

# Tulsa Law Review

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Volume 12 | Number 2

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1976

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### Recommended Citation

Laryn R. Philips, *The Timely Execution of Tulsa County Search Warrants*, 12 Tulsa L. J. 386 (1976).

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## THE TIMELY EXECUTION OF TULSA COUNTY SEARCH WARRANTS

*The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, taken together with legislation regulating the process, should be liberally construed in favor of the individual.*

*Chief Justice Charles Evans Hughes*

Prior to the issuance of a search warrant, a court must find from statements made under oath that sufficient evidentiary facts exist to justify the issuance of the warrant. Once issued, the warrant must be executed promptly. An Oklahoma statute provides that a search warrant, to be valid, must be executed and returned within ten days to the issuing magistrate.<sup>1</sup> The Oklahoma Court of Criminal Appeals has adopted a plain meaning interpretation of this statute, holding that warrants executed after the ten-day period do not afford a lawful basis for a search, whereas warrants executed within ten days after issuance are *prima facie* timely executed.<sup>2</sup> This article critically examines this statutory interpretation with respect to Tulsa County search warrants and suggests arguments for criminal defense attorneys who wish to challenge the execution of a Tulsa County search warrant despite the fact that it is executed within ten days after its issuance.

The Oklahoma statutory scheme for search and seizure<sup>3</sup> envisions the speediest possible execution of search warrants. Section 1225 of title 22 sets out the requisites for all warrants:

If the magistrate be thereupon satisfied of the existence of grounds of the application, or that there is probable cause to

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1. OKLA. STAT. tit. 22, § 1231 (1971) states in full: "A search warrant must be executed and returned to the magistrate by whom it is issued within ten days. After the expiration of these times respectively, the warrant, unless executed is void."

2. *Simmons v. State*, 286 P.2d 296 (Okla. Crim. App. 1955); *Overturf v. State*, 102 P.2d 623, 624 (Okla. Crim. App. 1940). If an issuing court feels that a warrant should be served within a shorter time than ten days, the court may place such a limitation in the warrant. But if a warrant contains no limitation, it may be executed within ten days after its issuance and the timeliness of its execution may not be questioned. 286 P.2d at 296.

3. The statutory provisions for search and seizure in Oklahoma are set out in title 22 of the Oklahoma statutes, sections 1221-1241.

believe their existence, *he must issue a search warrant, signed by him, with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate, and also to arrest the person in whose possession the same may be found, to be dealt with according to law.*<sup>4</sup>

In addition to the "forthwith" language of this statute, section 1226 of title 22 sets out the format with which Oklahoma search warrants must substantially comply:

You are therefore commanded, in the daytime (or "at any time of the day or night," as the case may be, according to Section 1230, as amended, of Title 22 of the Oklahoma Statutes), to make *immediate* search on the person of C.D. (or "in the house situated," describing it, or any other place to be searched, with reasonable particularity, as the case may be), for the following property (describing it with reasonable particularity), and if you find the same, or any part thereof, to bring it *forthwith* before me, at (stating the place).<sup>5</sup>

The format followed by Tulsa County search warrants, however, differs in one important aspect from the 1225 and 1226 guidelines: the language requiring immediate execution of the warrant has been deleted.

YOU ARE THEREFORE COMMANDED at any time of the day or night to make search of said person, vehicle and/or premises the curtilage thereof and the appurtenances thereunto belonging for the described property, and if found to seize the same and safely keep it, and bring it before me at the Tulsa County Courthouse in accordance with the subsequent order of the Court, and make return hereof within ten days.<sup>6</sup>

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4. OKLA. STAT. tit. 22, § 1225 (1971) (emphasis added).

