U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

December 31, 2012

MR. ALAN BUTLER
ELECTRONIC PRIVACY INFORMATION CENTER
SUITE 200
1718 CONNECTICUT AVENUE, NW
WASHINGTON, DC 20009

Subject: STINGRAY/CELL SITE SIMULATOR DEVICES

FOIPA No. 1182490- 000

Dear Mr. Butler:

The enclosed documents were reviewed under the Freedom of Information/Privacy Acts (FOIPA), Title 5, United States Code, Sections 552/552a. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Explanation of Exemptions:

Section 552		Section 552a
☐ (b)(1)	☐ (b)(7)(A)	☐ (d)(5)
☐ (b)(2)	☐ (b)(7)(B)	☐ (j)(2)
☑ (b)(3)	☑ (b)(7)(C)	☐ (k)(1)
The National Security Act of 1947	☐ (b)(7)(D)	☐ (k)(2)
	☑ (b)(7)(E)	☐ (k)(3)
	☐ (b)(7)(F)	☐ (k)(4)
☑ (b)(4)	☐ (b)(8)	☐ (k)(5)
☑ (b)(5)	☐ (b)(9)	☐ (k)(6)
☑ (b)(6)		☐ (k)(7)

1131 page(s) were reviewed and **157 page(s)** are being released.

☑ Document(s) were located which originated with, or contained information concerning other Government agency(ies) [OGA]. This information has been:

☐ referred to the OGA for review and direct response to you.
☑ referred to the OGA for consultation. The FBI will correspond with you regarding this information when the consultation is finished.

☐ In accordance with standard FBI practice and pursuant to FOIA exemption (b)(7)(E) [5 U.S.C. § 552 (b)(7)(E)], this response neither confirms nor denies the existence of your subject's name on any watch lists.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S. C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

☑ You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice,1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at http://www.justice.gov/oip/efoia-portal.html. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

☐ The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

☑ See additional information which follows.

Sincerely,

David M. Hardy
Section Chief
Record/Information Dissemination Section
Records Management Division

This represents the fourth interim release of information responsive to your Freedom of Information Act (FOIA) request.

Enclosure(s)

EXPLANATION OF EXEMPTIONS

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

(b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;

(b)(2) related solely to the internal personnel rules and practices of an agency;

(b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could be reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could be reasonably expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(b)(9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

(d)(5) information compiled in reasonable anticipation of a civil action proceeding;

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;

(k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;

(k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;

(k)(4) required by statute to be maintained and used solely as statistical records;

(k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service he release of which would compromise the testing or examination process;

(k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

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FOIPA
DELETED PAGE INFORMATION SHEET

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Page 444 ~ b5, b6, b7C, b7E
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[redacted] b6 b7C b5

Here's the applicable policy: the MIOG (OTD section pertaining to GPS) provides the following guidance:

16-4.8.13 Tracking and Location Information - Evidentiary Considerations (TTU) (See MIOG, Part 2, 16-2.12 (3).)

(1) Tracking and location information [redacted] may in fact constitute evidence in a number of investigative scenarios. See MIOG, Part 2, 10-10.8. Hence, such tracking and location information when evidential in nature should be maintained in an appropriate evidence envelope within the IA or IB section of a case file or within the Bulky Evidence Room. (TTU) b7E

(2) Since tracking and location information may constitute evidence in a number of investigative scenarios, it is important that careful consideration be given to field office [redacted] personnel becoming involved in the operation of tracking/locating devices, and in the downloading and chain of custody of tracking/locating information, with respect to the potential for being called to testify as a witness at trial (see FBI policy of [redacted]. Accordingly, consultation with the field office Chief Division Counsel (CDC) is warranted. Also see MIOG, Part 2, 10-9.8.1(2)(c) and 10-10.16. (TTU)

87

[redacted] b5

[redacted] b5

10-10.16 [redacted]

[redacted] b7E

(4) Expert witnesses are available from the Operational Technology Division, Engineering Research Facility, Quantico, Virginia, for media analysis and court testimony regarding authenticity [redacted] and other associated matters. These normally become points of question at pretrial hearings. It is a well-established fact that media recordings and other technically collected evidence are admissible in court. On the basis of current case law, the government can introduce recording media solely on the testimony of the Agent(s) who monitors and records the intercept (assuming the Agent can identify the voice(s) and testify to the authenticity of the media) [redacted] Normally, the Agent who signs the application for a court-ordered intercept will be called as a witness at a suppression hearing. [redacted] b7E See MIOG, Part 2, 16-7.2.2, 16- 3.1.6 (7).)

(5) If, in an unusual circumstance, the government's case mandates a disclosure of FBI technical operations, equipment or technique, the problem should be first brought to the attention of the Chief Division Counsel who will determine the disclosure and the reasons. Alternatives to disclosure will be sought and if no resolution is possible which would protect FBI technical concerns, then notification should be made to FBIHQ, Operational Technology Division, Electronic Surveillance Technology Section, so a final decision can be made in conjunction with the appropriate FBIHQ investigative divisions.

[redacted]

Hope this is helpful,

PRIVILEGED DELIBERATIVE DOCUMENT - NOT FOR DISCLOSURE OUTSIDE THE FBI WITHOUT PRIOR OGC APPROVAL

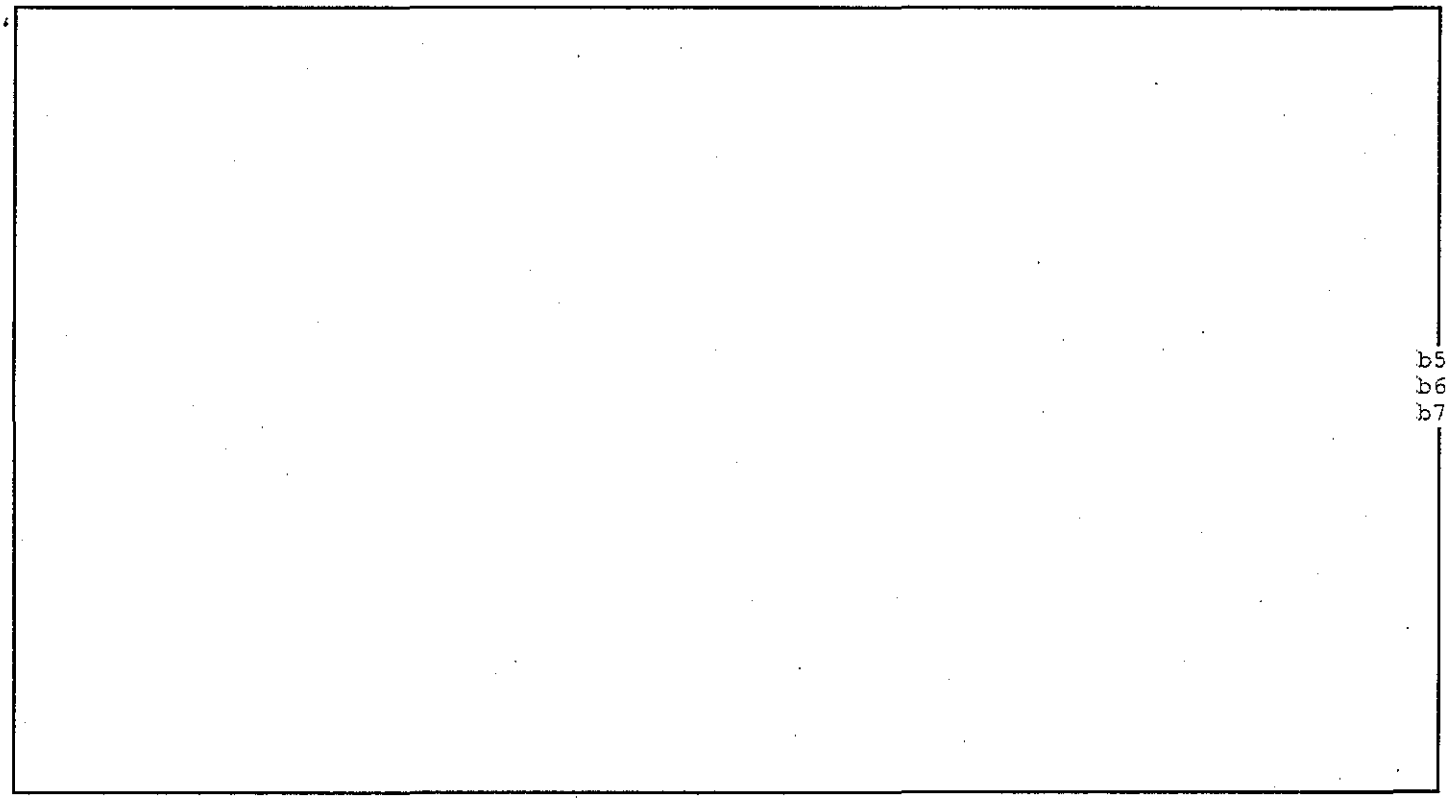
[redacted]

