My question is with technology the way it is in this day and time would the same apply to an affidavit being sworn to via message left on voice mail, email, and or text message. Ideal situation via video message. For instance, the officer messaging by one of the above means, swearing that the info in warrant # is true, etc. and leaving some kind of identifying info such as badge number or something similar.

S.C. Code Ann. § 17-13-140 states, in pertinent part:

A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

Herring asserts the statute requires the affiant appear before the magistrate in person. We disagree. (SC Supreme Court)

Contrary to Herring's contention, the language does not state an affidavit must be sworn in person. It only requires the affidavit be sworn. Officer Lawrence, who prepared the affidavit, was sworn over the telephone by the Magistrate. We find this complies with the literal terms of the statute such that there was no defect in the warrant. Cf. Gay v. Ariail, 381 S.C. 341, 673 S.E.2d 418 (2009) (literal terms of statute prevail); Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002) (where terms of a statute are clear, there is no room for construction).

Since 2001 the SC Supreme Court has recognized search warrants by facsimile.

Law/Analysis

This Office declines to extend the methods by which an affiant may be sworn “before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for [a search] warrant” beyond the express terms of Order No. 2001-07-26-01 of the Chief Justice of the South Carolina Supreme Court, a courtesy copy has been attached. See <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2001-07-26-01>. In State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000), the South Carolina Supreme Court described how the South Carolina Code of Laws and state court precedent require additional protections beyond those required by the federal constitution for issuing a search warrant. The Court stated:

The General Assembly has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Additionally, the South Carolina Code mandates that a search warrant “shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record...” S.C. Code Ann. § 17-13-140 (1985). Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause. See State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997). However, “sworn oral testimony, standing alone, does not satisfy the statute.” State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987).

342 S.C. at 128, 536 S.E.2d at 678-79. As cited by the Court and the request letter, Section 17-13-140 of the South Carolina Code of Laws states that a search warrant may only be “issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record.” S.C. Code Ann. § 17-13-140. Moreover, Section 17-13-141 requires judicial officers to “keep a record along with a copy of the returned search warrant and supporting affidavit and documents for a period of three years from the date of issuance of each warrant.” S.C. Code Ann. § 17-13-141.

In State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009), the South Carolina Supreme Court addressed the validity of a search warrant which was obtained where an officer was sworn over the telephone and by transmitting an affidavit by facsimile. The Court described the method of obtaining the warrant as follows:

SLED obtained a warrant utilizing the telephone procedure set forth in the Chief Justice's order of July 2001. Agent Lawrence testified that he had prepared the search warrant, and faxed it to Magistrate McDuffie, who was in bond court. The Magistrate swore him over the phone.

387 S.C. at 213, 692 S.E.2d at 496. The defendant contended that this process violated the terms of Section 17-13-140 because swearing over the telephone did not occur "before the magistrate." Id. The Court disagreed with this interpretation, stating:

Contrary to Herring's contention, the language does not state an affidavit must be sworn in person. It only requires the affidavit be sworn. Officer Lawrence, who prepared the affidavit, was sworn over the telephone by the Magistrate. We find this complies with the literal terms of the statute such that there was no defect in the warrant.

387 S.C. at 214, 692 S.E.2d at 496–97. The Herring Court's finding, in essence, interpreted the phrase "sworn to before a magistrate" as stated in Section 17-13-140 not to require the physical presence of an affiant before a magistrate, municipal judicial officer, or judge of a court of record, but instead to allow for the remote swearing by telephone.

The request letter asks this Office to opine as to whether the Herring Court's interpretation of Section 17-13-140 would allow a court to issue a search warrant based on an affidavit sworn to by any of several remote electronic messaging technologies. While Herring could be read broadly to allow additional methods of remote swearing and transmittal of the search warrant and supporting affidavits beyond the use of a facsimile and telephonic swearing, it would be inappropriate for this Office to either approve or disapprove of such further methodologies. As the Herring Court noted, the procedure which SLED used to obtain the search warrant was authorized by Chief Justice Toal pursuant to her authority under Article V, § 4 of the South Carolina Constitution. Herring, 387 S.C. at 213 n.5, 692 S.E.2d at 496 n.5. Article V, § 4 states that the Chief Justice of the Supreme Court is the administrative head of the State's unified judicial system and that the Court "shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts." As a matter of caution, this Office interprets Herring to approve only the methodology described in Order No. 2001-07-26-01 as complying with the literal terms of the statute, rather than a general authorization of remote swearing by emerging communication technologies. 387 S.C. at 214, 692 S.E.2d at 497. Further, please note that Order No. 2001-07-26-01 is a local order which only explicitly applies to Richland County. Accordingly, this Office advises that courts in jurisdictions outside of

Richland County should seek clarification from the South Carolina Supreme Court as to whether this method of obtaining a search warrant is authorized for their jurisdictions.

When this Office was similarly asked to comment on the legality of proxy or telephonic marriages performed by electronic means, we opined that such marriages would probably not be considered valid or legal marriages in the State. Op. S.C. Atty. Gen., 1991 WL 474788 (November 12, 1991). The opinion concluded by suggesting, "Due to the advancing electronic technology which was not in existence when our statutes governing marriage were adopted, it might be advisable to seek legislation to clarify the marriage statutes, particularly as to proxy or telephonic marriages or the use of 'faxed' applications for licenses." Id. at 5. Because Section 17-13-340 likewise predates the electronic communication methods at issue in this request, the opinion's suggestion is equally applicable here. Therefore, this Office suggests seeking clarification through legislation as to whether other communication technologies may be used to facilitate the swearing of an affiant before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for a search warrant.

Please note that this opinion is not intended to comment on the validity or legality of any particular search warrant. Further, this Office does not intend to intrude upon the discretion of the judiciary.

Conclusion

This Office declines to extend the methods by which an affiant may be sworn "before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for [a search] warrant" beyond the express terms of Order No. 2001-07-26-01 of the Chief Justice of the South Carolina Supreme Court. See <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2001-07-26-01>. While State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009), could be read broadly to allow additional methods of remote swearing and transmittal of the search warrant and supporting affidavits beyond the use of a facsimile and telephonic swearing, it would be inappropriate for this Office to either approve or disapprove of such further methodologies. The authority to make rules governing the administration of the State's unified judicial system is granted to the South Carolina Supreme Court in Article V, § 4 of the South Carolina Constitution. Rather, this Office suggests seeking clarification through legislation as to whether additional communication technologies may be used to facilitate the swearing of an affiant before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for issuing a search warrant. Further, please note that Order No. 2001-07-26-01 is a local order which only explicitly applies to Richland County. Accordingly, this Office advises that courts in jurisdictions outside of Richland County should seek clarification from the South Carolina Supreme Court as to whether this method of obtaining a search warrant is authorized for their jurisdictions.

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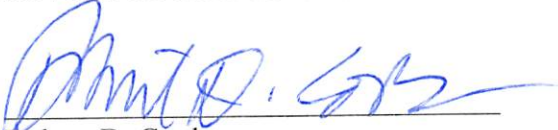
Please be advised that this opinion is not intended to comment on the validity or legality of any particular search warrant. Further, this Office does not intend to intrude upon the discretion of the judiciary.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General