5. OKLA. STAT. tit. 22, § 1226 (1971) (emphasis added).

6. Tulsa County utilizes five different types of search warrants. The quoted language appears in the Tulsa County general search warrant, which is applicable in any situation. Special forms specifically authorize searches for narcotics, gambling paraphernalia, alcohol, and stolen property. Their respective commands are as follows:

*Narcotics Search Warrant:*

YOU ARE THEREFORE COMMANDED at any time of the day or night to make search of said person, vehicle and/or house, building and premises, the curtilage thereof and the appurtenances thereunto belonging for the described property, and if found to seize the same and safely keep it, and bring it before me at the Tulsa County Courthouse in accordance with the subsequent order of the Court, and make return hereof within ten days.

*Gambling Paraphernalia Search Warrant:*

YOU ARE THEREFORE COMMANDED at any time of the day or

Since the Tulsa County warrant is silent as to the issue of immediate service, the law enforcement official who is to serve the warrant can reasonably infer from it that he may lawfully serve and return the warrant anytime within ten days. Such an inference, however, violates the express intention of sections 1225 and 1226, and is contrary to the whole tenor of other constitutional<sup>7</sup> and statutory provisions governing the execution of search warrants.

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night to make *immediate* search of said premises described, and to seize all gambling and lottery paraphernalia there found, together with all implements, furniture and fixtures and money used or kept for such illegal use as gambling or lottery paraphernalia, and safely keep the same for disposition in accordance with the subsequent order of this court, and make return of this warrant within ten days hereof.

*Alcohol Search Warrant:*

YOU ARE THEREFORE COMMANDED at any time of the day or night to make *immediate* search of the following described vehicle and/or premises, the curtilage thereof and the appurtenances thereto belonging, situated in Tulsa County, State of Oklahoma . . . and to seize all alcoholic beverages kept and possessed in violation of law, and all apparatus, equipment, instrumentality and vehicle used in the manufacturing or transporting of alcoholic beverages in violation of law, and safely keep the same for disposition in accordance with the subsequent order of this Court, and make return hereof within ten days from this date.

*Stolen Property Search Warrant:*

YOU ARE THEREFORE COMMANDED at any time of the day or night to make *immediate* search of said vehicle and/or premises, the curtilage thereof and the appurtenances thereunto belonging for the described property, and if found to seize the same and safely keep the same for disposition in accordance with the subsequent order of the Court, and also to arrest any person in whose possession said property may be found, that he may be dealt with according to law, and make return hereof within ten days from this date.

(emphasis added). Of the five types of warrants, only the specialized gambling paraphernalia, alcohol and stolen property warrants command an immediate search; the narcotics warrant and the general warrant make no such requirement. All five warrants authorize night searches.

7. Apart from the Oklahoma statutory scheme, reasonable searches authorized by search warrants are required by the fourth amendment to the United States Constitution, which states in full:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Oklahoma version of the fourth amendment appears in article 2, section 30 of the Oklahoma Constitution, which states in full:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.

Failure to strictly comply with the formalities required by state statute has been held violative of the fourth amendment. *See, e.g., State v. Morley*, 5 N.J. Misc. 987, 139 A. 392 (1927) (warrant failing to command immediate service despite statutory requirement violative of fourth amendment). The court relied on the Supreme Court's language in *Goueld v. United States*, 255 U.S. 298, 304 (1921): "It has been repeatedly decided that . . . [the fourth and fifth] Amendments should receive a liberal construc-

The purpose for a search warrant in Oklahoma, as in every state, is to insure that the thing to be seized is at the place to be searched and to bring it before the magistrate.<sup>8</sup> As a result, warrants are directed to existing violations of the law and are issued only on a showing to the satisfaction of the magistrate that the property in question is presently at the place to be searched.<sup>9</sup> Once satisfied, the magistrate issues a search warrant commanding immediate search.<sup>10</sup> After the premises have been searched for the specified property, the return of the warrant to the magistrate must be expeditious.<sup>11</sup>