Assistant General Counsel
Science & Technology Law Unit
Engineering Research Facility

[redacted] b6 b7C

SCIENCE & TECHNOLOGY LAW UNIT - OFFICE OF THE GENERAL COUNSEL

[redacted] b6 b7C b5



b5
b6
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The United States Court of Appeals for the Eleventh Circuit in United States v. Van Horn, 789 F.2d 1492(11th Cir.), cert. denied, 479 U.S. 854 (1986), recognized a qualified government privilege not to disclose sensitive investigative techniques. The court opined:

> We recognize a qualifed government privilege not to disclose sensitive investigative techniques in Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the Supreme Court acknowledged the existence of an "informer's privilege." The Court stated that the government has a privielge to withhold the identity of persons who furnish information of violations of law to the police, reasoning that the privilege furthered effective law enforcement by encouraging citizens to come forward with relevant information, 353 U.S. at 59, 77 S. Ct. at 627. . .
>
> We hold that the privilege applies equally to the nature and location of electronic surveillance equipment. Disclosing the precise locations where surveillance devices are hidden or their precise specifications will educate criminals regarding how to protect themselves against police surveillance. Electronic surveillance is an important tool of law enforcement, and its effectiveness should not be unnecessarily compromised. Disclosure of such information will also educate persons on how to employ such techniques themselves, in violation of Title III. (789 F.2d at 1507 to 1508).

The privilege will only give way if the Defendant can show a need for the information. 789 F.2d at 1508. To meet this burden, a defendant must establish that the information sought "is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause." Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). The court must then weigh the defendant's need for the information against the government's interest in non-disclosure and the policies underlying the privilege. This case-by-case balancing process is necessarily ad hoc. However, in general, the courts applying the investigative techniques privilege have held that where the defendant has access to evidence from which a jury can determine the accuracy and validity of the surveillance equipment and techniques, the defendant has no need for the information. See, e.g., United States v. Van Horn, 789 F.2d at 1507-08 (concealed microphone in office, location and means of concealment not disclosed because defendant had alternative way to challenge voice identification through the tapes themselves);United States v. Harley, 682 F.2d 1018 (D.C. Cir. 1982); United States v. Garey, 2004 WL 2663023 (M.D.Ga. 2004)(defendant sought nature and technical details of device used to determine geographical location of cellular phone, because phone allegedly used in making threatening calls had been seized from defendant's residence it confirmed the accuracy of the geographic surveillance and defendant had the means to challenge the accuracy of the analysis used to link that phone to the criminal conduct). In contrast, if the defendant has no alternative means to examine the validity and accuracy of the surveillance, the balance will tend to shift in favor of disclosing the information to enable the defense to make his case. See, e.g., United States v. Foster, 986 F.2d 541, 543 (D.C. Cir. 1993) (defendant sought location of observation post: officer's observation of drug transaction was key evidence implicating defendant; surveillance not taped or photographed, so no alternative evidence for jury to examine to determine whether surveillance post provided clear view from which officer could make accurate

identification of defendant).

In this case, the Government has a qualified privilege to maintain the confidentiality of the technology and techniques used in the investigation of this case. [redacted] b5

[redacted] See, e.g., United States v. Harley, 682 F.2d 1018 (D.C. Cir. 1982); United States v. Angiuilo, 847 F.2d 956, 982-84 (1s Cir. 1988); United States v. Fernandez, 797 F.2d 943, 952-53 (11thCir. 1986).

[redacted] b6 b7C

Subject: FW: US Supreme Court Approved Changes to the Federal Rules of Criminal Procedure 5, 6, 32.1, 40, 41, and 58

UNCLASSIFIED
NON-RECORD

Further follow-up: the attached contains the actual amendment for Rule 41--on warrants for "tracking devices"

-----Original Message-----
From: [redacted]
Sent: Friday, January 05, 2007 2:22 PM
To: [redacted]

[redacted] b6 b7C

Subject: RE: US Supreme Court Approved Changes to the Federal Rules of Criminal Procedure 5, 6, 32.1, 40, 41, and 58

UNCLASSIFIED
NON-RECORD

Folks,

Attached are the Amendments to Criminal Rules 5, 6, 32.1, 40, 41, and 58 as approved by the US Supreme Court in April 2006, which took effect on December 1, 2006, along with an excerpt of the "Report of the Advisory Committee on Criminal Rules," RE these Rules.


Criminal_Rules_Approved_US_Sup...


Combined_CR_Report_Rules.pdf

b6
b7C

CELL/OTD 006123

[redacted] b6 b7C

Subject: Changes to the Federal Rules of Criminal Procedure

UNCLASSIFIED
NON-RECORD

Ladies and Gentlemen,

Attached are the amendments to the Federal Rules of Criminal Procedure as approved by the Judicial Conference (see www.uscourts.gov website) along with an excerpt of the "Report of the Advisory Committee on Criminal Rules," and, for your edification, a document and chart that describes the rulemaking process.

As always, please forward to appropriate personnel.

<< File: Changes_to_Federal_Rules_Criminal_Procedure.pdf >> << File: Excerpt_CR.pdf >> << File: Federal Rulemaking.doc >>

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AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial Appearance

* * * * *

(c) Place of Initial Appearance; Transfer to Another District.

* * * * *

(3) *Procedures in a District Other Than Where the Offense Was Allegedly Committed.* If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

* * * * *

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1;

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, or a reliable electronic form of either; and

* * * * *

Rule 6. The Grand Jury

* * * * *

(e) Recording and Disclosing the Proceedings.

* * * * *

(3) ***Exceptions.***

* * * * *

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign

intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state,

state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued

by the Attorney General and the Director of National Intelligence.

