06-CR-F

United States District Court
Southern District Of California
U.S. Courts Building
940 Front Street
Room 1145
San Diego, California 92101-8927

Anthony J. Battaglia
United States Magistrate Judge

Phone: (619) 557-3446
Fax: (619) 702-9988

MEMORANDUM

TO: Judge Bucklew

CC: Sara Sun Beale and John Rabiej

FROM: Judge Battaglia

RE: Possible Amendments to Rule 32.1 and 46

DATE: August 14, 2006

A colleague called me recently searching for procedural guidance on the procedure required for the issuance of an arrest warrant for alleged violations of supervised release conditions. As demonstrated below, there is no current procedural rule addressing the issue, and in fact there is a "gap" in our constellation of rules relative to warrants and charging documents.

I did an informal survey of the judges serving on the Federal Magistrate Judge Association Board of Directors and the judges serving on the Executive Board of the Ninth Circuit Magistrate Judges. I have the pleasure of serving on both. Those judges feel that procedural guidance would be very useful. In fact, they pointed out that "we have same problem" associated with warrants for alleged violation of pretrial release conditions.

Rules 3 (complaint), 4 (warrant on a complaint), 9 (warrant on indictment or information), and 41 (search warrants), respectively, specify the necessary documentation and "showing" associated with the issuance of charging documents as well as warrants. They specify the necessary "written statement of essential facts constituting the offense charged . . . under oath . . ." Fed. R. Crim. P. 3, "one or more affidavits . . . establish probable cause" Fed. R. Crim. P. 4 and 9; or, "affidavit," Fed. R. Crim. P. 41(d)(2) required to obtain a warrant. There are no counter-parts for issuing a warrant, and none of the existing rules are broad enough to address warrants for proceeding in these circumstances.

I am therefore writing to propose amendments to Rules 32.1 and 46, respectively, and would ask that this matter be placed on the October, 2006 or April 2007 Agenda (as you determine best) for the committee's review.

As most judges will attest, in the normal course, petitions are brought by probation officers

for the issuance of a warrant for alleged violation of probation or supervised release conditions. Probation officers and pre-trial services officers bring similar petitions related to pre-trial release conditions. These will be addressed separately below.

Probation and Supervised Release Violation Warrants

I would propose a new paragraph (a) to Rule 32.1 to address this issue. Language could be similar to the following:

> (a) **The Issuance of a Warrant.** After receiving an affidavit from a probation officer or an attorney for the government, a federal judge may issue a warrant to a person authorized to serve it, if there is probable cause to believe that a person has violated a condition of probation or supervised release. The judge may alternatively issue a summons, instead of a warrant, to a person authorized to serve it.
>
> ~~(a)~~(b) **Initial Appearance. . . .**

This amendment would then require relettering of the subparagraphs that follow.

Discussion

Currently, Rule 32.1 starts with "a person held in custody." Fed. R. Crim. P. 32.1(a). The predicate procedure to the arrest is absent. This amendment would satisfy a need for procedural guidance in seeking arrest warrants for proceedings under Fed. R. Crim. P. 32.1. As noted above, procedural guidance is provided for search warrants, complaints, arrest warrants on complaints, and arrest warrants on information. All require a finding of probable cause upon oath or affirmation, which is consistent with the Warrant Clause of the Fourth Amendment. See also, *United States v. Piccard*, 207 F.2d 472, 475 (9th Cir. 1953) (noting the Warrant Clause secures an individual's right "to be protected against the issuance of warrant for his arrest, except upon probable cause supported by oath or affirmation"). See also *ex parte Burford*, 7 U.S. (3 Cranch) 448, 453, 2 L. Ed. 495 (1806) ("warrant of commitment was illegal, for want of stating some good cause certain, supported by oath").