Even without these statutory mandates, it is a matter of logical necessity that all search warrants must be served without delay. Since warrants are issued on the basis of allegations of presently existing facts, it is essential that search warrants be executed promptly in order to lessen the possibility that the situation existing at the time the warrant was issued has not changed.<sup>12</sup> If there is delay in execution, not only may the property to be seized disappear, but there is the additional danger that property brought to the premises after the search warrant was issued will be seized. Despite these directives, Tulsa County search warrants fail to command immediate service.<sup>13</sup>

This failure to command immediate execution becomes particularly objectionable when the warrant involved authorizes a night search. Special circumstances must exist before the issuance of a night warrant

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tion, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." Because Oklahoma statutory requirements are not fulfilled in Tulsa County search warrants, execution of the warrants may be unreasonable within the meaning of these constitutional provisions. See notes 20-42 *infra* and accompanying text.

8. See OKLA. STAT. tit. 22, §§ 1221, 1222 (1971).

9. OKLA. STAT. tit. 22, § 1223 (1971). Search warrants issued on affidavits which fail to state facts showing probable cause are illegal. See, e.g., *Wagner v. State*, 99 P.2d 161 (Okla. Crim. App. 1940). Moreover, if any oral testimony is to be used to supplement the affidavit, this testimony is to be transcribed "forthwith". OKLA. STAT. tit. 22, § 1224.1 (1971).

10. OKLA. STAT. tit. 22, §§ 1225, 1226 (1971).

11. OKLA. STAT. tit. 22, § 1233 (1971).

12. The Oklahoma Court of Criminal Appeals recognizes probable cause as a time-oriented concept because the facts on which issuance of a warrant are based are likely to change: "Facts sufficient to provide probable cause at one point in time may not be sufficient a year, a month, or even a day later." *Warthen v. State*, 47 OKLA. B. A. J. 2950 (Okla. Crim. App. 1976) (invalidating search warrant because the affidavit on which it was based failed to state the time of the occurrence supporting the warrant's issuance). The court, however, has yet to apply this flexible standard when reviewing the timely execution of Oklahoma search warrants. See note 2 *supra* and accompanying text.

13. See note 6 *supra*.

can be justified. These requisites are set out in section 1230 of title 22:

The judge shall insert a direction in the warrant that it be served in the daytime, unless the affidavits be positive that the property is on the person, or in the place to be searched, and the judge finds that there is likelihood that the property named in the search warrant will be destroyed, moved or concealed. In which case the judge may insert a direction that it be served at any time of the day or night.<sup>14</sup>

A simple reading of this statute indicates that night warrants are the exception rather than the rule. Since they involve a greater intrusion than ordinary searches, their issuance requires a greater justification.<sup>15</sup> The need for increased justification is reflected in the requirement that not only must the magistrate be assured from the affidavit that the property is on the person or place to be searched, but there must be a strong showing that the property in question is likely to be destroyed, removed, or concealed unless an immediate search is allowed. Accordingly, immediate execution is of the utmost necessity when a night warrant is involved.<sup>16</sup>

Tulsa County search warrants not only fail to command immediate execution, they are routinely used to permit night searches.<sup>17</sup> By routinely authorizing night searches, the issuance of such warrants is not made contingent on the judicial determinations contemplated by section 1230.<sup>18</sup> Moreover, without words of immediacy, these war-

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14. OKLA. STAT. tit. 22, § 1230 (1971).

15. In cases in which the Fourth Amendment requires that a warrant to search be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. . . .

. . . . Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.

*Camara v. Municipal Court*, 387 U.S. 523, 534-37 (1967) (standard of reasonableness relaxed for area code enforcement inspections involving minimal intrusion). By implication, greater justification should be required for the issuance of a night warrant, which is personal in nature and involves substantial intrusion into an individual's privacy.

16. Consider the typical drug case. Except when present in large quantities, narcotics are easily transportable and concealable. When the contraband involved is of this sort, the facts upon which probable cause is based can be easily and quickly altered. Thus, in such a case it is unreasonable to expect this same contraband to be found in a search roughly a week to ten days after the warrant was issued. Tulsa County narcotics warrants, however, fail to command immediate execution. See Tulsa County narcotics search warrant in note 6 *supra*.