* * * * *

(7) *Contempt.* A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.

* * * * *

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

* * * * *

(5) *Appearance in a District Lacking Jurisdiction.* If the person is arrested or appears in a district that does not have

jurisdiction to conduct a revocation hearing, the magistrate judge must:

* * * * *

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application, or produces copies of those certified documents by reliable electronic means; and

(ii) the judge finds that the person is the same person named in the warrant.

* * * * *

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

(a) **In General.** A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by a subpoena; or

(ii) violating conditions of release set in another district.

* * * * *

Rule 41. Search and Seizure

(a) **Scope and Definitions.**

* * * * *

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

* * * * *

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) **Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district — or if none is reasonably available, a judge of a state court of record in the district — has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or

property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;

(3) a magistrate judge — in an investigation of domestic terrorism or international terrorism — with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

* * * * *

(d) Obtaining a Warrant.

(1) ***In General.*** After receiving an affidavit or other information, a magistrate judge — or if authorized by Rule 41(b), a judge of a state court of record — must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.

* * * * *

(3) ***Requesting a Warrant by Telephonic or Other Means.***

(A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

* * * * *

(e) **Issuing the Warrant.**

(1) *In General.* The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) ***Contents of the Warrant.***

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 10 days;

(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant.

(B) *Warrant for a Tracking Device.* A tracking-

device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly

authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) *Preparing an Original Warrant.* If the applicant reads the contents of the proposed duplicate original warrant, the magistrate

judge must enter those contents into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) *Modification.* The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly.

(D) *Signing the Warrant.* Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic

means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) ***Warrant to Search for and Seize a Person or Property.***

(A) *Noting the Time.* The officer executing the warrant must enter on it the exact date and time it was executed.

(B) *Inventory.* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the

inventory in the presence of at least one other credible person.

(C) *Receipt.* The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.

(D) *Return.* The officer executing the warrant must promptly return it — together with a copy of the inventory — to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) *Warrant for a Tracking Device.*

(A) *Noting the Time.* The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) *Return.* Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant.

(C) *Service.* Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a

copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) ***Delayed Notice.*** Upon the government's request, a magistrate judge — or if authorized by Rule 41(b), a judge of a state court of record — may delay any notice required by this rule if the delay is authorized by statute.

* * * * *

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

* * * * *

(2) ***Initial Appearance.*** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

* * * * *

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

To: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Susan C. Bucklew, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **May 17, 2005**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure met on April 4-5, 2005 in Charleston, South Carolina and took action on a number of proposed amendments to the Rules of Criminal Procedure.

* * * * *

II. Action Items – Overview

First, the Committee considered two public comments to the following rules:

- Rule 5, Initial Appearance, Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.

- Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.

- Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearing.

- Rule 41. Search and Seizure; Previously Approved Amendment Concerning Tracking Device Warrants.

As noted in the following discussion, the Advisory Committee proposes that amendments to Rule 6 be approved by the Committee and forwarded to the Judicial Conference without being published for comment.

Second, the Committee considered technical and conforming amendments to the following rule:

- Rule 6, The Grand Jury.

As noted in the following discussion, the Advisory Committee proposes that this amendment be forwarded to the Judicial Conference.

* * * * *

III. Action Items–Recommendations to Forward Amendments to the Judicial Conference

At its June 2004 meeting, the Standing Committee approved the publication of proposed amendments to Rules 5, 32.1, 40, 41, and 58. The comment period for the proposed amendments was closed on February 15, 2005. The Advisory Committee received two comments on the proposed amendments, and several suggestions from the Style Committee. The Committee made only minor changes as proposed by the Style Committee, and it recommends that all of the proposed amendments be forwarded to the Judicial Conference for approval and transmitted to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

1. ACTION ITEM–Rule 5, Initial Appearance, Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

The amendment to Rule 5 is intended to permit the magistrate judge to accept a warrant by reliable electronic means. At present, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. The amendment reflects the availability of improved technology, which makes the use of electronic media as reliable and efficient as using a facsimile. The term "electronic" is used to provide some flexibility, allowing for further technological advances in transmitting data. If electronic means are used, the rule requires that the means be "reliable," and leaves the definition of that term to a court or magistrate judge at the local level. The Advisory Committee received two comments on the published amendment. Federal Public Defender Frank Dunham wrote that the rule should make clear that "non-certified electronic copies" are not reliable electronic means. The Federal Magistrate Judges Association expressed its support for the rule as drafted.

Following consideration of the comments, the Committee unanimously approved the amendment, as published.

Recommendation–The Advisory Committee recommends that the amendment to Rule 5 be approved and forwarded to the Judicial Conference.

2. ACTION ITEM–Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

This amendment to Rule 32.1 permits the magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means. It parallels similar changes to Rule 5, reflecting the same enhancements in technology. As in Rule 5, what constitutes "reliable" electronic means is left to a court or magistrate judge to determine as a local matter. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published (with a minor change recommended by the Style Committee).

Recommendation–The Advisory Committee recommends that the amendment to Rule 32.1 be approved and forwarded to the Judicial Conference.

3. **ACTION ITEM–Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.**

This amendment to Rule 40 is intended to fill a perceived gap in the rule related to persons who are arrested for violating the conditions of release in another district. It authorizes the magistrate judge in the district where the arrest takes place to set conditions of release. The amendment makes it clear that the judge has this authority not only in cases where the arrest takes place because of failure to appear in another district, but also for violation of any other condition of release. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published (with a minor change recommended by the Style Committee).

Recommendation–The Advisory Committee recommends that the amendment to Rule 40 be approved and forwarded to the Judicial Conference.

4. **ACTION ITEM–Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.**

This amendment to Rule 41 authorizes magistrate judges to use reliable electronic means to issue warrants. This parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i), allowing the use of improved technology, and leaving what constitutes "reliable" electronic means to a court or magistrate judge to determine as a local matter. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published.

Recommendation–The Advisory Committee recommends that the amendment to Rule 41 be approved and forwarded to the Judicial Conference.

5. ACTION ITEM–Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearing.

Rule 58(b)(2) governs the advice to be given to defendants at an initial appearance on a misdemeanor charge. The amendment eliminates a conflict with Rule 5.1(a) concerning a defendant's entitlement to a preliminary hearing. Instead of attempting to define in this rule when a misdemeanor defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published.

Recommendation–The Advisory Committee recommends that the amendment to Rule 58 be approved and forwarded to the Judicial Conference.

6. ACTION ITEM–Rule 41. Search and Seizure; Previously Approved Amendment Concerning Tracking Device Warrants.

An amendment to Rule 41 which would provide procedures for tracking device warrants was recommended, published for public comment, reviewed by the Advisory Committee, and approved by the Standing Committee at its June 2003 meeting for submission to the Judicial Conference. However, subsequent to that meeting the Department of Justice requested additional time to review the proposal. At the April 2005 meeting of the Advisory Committee, Ms. Rhodes stated that the Department had completed its review of the amendment and had no further recommendations for changes to it. In light of the clarification of the Department's position, there is no longer any need to defer submission to the Judicial Conference.

The rule and committee note as approved by the Standing Committee at its June 2003 meeting, including changes proposed by the Style Committee, are submitted again for consideration.

Recommendation–The Advisory Committee recommends that the amendment to Rule 41 be approved and forwarded to the Judicial Conference.

