2-8-19
Mtg.

**HB33--Applications for search warrants**

- My name is Mike French, and I'm a member of the Idaho Association of Criminal Defense Attorneys; I'm here to voice our opposition to HB33
- Prosecutor, law enforcement officer, and judge (and perhaps others) talking about a defendant's case without the defendant or defendant's attorney present
    - Implicates fundamental privacy rights under federal 4th Amendment and Idaho Constitution Article I, Section 17, which specifically mentions the affidavit: 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 warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.
- In 1994, the Idaho Prosecuting Attorneys Association presented then SB1468—to add a new section to the penal code to allow applications for search warrants to be made by an oral affidavit over the telephone:
    - That new section, 19-4404, in recognition of the importance of the affidavit, specified that the oral affidavit must be "recorded and transcribed."

- The IPAA's 1994 bill simultaneously proposed amending section 19-4406, to allow for the magistrate to authorize law enforcement to sign the magistrate's name on a duplicate original warrant, which the magistrate would then later sign himself
    - In a meeting of this committee on February 28, 1994, opposition to the IPAA bill was voiced, specifically that the section of the bill amending 19-4406, regarding the magistrate's authorization of law enforcement to sign on the magistrate's behalf, was not, in the language of the original bill, required to be recorded and transcribed
    - The bill was sent to the floor and amended to address this criticism, and today, 19-4406 requires that the magistrate's verbal authorization be "recorded and transcribed."

- So, what we are left with in HB33, first off, is an inconsistency that really doesn't make any sense; 19-4406 requires the magistrate's verbal authorization of a law enforcement officer to sign a search warrant on his behalf is required to be recorded and transcribed; HB33 would amend 19-4404 to say that the portion of the recording just before this authorization—the affidavit establishing probable cause—does not need to be transcribed; that seems to be an inconsistency that will not really meet the stated cost

savings purpose of HB33; it seems improbable that the process of transcribing the magistrate's verbal authorization—which should come at the end of the recording of the proceedings—will cost less than simply transcribing the entire recording

- The fact that the IPAA and the 1994 Legislature recognized that the entire application for a search warrant proceeding should be both recorded and transcribed is an indicator of the importance of the process to fundamental to constitutional rights—the right to be free from unreasonable search and seizure is the bedrock of democracy; the application for a warrant should not be divorced from the tangible, hardcopy of a court file, required to be hunted down, requested, only included upon extra steps; the hardcopy of a file is readily accessible, it's the thing that gets passed from one attorney to the next, what gets passed on when the case is moved, and pieces of the case such as an untranscribed recording can get lost or forgotten; technology can fail; the Legislature recognized that such a fundamental part of a criminal case—one that is an ex parte proceeding upon which entire prosecutions may rest—should not be left to the vagaries of existing only in audio format—the transcription provides an added layer that ensures that both the affidavit and the magistrate's authorization of the search are preserved without question

- The Statement of Purpose for HB33 indicates that the transcripts of the recordings of these application proceedings are "infrequently used." This statement does not convey the entire picture and is unfortunately misleading. Under Idaho Criminal Rule 16, the rule governing discovery in criminal cases, the prosecution is required to produce statements of prosecution witnesses upon request of the defendant; I am here to tell you that defense attorneys are requesting these statements—which include the affidavits (oral or written) made in applications for search warrants--and we are not being provided with those affidavits; we are having to bring motions to compel, at great expense of time and money, which is sometimes not available, and even then are sometimes not provided with these statements; Our concern is that HB33 puts these affidavits even further out of reach; we are seeking to have these statements produced to us, they are not being provided, and that lack of provision is now being used as a reason to erode the protection that preserving these statements both electronically and hardcopy provides; our requests are already going ignored, and this bill adds in another requirement for yet another "request," adding more time and cost to the provision of a constitutional defense;
- Because HB33 would result not result in as great of cost savings as it might seem at first, due to 19-4406's already requiring part of the warrant

application recording be transcribed, and because it stamps approval on the failure of the prosecution to provide bedrock, constitutionally necessary documents and makes those documents harder to get by adding in another requirement for another request, the IACDL respectfully requests that members of this committee vote against sending this bill to the floor