17. See the five types of Tulsa County warrants in note 6 *supra*, all of which provide for searches "at any time of the day or night."

18. It seems clear that the Oklahoma legislature did not envision Tulsa County mechanically issuing nothing but night warrants. The express language of section 1230 itself plainly indicates that only after the issuing judge is satisfied that an immediate

ants permit the police to frustrate the intention of the Oklahoma legislature as expressed in section 1230. Although policemen should be allowed certain leeway in the performance of their duties, surely the Oklahoma legislature did not wish to allow execution of night warrants at the leisure of police, nor did they intend to invest policemen with the discretion to execute the warrant at any time within the ten days they believed to be the most advantageous.<sup>19</sup> Yet, despite the fact that these warrants are only to be issued in the most exigent of circumstances, Tulsa County search warrants mechanically authorize night searches in addition to discounting the statutory command of immediacy to the point of exclusion.

Section 1231 of title 22 and its subsequent interpretation by the Oklahoma Court of Criminal Appeals represents the only justification for delayed execution of search warrants. This section provides that: "A search warrant must be executed and returned to the magistrate

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search is necessary under the particular circumstances, may he authorize a night search. In addition to the special criteria set out in section 1230 for the issuance of night warrants, consider the language of section 1226 of title 22 which sets out the format for Oklahoma search warrants: "You are therefore commanded, in the daytime (or 'at anytime day or night,' as the case may be, under Section 1230) to make immediate search. . . ." Clearly the legislature intended some warrants to be executed during the day, and some to be executed "at any time of the day or night," provided that the requisites for the issuance of a night warrant were justified under the particular circumstances in accordance with section 1230.

19. The fear of arbitrary intrusion by the police lies at the very core of the fourth amendment. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

In *Simmons v. State*, the Oklahoma Court of Criminal Appeals stated: "It is an integral part of our system of government that an officer assuming to execute process upon the property or person of a citizen should execute it promptly." 286 P.2d 296, 298 (Okla. Crim. App. 1955). Other states have also construed the term "forthwith" in a manner requiring diligence upon the part of executing authorities. See, e.g., *State v. Miller*, 329 Mo. 855, 46 S.W.2d 541, 542 (1932); *People v. Fetsko*, 332 Ill. 110, 163 N.E. 359, 360 (1928); *People v. Wiedeman*, 324 Ill. 66, 154 N.E. 432 (1926); *State v. Guthrie*, 90 Me. 448, 38 A. 368 (1897).

Delayed police action was also discouraged in *Spinelli v. United States*, 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 416 (1969):

A warrant is a court order requiring the police to perform a ministerial function . . . . A lapse of up to ten days in execution may be reasonable when the delay is caused by distance, traffic conditions, weather, inability to locate the person or premises to be searched, personal safety, etc. However, a delay of a few hours may be unreasonable if the police are not diligent in executing the warrant and the purpose of the delay was to prejudice the rights of the suspect.

382 F.2d at 885.

The police officer is not the only official who may not execute search warrants at his own discretion. "Even the magistrate has no right, once he has determined that the conditions for the issuance of a search warrant are in existence, to keep the suspect under surveillance and postpone execution of the warrant until such time as it may do the suspect the greatest harm." *Mitchell v. United States*, 258 F.2d 435, 437 (D.C. Cir. 1958).

by whom it is issued within ten days. After the expiration of these times respectively, the warrant, unless executed is void."<sup>20</sup> This section's invalidation of warrants executed after ten days has also been interpreted to support the validity of those warrants executed within ten days.<sup>21</sup>