7. ACTION ITEM–Rule 6. The Grand Jury; Technical and Conforming Amendments.

This amendment makes technical changes to the language added to Rule 6 by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. 108-458, Title VI, § 6501(a), 118 Stat. 3760, in order to bring the new language into conformity with the conventions introduced in the general restyling of the Criminal Rules. No substantive change is intended.

The Advisory Committee unanimously approved the proposal as a technical and conforming amendment, for which no publication and comment period would be necessary.

Recommendation–The Advisory Committee recommends that the technical and conforming amendment to Rule 6 be approved and forwarded to the Judicial Conference.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

* * * * *

(c) **Place of Initial Appearance; Transfer to Another District.**

* * * * *

(3) *Procedures in a District Other Than Where the Offense Was Allegedly Committed.* If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

* * * * *

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1 ~~or Rule 58(b)(2)(G)~~;

*New material is underlined; matter to be omitted is lined through.

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, ~~a facsimile of either,~~ or ~~other appropriate~~ a reliable electronic form of either; and

* * * * *

COMMITTEE NOTE

Subdivisions (c)(3)(C) and (D). The amendment to Rule 5(c)(3)(C) parallels an amendment to Rule 58(b)(2)(G), which in turn has been amended to remove a conflict between that rule and Rule 5.1(a), concerning the right to a preliminary hearing.

Rule 5(c)(3)(D) has been amended to permit the magistrate judge to accept a warrant by reliable electronic means. Currently, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. This amendment parallels similar changes to Rules 32.1(a)(5)(B)(i) and 41. The reference to a facsimile version of the warrant was removed because the Committee believed that the broader term "electronic form" includes facsimiles.

The amendment reflects a number of significant improvements in technology. First, more courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Changes Made After Publication and Comment

The Committee made no changes in the Rule and Committee Note as published. It considered and rejected the suggestion that the rule should refer specifically to non-certified photocopies, believing it preferable to allow the definition of reliability to be resolved at the local level. The Committee Note provides examples of the factors that would bear on reliability.

* * * * *

Rule 6. The Grand Jury

* * * * *

(e) **Recording and Disclosing the Proceedings.**

* * * * *

(3) *Exceptions.*

* * * * *

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule

6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal ~~Federal~~, state~~State~~, state~~State~~ subdivision, Indian

tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state~~State~~, state~~State~~ subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information ~~only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly~~

~~issue~~ only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

* * * * *

(7) *Contempt.* A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence ~~pursuant to~~ under Rule 6, may be punished as a contempt of court.

* * * * *

COMMITTEE NOTE

Subdivision (e)(3) and (7). This amendment makes technical changes to the language added to Rule 6 by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. 108-458, Title VI, § 6501(a), 118 Stat. 3760, in order to bring the new language into conformity with the conventions introduced in the general restyling of the Criminal Rules. No substantive change is intended.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) **Initial Appearance.**

* * * * *

(5) *Appearance in a District Lacking Jurisdiction.* If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

* * * * *

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application, or produces copies of those certified documents by reliable electronic means; and

(ii) the judge finds that the person is the same person named in the warrant.

* * * * *

COMMITTEE NOTE

Subdivision (a)(5)(B)(i). Rule 32.1(a)(5)(B)(i) has been amended to permit the magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means. Currently, the rule requires the government to produce certified copies of those documents. This amendment parallels similar changes to Rules 5 and 41.

The amendment reflects a number of significant improvements in technology. First, receiving documents by facsimile has become very commonplace and many courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. The Committee envisions that the term "electronic" would include use of facsimile transmissions.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, the means used be

"reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may wish to consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Changes Made After Publication and Comment

The Committee made minor clarifying changes in the published rule at the suggestion of the Style Committee.

* * * * *

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

~~(a) In General. If a person is arrested under a warrant issued in another district for failing to appear as required by the terms of that person's release under 18~~

~~U.S.C. §§ 3141–3156 or by a subpoena — the person must be taken without unnecessary delay before a magistrate judge in the district of the arrest.~~

(a) **In General.** A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by a subpoena; or

(ii) violating conditions of release set in another district.

* * * * *

COMMITTEE NOTE

Subdivision (a). Rule 40 currently refers only to a person arrested for failing to appear in another district. The amendment is intended to fill a perceived gap in the rule that a magistrate judge in the district of arrest lacks authority to set release conditions for a person arrested only for violation of conditions of release. *See,*

e.g., *United States v. Zhu*, 215 F.R.D. 21, 26 (D. Mass. 2003). The Committee believes that it would be inconsistent for the magistrate judge to be empowered to release an arrestee who had failed to appear altogether, but not to release one who only violated conditions of release in a minor way. Rule 40(a) is amended to expressly cover not only failure to appear, but also violation of any other condition of release.

Changes Made After Publication and Comment

The Committee made minor clarifying changes in the published rule at the suggestion of the Style Committee.

* * * * *

Rule 41. Search and Seizure

(a) **Scope and Definitions.**

* * * * *

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

* * * * *

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) **Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district — or if none is reasonably available, a judge of a state court of record in the district — has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved

outside the district before the warrant is executed; ~~and~~

(3) a magistrate judge — in an investigation of domestic terrorism or international terrorism ~~(as defined in 18 U.S.C. § 2331) having~~ — with authority in any district in which activities related to the terrorism may have occurred~~, may~~ has authority to issue a warrant for a person or property within or outside that district.; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

* * * * *

(d) Obtaining a Warrant.

(1) ~~*Probable Cause*~~ *In General.* After receiving an affidavit or other information, a magistrate judge — or if authorized by Rule 41(b), ~~or~~ a judge of a state court of record — must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device ~~under Rule 41(c)~~.

* * * * *

(3) *Requesting a Warrant by Telephonic or Other Means.*

(A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means. ~~appropriate means, including facsimile transmission.~~

(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

* * * * *

(e) Issuing the Warrant.

(1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) ***Contents of the Warrant.***

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, ~~T~~the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

~~(A)~~(i) execute the warrant within a specified time no longer than 10 days;

~~(B)~~(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

~~(C)~~(iii) return the warrant to the magistrate judge designated in the warrant.

(B) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or

property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly

authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) *Preparing an Original Warrant.* If the applicant reads the contents of the proposed duplicate original warrant, the ~~The~~

magistrate judge must enter ~~the~~ those contents ~~of the proposed duplicate original warrant~~ into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) *Modifications.* The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly. ~~In that case, the judge must also modify the original warrant.~~

(D) *Signing the ~~Original Warrant and the Duplicate Original~~ Warrant.* Upon determining to issue the warrant, the

magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

(f) **Executing and Returning the Warrant.**

(1) Warrant to Search for and Seize a Person or Property.

~~(1)~~(A) *Noting the Time.* The officer executing the warrant must enter on it ~~its face~~ the exact date and time it ~~is~~ was executed.

~~(2)~~(B) *Inventory.* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or

from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

~~(3)~~(C) *Receipt.* The officer executing the warrant must: ~~(A)~~ give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or ~~(B)~~ leave a copy of the warrant and receipt at the place where the officer took the property.

~~(4)~~(D) *Return.* The officer executing the warrant must promptly return it — together with a copy of the inventory — to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose

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

(2) ***Warrant for a Tracking Device.***

(A) *Noting the Time.* The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) *Return.* Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant.