The proposed amendment would be consistent with 18 U.S.C. § 3606,[1] which requires probable cause, 18 U.S.C. § 3606, however lacks procedural specificity. The amendment would also conform to current practice as stated above. Finally, this would also be consistent with the "warrant or summons" requirement of 18 U.S.C. §3565(c) for delayed revocation of probation, as well as 18 U.S.C. § 3583(i), dealing with delayed revocation of supervised release. That section provides that a court ordered summons issued during the term of supervised release, extends the Court's jurisdiction to revoke beyond the expiration of the term. One court has recently concluded that the "warrant" mentioned in § 3583(i) must be based on a sworn statement establishing probable cause. *United States v. Vargas-Amaya*, 389 F.3d 901 (9th Cir. 2004).

The use of the term "affidavit" is used intending the interpretation supplied by 28 U.S.C. §

[1] "If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation, he may be arrested, and, upon arrest shall be taken without unnecessary delay before the court having jurisdiction over him. . ."

1746.[2] In that regard, a declaration under penalty of perjury would suffice. In the normal course, these applications or petitions are signed under penalty of perjury. This interpretation and practical use has been upheld in *United States v. Bueno-Vargas*, 383 F.3d 1104 (9th Cir. 2004).

The proposed amendment is stated in permissive language, in the event the judge wants to take action other than the issuance of a warrant. The wording acknowledges the judges ability to issue a summons, instead of a warrant, similar to Rule 4. Rule 4 distinguishes a summons from a warrant in that "it must require the defendant to appear before a magistrate judge at a stated time and place" as opposed to being a subject of an arrest. (See, Fed. R. Crim. P. 4(b)(2).)

Additionally, the amendment would not preclude the Court's ability to *sua sponte* initiate proceedings based on information acquired from any source. *U.S. v. Davis*, 151 F.3d 1304, 1307-08 (10th Cir 1998).

In practice, there are occasions where the judge will choose to take no action beyond recommending the probation officer to continue to monitor and report if the suspect's conduct continues. The judge might otherwise chose a summons over a warrant under a particular set of circumstances. Leaving this in a permissive form would preserve that discretion and flexibility. In a mandatory form, then in every instance, where probable cause is shown, a warrant would have to issue. That may be the practice of many judges individually, but allowing for variation would appear consistent for judges who might have different local or personal practice.

Pre-trial Release Violation Warrants

Warrants for an alleged violation of a condition of pre-trial release are covered by 18 U.S.C. § 3148(b). This section provides in pertinent part:

> The attorney for the government may initiate a proceeding for revocation of an Order of Release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which such persons arrest was ordered for a proceeding in accordance with this section.

There is no reference in the statute to the procedural requirements upon which the warrant should be supported. Additionally, in practice, probation officers or pre-trial services officers typically apply for the warrants. Clearly, probable cause would be the legal standard. I would therefore, recommend an amendment to Rule 46[3] as follows:

---

[2] "Wherever . . . any matter is required or permitted to be supported, evidenced, established or proved by the sworn declaration, verification, certificate, statement, oath or affidavit in writing of the person making the same . . . such matter may, with like force and effect, be supported, evidenced, established or proved by the unsworn declaration, certificate, verification or statement in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, . . ."

[3] Rule 46 covers release from custody, generally, including a reference to pre-trial release [Fed. R. Civ. P. 46(a)] but does not address pre-trial release violations. This would seem to be the logical place for the proposed amendment.

(f) Issuance of a Warrant on a Violation. After receiving an affidavit from an attorney for the government, a probation officer or a pretrial services officer, a federal judge may issue a warrant if there is probable cause to believe that a person has violated a condition of pretrial release. The judge may alternatively issue a summons, instead of a warrant.

If adopted, this would require relettering current section (f), and those that follow for consistency. This amendment would make clear that current practice experience, that probation officers and pre-trial services officers bring forth the applications for these warrants. It also confirms the need to establish probable cause in a trustworthy format. In this case, the format would again be the "affidavit" as is interpreted in 28 U.S.C. § 1746. By retaining the ability of the "attorney for the government" to proceed, the rule would be consistent with current 18 U.S.C. § 3148(b) in that regard.

I trust that this brief summary adequately addresses the issue and a potential solution that would serve as a basis for discussion by the Advisory Committee on Criminal Rules.

C:\Documents and Settings\rabiej\Local Settings\Temp\notesFFF692\amendments32.1and46.awarrants.wpd