Although unambiguous, section 1231 must be read in light of section 1225 (requiring forthwith command),<sup>22</sup> section 1226 (commanding immediate service),<sup>23</sup> and, in the case of a night warrant, section 1230.<sup>24</sup> More importantly, this section must be squared with Article 2 section 30 of the Oklahoma Constitution<sup>25</sup> and the fourth amendment of the United States Constitution.<sup>26</sup> These statutory and constitutional provisions were designed to protect the privacy of the citizen from unreasonable searches, and unless the strict standards set for searches and seizures are satisfied, any ambiguity should be resolved in favor of the individual.<sup>27</sup>

Reading the statute in this light, it seems clear that the ten-day provision of section 1231 is merely designed to serve as an outer limit for timely service.<sup>28</sup> To read the ten-day provision of section 1231

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20. OKLA. STAT. tit. 22, § 1231 (1971).

21. See note 2 *supra* and accompanying text for the interpretation given the ten-day provision of section 1231 by the Oklahoma Court of Criminal Appeals.

22. OKLA. STAT. tit. 22, § 1225 (1971). See text accompanying note 4 *supra* for an examination of the language of this section commanding forthwith service.

23. OKLA. STAT. tit. 22, § 1226 (1971). See text accompanying note 5 *supra* for an examination of the immediacy language required to be placed in Oklahoma search warrants.

24. OKLA. STAT. tit. 22, § 1230 (1971). See text accompanying notes 14-19 *supra* for the circumstances required for the issuance of a night warrant.

25. OKLA. CONST. art. 2, § 30. The full text of this provision appears in note 7 *supra*. For an example of how this section has been interpreted, see McClary v. State, 246 P. 891 (Okla. Crim. App. 1926) (warrant not served until fourteen days after its issuance invalid).

26. U.S. CONST. amend. IV, designed to protect individuals from unreasonable searches, applies to the states through the fourteenth amendment. Wolf v. Colorado, 338 U.S. 25 (1949). The full text of the fourth amendment appears in note 7 *supra*.

27. Rea v. United States, 350 U.S. 214, 218 (1956); Sgro v. United States, 287 U.S. 206, 210 (1932); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Marron v. United States, 275 U.S. 192, 196 (1927); Byars v. United States, 273 U.S. 28, 32 (1927); Goueld v. United States, 255 U.S. 298, 304 (1921); Boyd v. United States, 116 U.S. 616, 635 (1886). Representative of this principle is the statement by Chief Justice Hughes in *Sgro*: "The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the fourth amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual." 287 U.S. at 210 (search warrant not timely executed held invalid).

28. See Y. KAMISAR, W. LAFAYE and J. ISRAEL, MODERN CRIMINAL PROCEDURE 261-62 (4th ed. 1974) [hereinafter cited as KAMISAR, LAFAYE & ISREAL]. For a similar interpretation of the ten-day limit see FED. R. CRIM. P. 41(c), which requires the "officer to search within a specified period of time not to exceed ten days, the person or



as allowing an unexplained ten-day delay in the execution of any search warrant,<sup>29</sup> particularly a night warrant, is not only to read out of the statute the logical requirement that service must be made immediately,<sup>30</sup> and the constitutional requirement of reasonableness with regard to the execution of search warrants,<sup>31</sup> but also to reject all the other statutory requirements intended to insure the speediest possible execution of search warrants.<sup>32</sup> Just because a warrant is executed within the ten-day period does not necessarily mean that its execution is timely.<sup>33</sup>

Such an interpretation is mandated not only because every hour of delay endangers future prosecution,<sup>34</sup> but also because every hour of

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place named or the property specified." The lower federal courts adopted the "outer limit" interpretation, making the time of execution as essential as any other element when determining the validity of a search warrant. See cases in note 33 *infra*.

A cursory examination of other aspects of Oklahoma's warrant scheme seems to support a similar interpretation of Oklahoma's ten-day provision. The express language of sections 1225 (requiring forthwith command) and 1226 (requiring immediate service language), coupled with the judicial findings necessary to support the issuance of a night warrant under section 1230, leaves little doubt that while a warrant may be returned within ten days, a search must be immediate.