(C) *Service.* Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished

by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) *Delayed Notice.* Upon the government's request, a magistrate judge — or if authorized by Rule 41(b), a judge of a state court of record — may delay any notice required by this rule if the delay is authorized by statute.

* * * * *

COMMITTEE NOTE

The amendments to Rule 41 address three issues: first, procedures for issuing tracking device warrants; second, a

provision for delaying any notice required by the rule; and third, a provision permitting a magistrate judge to use reliable electronic means to issue warrants.

Subdivision (a). Amended Rule 41(a)(2) includes two new definitional provisions. The first, in Rule 41(a)(2)(D), addresses the definitions of "domestic terrorism" and "international terrorism," terms used in Rule 41(b)(2). The second, in Rule 41(a)(2)(E), addresses the definition of "tracking device."

Subdivision (b). Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. Such searches are recognized both by statute, *see* 18 U.S.C. § 3117(a) and by caselaw, *see, e.g., United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). Warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy. *See, e.g., United States v. Karo, supra* (although no probable cause was required to install beeper, officers' monitoring of its location in defendant's home raised Fourth Amendment concerns). Nonetheless, there is no procedural guidance in current Rule 41 for those judicial officers who are asked to issue tracking device warrants. As with traditional search warrants for persons or property, tracking device warrants may implicate law enforcement interests in multiple districts.

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to install and use a tracking device, as that term is defined in 18 U.S.C. § 3117(b). The magistrate judge's authority under this rule includes the authority to permit entry into an area where there is a reasonable expectation of privacy, installation of the tracking device, and maintenance and removal of the device. The Committee did not intend by this amendment to expand or contract

the definition of what might constitute a tracking device. The amendment is based on the understanding that the device will assist officers only in tracking the movements of a person or property. The warrant may authorize officers to track the person or property within the district of issuance, or outside the district.

Because the authorized tracking may involve more than one district or state, the Committee believes that only federal judicial officers should be authorized to issue this type of warrant. Even where officers have no reason to believe initially that a person or property will move outside the district of issuance, issuing a warrant to authorize tracking both inside and outside the district avoids the necessity of obtaining multiple warrants if the property or person later crosses district or state lines.

The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain the warrant. *See, e.g., United States v. Knotts, supra*, where the officers' actions in installing and following tracking device did not amount to a search under the Fourth Amendment.

Subdivision (d). Amended Rule 41(d) includes new language on tracking devices. The tracking device statute, 18 U.S.C. § 3117, does not specify the standard an applicant must meet to install a tracking device. The Supreme Court has acknowledged that the standard for installation of a tracking device is unresolved, and has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides

that if probable cause is shown, the magistrate judge must issue the warrant. And the warrant is only needed if the device is installed (for example, in the trunk of the defendant's car) or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.

Subdivision (e). Rule 41(e) has been amended to permit magistrate judges to use reliable electronic means to issue warrants. Currently, the rule makes no provision for using such media. The amendment parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i).

The amendment recognizes the significant improvements in technology. First, more counsel, courts, and magistrate judges now routinely use facsimile transmissions of documents. And many courts and magistrate judges are now equipped to receive filings by electronic means. Indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings may be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using facsimiles and electronic media to transmit a warrant can be both reliable and efficient use of judicial resources.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. Although facsimile transmissions are not specifically identified, the Committee envisions that facsimile transmissions would fall within the meaning of "electronic means."

While the rule does not impose any special requirements on use of facsimile transmissions, neither does it presume that those

transmissions are reliable. The rule treats all electronic transmissions in a similar fashion. Whatever the mode, the means used must be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Amended Rule 41(e)(2)(B) is a new provision intended to address the contents of tracking device warrants. To avoid open-ended monitoring of tracking devices, the revised rule requires the magistrate judge to specify in the warrant the length of time for using the device. Although the initial time stated in the warrant may not exceed 45 days, extensions of time may be granted for good cause. The rule further specifies that any installation of a tracking device authorized by the warrant must be made within ten calendar days and, unless otherwise provided, that any installation occur during daylight hours.

Subdivision (f). Current Rule 41(f) has been completely revised to accommodate new provisions dealing with tracking device warrants. First, current Rule 41(f)(1) has been revised to address execution and delivery of warrants to search for and seize a person or property; no substantive change has been made to that provision. New Rule 41(f)(2) addresses execution and delivery of

tracking device warrants. That provision generally tracks the structure of revised Rule 41(f)(1), with appropriate adjustments for the particular requirements of tracking device warrants. Under Rule 41(f)(2)(A) the officer must note on the warrant the time the device was installed and the period during which the device was used. And under new Rule 41(f)(2)(B), the officer must return the tracking device warrant to the magistrate judge designated in the warrant, within 10 calendar days after use of the device has ended.

Amended Rule 41(f)(2)(C) addresses the particular problems of serving a copy of a tracking device warrant on the person who has been tracked, or whose property has been tracked. In the case of other warrants, current Rule 41 envisions that the subjects of the search typically know that they have been searched, usually within a short period of time after the search has taken place. Tracking device warrants, on the other hand, are by their nature covert intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used. The amendment requires that the officer must serve a copy of the tracking device warrant on the person within 10 calendar days after the tracking has ended. That service may be accomplished by either personally serving the person, or both by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further service of the warrant. That might be appropriate, for example, where the owner of the tracked property is undetermined, or where the officer establishes that the investigation is ongoing and that disclosure of the warrant will compromise that investigation.

Use of a tracking device is to be distinguished from other continuous monitoring or observations that are governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime

Control and Safe Streets Act of 1968, *as amended* by Title I of the 1986 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance).

Finally, amended Rule 41(f)(3) is a new provision that permits the government to request, and the magistrate judge to grant, a delay in any notice required in Rule 41. The amendment is co-extensive with 18 U.S.C. § 3103a(b). That new provision, added as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, authorizes a court to delay any notice required in conjunction with the issuance of any search warrants.

Changes Made After Publication and Comment

The Committee agreed with the NADCL proposal that the words "has authority" should be inserted in Rule 41(c)(3), and (4) to parallel similar language in Rule 41(c)(1) and (2). The Committee also considered, but rejected, a proposal from NADCL to completely redraft Rule 41(d), regarding the finding of probable cause. The Committee also made minor clarifying changes in the Committee Note.

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Rule 58. Petty Offenses and Other Misdemeanors

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(b) **Pretrial Procedure.**

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(2) *Initial Appearance.* At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

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(G) ~~if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the~~ any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

* * * * *

COMMITTEE NOTE

Subdivision (b)(2)(G). Rule 58(b)(2)(G) sets out the advice to be given to defendants at an initial appearance on a misdemeanor charge, other than a petty offense. As currently written, the rule is restricted to those cases where the defendant is held in custody, thus creating a conflict and some confusion when compared to Rule 5.1(a) concerning the right to a preliminary hearing. Paragraph (G) is incomplete in its description of the circumstances requiring a preliminary hearing. In contrast, Rule 5.1(a) is a correct statement of the law concerning the defendant's entitlement to a preliminary hearing and is consistent with 18 U.S.C. § 3060 in this regard. Rather than attempting to define, or restate, in Rule 58 when a defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1.