29. The holding in *Simmons v. State*, 286 P.2d 296 (Okla. Crim. App. 1955) would protect this hypothetical warrant from attack. See note 2 *supra* and accompanying text.

30. See notes 12 and 13 *supra* and accompanying text.

31. See notes 7,25-27 *supra* and accompanying text.

32. See notes 4-5, 8-11 *supra* and accompanying text.

33. This has been the approach taken by the federal circuit courts in their interpretation of FED. R. CRIM. P. 41(c) which requires the "officer to search within a specified period of time not to exceed ten days, the person or place named or the property specified."

Although the following cases upheld the search warrants involved, all agreed that execution within the ten-day period is not necessarily timely and that a search warrant whose execution is unduly delayed is illegal. Moreover, every case rejected a mechanical interpretation of the ten-day provision of 41(c), holding that what constitutes a reasonable delay in execution should depend on the facts and circumstances of each case. The test applied in every case was whether the probable cause that initially justified the warrant still existed at the time the warrant was executed, and whether the reasons given for the delay in execution were justifiable under the circumstances. See, e.g., *United States v. Bedford*, 519 F.2d 650 (3d Cir. 1975) (8-day delay); *United States v. Wilson*, 491 F.2d 724 (6th Cir. 1974) (six-day delay); *United States v. Rael*, 467 F.2d 333 (10th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973) (five-day delay); *United States v. Nepstead*, 424 F.2d 269 (9th Cir.), *cert. denied*, 400 U.S. 848 (1970) (six-day delay); *United States v. Dunning*, 425 F.2d 836 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970) (nine-day delay); *United States v. Bradley*, 428 F.2d 1013 (5th Cir. 1970); *Spinelli v. United States*, 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969) (2 hours and 10 minutes delay).

The Oklahoma Court of Criminal Appeals has foreclosed the application of "continuing probable cause" through its holding in *Simmons*. See note 2 *supra* and accompanying text. This is particularly unfortunate in the case of Tulsa County search warrants, since delays of this kind are to be expected when the warrants fail to command immediate service in violation of a statute that requires this command. See notes 3-13 *supra* and accompanying text.

34. "No case can be stated in which a needless delay of service will aid the prosecu-

delay infringes an individual's fourth amendment protection from unreasonable searches.<sup>35</sup> This amendment has been held to protect individuals from search warrants which have inadequately described the place to be searched,<sup>36</sup> which have resulted in the seizure of items not listed in the search warrant,<sup>37</sup> and which were executed without notice by police who gained illegal entry.<sup>38</sup> In accordance with the fourth amendment's requirement that warrants must be based on probable cause,<sup>39</sup> warrants which are based on information that has become stale between the time of observation of the facts and issuance of the warrant are void, and evidence provided by the subsequent search under these circumstances must be suppressed.<sup>40</sup> If Oklahoma warrants can be constitutionally challenged because they are *untimely issued by magistrates* six to eight days after the alleged observation of criminal activity, they should also be susceptible to challenge when they are *untimely executed by police officers* six to eight days after their issuance,<sup>41</sup> especially when execution is pursuant to a warrant which

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tion . . . . Every hour's delay, whether from the officer's inefficiency or from his collusion with respondents, endangers the success of the prosecution." *Mitchell v. United States*, 258 F.2d 435, 438 (D.C. Cir. 1958) (Bazelon, J., concurring).

35. U.S. CONST. amend. IV. Delay in the execution of a warrant is inherently prejudicial to the defendant, since facts sufficient to provide probable cause at one point in time may rapidly dissipate. For a liberal interpretation of what constitutes prejudicial delay in the execution of a search warrant, see *United States v. McClard*, 333 F. Supp. 158 (E.D. Ark. 1971).

36. See KAMISAR, LAFAVE & ISREAL, *supra* note 28, at 259 for a discussion of this issue.

37. See KAMISAR, LAFAVE & ISREAL, *supra* note 28, at 264 for a discussion of this issue.

38. See KAMISAR, LAFAVE & ISREAL, *supra* note 28, at 261 for a discussion of this issue.

39. U.S. CONST. amend IV states in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and *no Warrants shall issue, but upon probable cause . . . .*" (emphasis added).

40. Such warrants are without probable cause, since there is no longer sufficient probability that the property is located in a particular place. *Aguilar v. Texas*, 378 U.S. 108,111 (1964). The standard used to test this probability of present possession must necessarily vary from case to case, depending on whether the offense is one of a continuing nature. *Sgro v. United States*, 287 U.S. 206, 210 (1932).

Following these principles, the Oklahoma Court of Criminal Appeals utilizes a flexible test for the determination of whether there is probable cause in light of the lapse of time between observation and issuance of the warrant. All of the facts in each individual case must be considered. See, e.g., *Warthen v. State*, 47 OKLA. B. ASS'N J. 2950 (Okla. Crim. App. 1976). For a collection of authority on the issue of staleness between the time of observation and issuance, see Comment, *A Fresh Look at Stale Probable Cause: Examining the Timeliness Requirement of the Fourth Amendment*, 59 IOWA L.R. 1308 (1974).

41. Such warrants are without continuing probable cause. The only difference between this situation and the situation in note 40 is that in the latter the delay was

fails to command immediate search in violation of statutes that require such commands. Thus, if so much time has transpired between issuance and execution that the facts justifying the initial finding of probable cause are likely to have changed, the information upon which the issuance was based should be considered stale, the search deemed unreasonable, and any evidence procured as a result of the search held inadmissible because of untimely execution.<sup>42</sup>

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between observation and issuance, not issuance and execution. Both situations, however, may represent unreasonable delays. See note 33 *supra* and cases cited therein for an explanation of how the test of continuing probable cause has been applied by the lower federal courts.

Although Oklahoma follows a flexible case-by-case approach in determining whether there is a sufficient time relationship between observation and issuance, the court follows a rigid interpretation when reviewing delays between issuance and execution. Compare note 12 and note 40 *supra* with note 2 *supra* and accompanying text.

42. This is not to say that every search warrant that is not immediately executed is inherently invalid. The question to be decided in each case is whether an unjustifiable period was allowed to pass between issuance and execution.

Even when narcotics are involved, a number of circumstances may justify a finding that a warrant's execution was timely despite some delay. If, for example, the search warrant is directed at a known narcotics dealer who is presently dealing in large quantities, with a staff of several peddlers and a stream of addicts going in and out of the premises, and if there is a desire to protect the safety of the informant due to the criminal reputation of the dealer, there is little doubt that the probable cause that existed at the time a warrant was issued would still be in existence a week or even ten days later. Moreover, there may be other valid reasons which would justify the delay in execution (see the quotation from *Spinelli* in note 19 *supra*).

Contrast this situation, however, with the Tulsa County night warrant issued in the recent case of *Brown v. State*, No. CRF-76-2886 (Okla. Dist. Ct. Feb., 1976). The affidavit supporting the warrant stated in pertinent part:

Affiant further states that in the last twenty-four hours he was met by confidential informant that advised the following:

The informant advised that a Negro male going in the name of Sylvester Snell was selling marijuana at the above described apartment.

Further your affiant advises that he accompanied the informant to the above described apartment within the last twenty-four hours and after having searched the informant and finding no money or drugs, gave the informant ten dollars (\$10.00) U.S. Currency.

Your affiant then observed the informant enter the above described apartment, stay twenty minutes, after which the informant returned directly to your affiant. Your affiant then searched the informant and found approximately one ounce of marijuana but no other controlled substances or money.

The informant advised your affiant that the informant had purchased this marijuana from Sylvester Snell.