Changes Made After Publication and Comment

The Committee no changes to the Rule or Committee note after publication.

* * * * *

[redacted] b6 b7C

Subject: FW: Changes to the Federal Rules of Criminal Procedure

UNCLASSIFIED
NON-RECORD

FYI--as a follow-up to the question raised on warrant requirements for "tracking devices"

-----Original Message-----
From:
Sent:
To:

[redacted] b6 b7C

Subject: Changes to the Federal Rules of Criminal Procedure

UNCLASSIFIED
NON-RECORD

Ladies and Gentlemen,

Attached are the amendments to the Federal Rules of Criminal Procedure as approved by the Judicial Conference (see www.uscourts.gov website) along with an excerpt of the "Report of the Advisory Committee on Criminal Rules," and, for your edification, a document and chart that describes the rulemaking process.

As always, please forward to appropriate personnel.


Changes_to_Federal_Rules_Crimi...


Excerpt_CR.pdf


Federal Rulemaking.doc

UNCLASSIFIED

UNCLASSIFIED

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable

sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

* * * * *

Rule 32. Sentence and Judgment

* * * * *

(d) Presentence Report.

(1) ***Applying the Advisory Sentencing Guidelines.*** The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) ***Additional Information.*** The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

* * * * *

Rule 35. Correcting or Reducing a Sentence

* * * * *

(b) Reducing a Sentence for Substantial Assistance.

(1) *In General.* Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

* * * * *

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of Civil

Procedure 5(b)(2)(B), (C), or (D), 3 days are added after the period would otherwise expire under subdivision (a).

Rule 49.1. Privacy Protection For Filings Made with the Court

(a) **Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

(b) **Exemptions from the Redaction Requirement.** The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) **Immigration Cases.** A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) **Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the

person who made the filing to file a redacted version for the public record.

(e) **Protective Orders.** For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) **Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) **Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be

amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) **Waiver of Protection of Identifiers.** A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

[Model Form for Use in 28 U.S.C. § 2254 Cases Involving a Rule 9 Issue under Section 2254 of Title 28, United States Code]

(Abrogated.)

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

To: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Susan C. Bucklew, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **May 20, 2005 (revised July 20, 2006)**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 3-4, 2006 in Washington, D.C. and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report addresses a number of action items: approval of published Rules 11, 32, 35, 45, and 49.1. for transmission to the Judicial Conference; approval of proposed amendments to Rules 29 and 41 for publication and comment; and approval of the time computation template for eventual publication. In addition, the Committee has several information items to bring to the attention of the Standing Committee, most notably continued discussion of a draft amendment to Rule 16.

II. Action Items–Recommendations to Forward Amendments to the Judicial Conference

1. ACTION ITEM–Rule 11. Pleas; Proposed Amendment Regarding Advice to Defendant Under Advisory Sentencing Guidelines.

This amendment is part of a package of proposals required to bring the rules into conformity with the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provisions of the federal sentencing statute that make the Guidelines mandatory violate the Sixth Amendment right to jury trial. With these provisions excised, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." 543 U.S. at 222. Rule

11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

There were many public comments received on this and the other *Booker* amendments. The Sentencing Commission stated that the amendment tracked the approach the Commission believes to be implicit in *Booker*, but it suggested that the word "calculate" be replaced with "determine and calculate." Other comments suggested that the amendment gave the Guidelines greater prominence than warranted under *Booker*, insufficiently emphasizing the remaining sentencing factors set forth in 18 U.S.C. § 3553(a). There was extensive discussion of the public comments and an additional concern, raised at the meeting, that the amendment might be read as requiring a complete guideline calculation in every case. That would be inconsistent with cases such as *United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005). *Crosby* recognized that the district courts would "normally" have to determine the applicable guideline range. *Id.* at 111. However, in some cases the court may conclude that it is unnecessary to resolve a particular guideline issue because statutory factors under 3553(a) require a variance that moots the guideline issue. *Id.* at 112. Consideration was given to adding a reference to *Crosby* in the note, but this effort was ultimately abandoned because of the difficulty crafting a statement that would be consistent with the varying approaches in the circuits.

The Committee agreed that the function of the rule is to advise a defendant who is pleading guilty of the manner in which the court will determine the defendant's sentence. The published language captures the approach taken by most courts after *Booker*. Here, and in the other *Booker* amendments, the Committee agreed to delete from the Committee Note a reference to the Fifth Amendment requirement of proof beyond a reasonable doubt from the description of *Booker*.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 11 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM–Rule 32, Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

These amendments adapt two subdivisions of the Rule 32 to *United States v. Booker*, 543 U.S. 220 (2005), which directs courts to consider not only information relevant to the Sentencing Guidelines, but also information relevant to the statutory factors listed in 18 U.S.C. § 3553(a). The Committee is proposing amendments only to subdivisions (d) and (h), which govern presentence reports and notice of possible departures. As noted below, the Committee has withdrawn the proposed amendment to subdivision (k) because of legislative activity that occurred after the approval of the amendments for publication and comment.

Subdivision (d) Subdivision (d) of the rule establishes the requirements for presentence reports. It already requires that the report include the applicable Guidelines and information relevant to the guideline calculations. The amendment adds the requirement that the report include

information relevant to the statutory criteria under § 3553(a). However, in light of the difficulty that the probation office may have in determining the scope of the information that would be relevant to the broad statutory criteria under § 3553(a), the proposed amendment requires that information relevant to the statutory criteria be included only when required by the court.

The Committee received critical comments from the Federal Public Defenders and the National Association of Criminal Defense Lawyers who saw the published amendment as improperly giving primacy to the Guidelines in the sentencing process. They also urged that the rule address individually each of the sentencing factors under 3553(a) and that the rule be revised to require the probation office to collect all information relevant to each of the statutory factors. Additionally, they suggested that the title of the heading should be amended to refer to the "advisory" character of the Guidelines.

The Committee agreed that the heading should be revised to refer to the Guidelines as "advisory," and with that change it approved the amendment as published. The Committee felt the published language accurately reflects the approach most courts are taking after *Booker*, and it avoids placing an open-ended and unmanageable obligation on the probation office.

In the Committee Note accompanying the amendment to this subdivision and subdivision (h), the Committee also deleted the Fifth Amendment from the description of the *Booker* decision.

Subdivision (h). The Standing Committee approved publication of an amendment to Rule 32(h) to conform to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Currently, it requires notice that the court is considering departing from the Guidelines on the basis of factors not identified in the presentence report or pleadings. The proposed amendment stated that the court must provide this notice when it is considering either a departure or a non-guideline sentence based upon the factors in 18 U.S.C. § 3553(a) on the basis of a ground not identified in the presentence report or prehearing submissions.

The public comments to the published draft revealed several ambiguities in the language. The language was interpreted by some as overly broad (requiring notice whenever the court intends to rely on a non-guideline factor) and by others as too narrow (requiring no notice when a factor has been identified for one purpose, but the parties are unaware that the court is considering it for a wholly different purpose). Given the potential for misinterpretation, the Committee agreed that a modification of the published language was needed, and it unanimously accepted the alternative language proposed by the Sentencing Commission.

After discussion at the Standing Committee of recent decisions taking various approaches to the question whether notice must be given, the proposed amendment to subdivision (h) was withdrawn to permit further study.