Note that this affidavit contains no allegations of large quantities of narcotics either seen or being sold in the apartment in question, no allegations relating to any past dealings with Sylvester Snell, no allegations underlying the informant's belief that Sylvester Snell was selling marijuana in his apartment, no allegations as to the criminal reputation of Sylvester Snell, and no allegations as to any systematic activity involving the selling of marijuana by Sylvester Snell. However, because the informant made one purchase for \$10 on the night in question, the magistrate had sufficient probable cause for believing the contraband was presently located in the particular apartment at the time the search warrant was applied for. Accordingly, a Tulsa County night warrant was issued, which failed to command immediate service. See narcotics warrant in note

What constitutes a reasonable delay in executing a search warrant should depend on the facts and circumstances of each individual case. Unfortunately, however, the Oklahoma Court of Criminal Appeals has foreclosed such an inquiry through its interpretation of section 1231's ten-day provision. Rather than adopting a case-by-case analysis utilizing the concept of continuing probable cause,<sup>43</sup> the court has opted for a rigid rule, allowing no challenge to the timeliness of warrants executed within the statutory period.<sup>44</sup> The mechanical application that this interpretation permits, particularly with respect to night warrants,<sup>45</sup> is seemingly inconsistent with the express intent of the Oklahoma legislature's statutory scheme for the execution of search warrants as well as with the Oklahoma constitution and the United States Constitution. More importantly, delays in the execution of Tulsa County search warrants are to be expected, since the warrants fail to command immediate execution. If the exclusionary rule is to have continuing

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6 *supra*. The officers in this case did not execute the warrant immediately. They waited until more than seven days after the issuance of the warrant, and more than eight days after the informant's \$10 buy, before breaking into the home of Sylvester Snell and seizing the evidence which formed the basis of *Brown v. State*. Sylvester Snell was not even home when the warrant was served. The total marijuana recovered consisted of 1½ ounce of marijuana, six marijuana cigarette butts, and some marijuana residue and seeds; an amount lending little support to the informer's contention that Sylvester Snell was selling marijuana in his apartment.

This case provides a good illustration of the concept of continuing probable cause. Examining the sparse allegations of the affidavit, immediate execution of this warrant was of the utmost necessity. Under these circumstances, the probable cause that existed on October 19, when the night warrant was issued, did not continue until the execution of the warrant on the evening of October 26. Assume, for example, that this seven-day delay had occurred between observation and issuance, not issuance and execution. If the police officer had come to the magistrate with one bag of marijuana purchased eight days earlier, making the same allegations (or lack thereof) as appeared in the previous affidavit, it is obvious that this information would be too stale to support the issuance of a search warrant. See note 40 *supra* and accompanying text. If the magistrate could not lawfully issue a warrant based on this eight-day-old information, the policemen in this case should not have been permitted to lawfully execute the warrant based on eight day old information. Accordingly, it was wholly unreasonable to execute this warrant under these circumstances seven days after its issuance, and the motion to suppress for untimely execution in this case should have been sustained.

Moreover, since the night warrant failed to command immediate execution, it is possible that the seven-day delay was the result of the officer's understanding that they had ten days in which to execute the warrant. This belief is legally erroneous in light of the legislative admonitions underlying the relevant statutory and constitutional provisions already mentioned.

43. See note 33 *supra* and accompanying text for a discussion of this concept.

44. See note 2 *supra* and accompanying text.

45. This interpretation, for example, forecloses any inquiry into the timely execution of a Tulsa County night warrant executed after an unexplained expiration of nine days following its issuance, despite the fact that night warrants are only to be issued when an immediate search is of the utmost necessity. See notes 14-19 *supra* and accompanying text.

vitality in Oklahoma and if Oklahoma statutes are to be read consistently with their drafter's intent and the dictates of the fourth amendment, the Oklahoma Court of Criminal Appeals should reconsider its longstanding interpretation of section 1231 and, at a minimum, force Tulsa County search warrants into compliance with the statutory requirements that were meant to govern their execution.

*Layn R. Phillips*