Subdivision (k). The Standing Committee also approved the publication of a proposed amendment to subdivision (k) intended to standardize the collection of data regarding post-*Booker* sentencing by requiring all courts to enter their judgments, including the statement of reasons, on forms prescribed by the Judicial Conference. This provision, which provoked considerable controversy, was withdrawn by the Committee in light of the enactment of § 735 of the USA Patriot Improvement and Reauthorization Act, which amended 28 U.S.C. § 994(w). The amended statute requires the chief judge of each district to provide the Sentencing Commission with an explanation of each sentence including "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." The Criminal Law Committee withdrew its request for an amendment to Criminal Rules, and the Advisory Committee concluded that an amendment to subdivision (k) was no longer necessary.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 32(d) be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM–Rule 35, Correcting or Reducing Sentence; Proposed Amendment Regarding Elimination of Reference to Mandatory Sentencing Guidelines.

This amendment conforms Rule 35(b)(1)(B) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), holding that the Guidelines are advisory, rather than mandatory. The rule currently states that the court may reduce a sentence if "reducing the sentence accords with the Sentencing Commission's guidelines and policy statements." Although the Guidelines do not currently include provisions governing the correction of sentences under Rule 35, the amendment removes the rule's language that seems, on its face, to be inconsistent with the decision in *Booker*.

Both the Sentencing Commission and the National Association of Criminal Defense Lawyers (NACDL) suggested changes in either the amendment or the note. After discussion, the Committee decided not to alter the amendment. In essence, the proposed changes introduced additional issues that were not part of the amendment as published. NACDL suggested that given the advisory character of the Guidelines, it is no longer appropriate for the rule to require that the motion be made by the government, since powerful evidence of cooperation should be considered under 18 U.S.C. § 3553(a) even in the absence of such a motion. The language of the rule, however, was enacted by Congress. Even if the Committee had the authority to delete this requirement under the Rules Enabling Act, it could not do so without publishing such an amendment for public comment. The Sentencing Commission raised the question whether the *Booker* remedial opinion is applicable to the post-sentencing context. It suggested that the Committee Note be amended to address this issue. The Committee unanimously declined to introduce the new language to the Note, or otherwise to alter the rule as published for public comment. (The only exception was the agreement to eliminate the reference to the Fifth Amendment in the description of the *Booker* decision in this Note, as well as the notes accompanying the other *Booker* amendments.)

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 35 be approved as published and forwarded to the Judicial Conference.

4. ACTION ITEM–Rule 45, Computing and Extending Time; Proposed Amendment Regarding Computation of Additional Time for Service.

This amendment has its origins in an amendment to Civil Rule 6 that clarifies the computation of the additional time provided when service is made by mail, leaving with the clerk of court, or electronic means under Civil Rule 5(b)(2)(B), (C), or (D). The amendment of the Civil Rule became effective on December 1, 2005. The proposed amendment to Rule 45 tracks the language of the civil rule.

The Committee received only one comment on the proposed amendment, which consisted of a statement of strong approval for the change. Without objection the Committee approved the amendment of Rule 45.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be approved as published and forwarded to the Judicial Conference.

5. ACTION ITEM–Rule 49.1, Privacy Protections for Filings Made with the Court; Proposed Rule to Implement E-Government Act.

This new rule, which is based upon the common template developed by Professor Daniel Capra, implements the E-Government Act. It differs from the common provisions in several respects, including the partial redaction of an individual's home addresses (which reflects the special concerns of witnesses and victims in criminal cases) and an exemption from redaction for certain information needed for forfeitures. Rule 49.1 also deletes the template provisions relating to social security and immigration cases, which are exclusively civil. The proposed rule includes provisions regarding actions under 28 U.S.C. §§ 2254, 2255, and 2241. Although these actions are also technically civil, the Advisory Committee concluded it was appropriate to refer to them in Rule 49.1 because they are governed by procedural rules recently restyled by the Criminal Rules Committee.

The e-government rules, including Rule 49.1, generated extensive public comment. A subcommittee reviewed the public comments and considered the advice of Professor Capra and the reporters for the other committees prior to the Committee's April meeting.

Many of the public comments dealt with considerations common to all of the e-government rules, and the Committee sought to incorporate the common changes recommended by Professor Capra after consultation with all of the reporters. These included (1) using of the term "individual" rather than "person" throughout the rule, (2) clarifying that the responsibility for redaction lies with the person making the filing, (3) rewording the exemption from redaction for information necessary

to identify property subject to forfeiture, so that it is clearly applicable in ancillary proceedings related to forfeiture, and (4) rewording the exemption from redaction for judicial decisions that were not subject to redaction when originally filed.

The Committee also discussed the provisions for filing under seal and protective orders. The provisions, which were common to all of the e-government rules, were the topic of considerable commentary from the public and members of the Committee. The Committee ultimately endorsed a change in the provision on protective orders, and we understand that language may be adopted by the other advisory committees. The discussion focused on the difference between the standards for sealing and those for protective orders, which were not parallel in the amendment as published for comment. Protective orders were authorized only "[i]f necessary to protect private or sensitive information," while no similar restriction is placed on sealing. The Committee was satisfied with the explanation that the standard for sealing is well established, and there should be no effort to restate that standard in Rule 49.1. The Committee concluded, however, that the provision for protective orders should be modified to incorporate the more flexible standard for the issuance of protective orders set forth in Civil Rule 26(c), which employs the phrase "[f]or good cause shown." The Committee amended subdivision (d) to incorporate this language, and Professor Capra said that he would bring this change to the attention of the other advisory committees. After the Committee meeting all of the reporters agreed to recommend language based on this change to Rule 49.1, but to shorten the phrase to "cause shown." This phrasing is used elsewhere in the Criminal Rules, so we have conformed Rule 49.1 as well to "cause shown." (Note that this provision is now found in (e) due to the renumbering following the addition of a new subdivision (c) regarding immigration cases; the new subdivision is discussed below.)

Other issues addressed in the public comments and Committee discussion were specific to Rule 49.1 or bear most heavily on that rule.

Several issues related to information identifying individuals, particularly date of birth and social security number. After consultation with CACM staff and Professor Capra, the Committee was persuaded that the current rule reflects a careful balancing of interests, and it declined to make any changes. It thus rejected the request of background screeners, who urged that the public record in criminal cases should include full identifying information, such as date of birth, in order to aid private criminal records searches. It also rejected a suggestion from within the Committee that even the disclosure of the last four digits of an individual's social security number might create a danger of breaches of privacy or identity theft. The Committee was informed that CACM had considered the privacy and security issues relating to social security numbers, and had based the rule permitting disclosure of the last four digits on the practice of the Social Security Administration.

Several issues concerned actions under 18 U.S.C. §§ 2254, 2255, and 2241, which as noted above are covered by both Civil Rule 5.2 and Criminal Rule 49.1.

CACM and the National Association of Criminal Defense Lawyers (NACDL) expressed concern that a categorical exemption from redaction for filings in proceedings under 18 U.S.C.

§§ 2254, 2255, and 2241, was unnecessarily broad. The Committee's rationale for exempting these actions was its conclusion that, as a practical matter, the pro se plaintiffs who file such actions will not generally be aware of the redaction requirements. To meet the overbreadth objection, the Committee decided to restrict the exemption to filings by pro se plaintiffs in these actions. The Committee declined, however, to eliminate the exemption entirely. It rejected the suggestion that it would be sufficient merely to relax the application of the redaction requirements in the case of pro se filings. If the rule as a technical matter requires redaction in the case of pro se filings, there could be adverse legal consequences for pro se plaintiffs who failed to redact sensitive information. If a pro se filing under §§ 2254, 2255, and 2241 contains unredacted information that raises security concerns, the court can issue a protective order.

Subsequent to the Advisory Committee meeting, Professor Cooper raised an additional issue regarding actions under 18 U.S.C. § 2241 raising immigration claims. Without going into great detail, the issue that emerged concerned efforts under Rule 5.2 to mesh the special considerations attendant to immigration cases (including limited remote access) with the considerations applicable to actions under §§ 2254, 2255, and 2241. All of the reporters agreed that it was important to apply the same standards to all 2241 cases involving immigration rights. Rather than import additional provisions into Rule 49.1 to deal with such cases, the reporters agreed that it would be preferable to deal with 2241 cases involving immigration rights exclusively under Rule 5.2. Accordingly, subdivision (c) was added to provide that such cases are governed exclusively by Rule 5.2. Since this change was needed to prevent a potential conflict with some or all of the provisions in Rule 5.2 governing immigration claims, it seemed to fall well within the authority that the Committee agreed to give to Judge Bucklew and the reporter.

CACM objected to the categorical exemption from redaction in Rule 49.1(b)(8), (9), and (10), for charging documents, affidavits in support of charging documents, arrest or search warrants, and filings prepared before the filing of a criminal charge that is not part of a docketed case. In CACM's view, redaction of specific private or sensitive information should be sufficient. The Committee reviewed the reasons for its original decision to exempt these filings, particularly the importance of particularity and identification in documents such as arrest or search warrants. Also, the public has a right to know with some specificity who has been charged with a criminal offense or where a search was executed. After discussion, the Committee agreed without objection to retain the exemptions as published.

CACM also expressed strong concern that Rule 49.1 as published did not protect the confidentiality of a grand jury foreperson's name, because it exempts charging documents from the redaction requirement. Disclosure of a grand juror's name, CACM noted, was inconsistent with its policy of protecting the privacy of jurors. Although the published draft includes the CACM policy in the Committee Note, the policy would require sealing on a case by case basis, which CACM deemed insufficient. In discussing this issue, the Committee noted that the petit jury verdict forms present a similar issue, since they are also signed by the foreperson.

The Committee considered an amendment to the published rule that would have redacted the foreperson's name and substituted that person's initials. After extended discussion of the problems posed by requiring redaction, the Committee concluded that the rule should be recommended to the Judicial Conference as published, though the concerns raised by CACM may warrant further study. Several considerations weighed against requiring redaction at this time. Some of the concerns were practical in nature, given the importance of having an original signed version of the documents initiating a criminal prosecution and recording the verdict in the public record. Although it might be possible to have two versions of these documents, one signed and filed under seal and the other merely initialed and filed in the public record, it was unclear exactly how that would work. Moreover, that procedure had not been the subject of notice and public comment. Committee members also expressed concern about an anonymous system of justice. Under Rule 10(a)(1) the court must ensure that the defendant has a copy of the signed grand jury indictment at the time of arraignment. Rule 6(f) provides for the return of a grand jury indictment in open court, and there was support for the view that absent specific findings the public should be entitled to see any document filed in open court. Given the complexity of the issue, the Committee thought that it would be desirable to have a study to determine whether public disclosure of foreperson signatures has caused significant problems before proposing a new rule requiring redaction of every grand jury indictment and every petit jury verdict form.

Finally, the Committee clarified the relationship between the CACM policy statement, which was included in the Committee Note as published, and the rule itself. At Professor Capra's suggestion, the Committee Note was revised to state more clearly that when the rule itself does not exempt the materials listed in the CACM policy statement from disclosure, privacy and law enforcement concerns are to be accommodated through the sealing and protective order provisions of the rule.

Professor Capra also asked the Committee to give the chair and reporter the authority to work with their counterparts on the other advisory committees to work out any last-minute wording issues and to bring all of the e-government rules into agreement as far as possible.

Recommendation–The Advisory Committee recommends that proposed Rule 49.1 be approved, as modified after public comment, and forwarded to the Judicial Conference.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 11. Pleas

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range ~~apply the Sentencing Guidelines, and the~~

*New material is underlined; matter to be omitted is lined through.

~~court's discretion to depart from those guidelines under some circumstances~~ and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

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COMMITTEE NOTE

Subdivision (b)(1)(M). The amendment conforms Rule 11 to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp. 2004)." *Id.* at 245-46. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the text of the proposed amendment as released for public comment. One change was made to the Committee note. The reference to the Fifth Amendment was deleted from the description of the Supreme Court's decision in *Booker*.

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Rule 32. Sentence and Judgment

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(d) Presentence Report.

(1) ***Applying the Advisory Sentencing Guidelines.*** The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) ***Additional Information.*** The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical

impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

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COMMITTEE NOTE

Subdivision (d). The amendment conforms Rule 32(d) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing

statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 245-46. Amended subdivision (d)(2)(F) makes clear that the court can instruct the probation office to gather and include in the presentence report any information relevant to the factors articulated in § 3553(a). The rule contemplates that a request can be made either by the court as a whole requiring information affecting all cases or a class of cases, or by an individual judge in a particular case.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Committee revised the text of subdivision (d) in response to public comments. In subdivision (d), the Committee revised the title to include the word "Advisory" in order better to reflect the guidelines' role under the *Booker* decision. It withdrew proposed subdivisions (k) and (h).

Proposed subdivision (h) would have expanded the sentencing court's obligation to give notice to the parties when it intends to rely on grounds not identified in either the presentence report or the parties' submissions. The amendment was intended to respond to the courts' expanded discretion under *Booker*. In light of a number of recent decisions in the lower courts considering the proper scope of

this obligation in light of *Booker*, the proposed amendment was withdrawn for further study.

Subdivision (k), which would have required that courts use a specified judgment and statement of reasons form, was withdrawn because of the passage of § 735 of the USA Patriot Improvement and Reauthorization Act. This legislation amended 28 U.S.C. § 994(w) to impose a statutory requirement that sentencing information for each case be provided on "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." The Criminal Law Committee, which had previously requested that the uniform collection of sentencing information be addressed by an amendment to the rules, withdrew that request in light of the enactment of the statutory requirement.

Finally, here—as in the other *Booker* rules—the Committee deleted the reference in the Committee Note to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

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Rule 35. Correcting or Reducing a Sentence

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(b) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if: the defendant, after sentencing,

provided substantial assistance in investigating or prosecuting another person.

~~(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and~~

~~(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.~~

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COMMITTEE NOTE

Subdivision (b)(1). The amendment conforms Rule 35(b)(1) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 245-46. Subdivision (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the text of the proposed amendment as released for public comment, but one change was made in the Committee Note. Here—as in the other *Booker* rules—the Committee deleted the reference to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

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Rule 45. Computing and Extending Time

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(c) Additional Time After Certain Kinds of Service. ~~When these rules permit or require~~ Whenever a party must or may to act within a specified period after ~~a notice or a paper has been served on that party~~ service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D), 3 days are added after ~~to~~ the period would otherwise expire under subdivision (a) ~~if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D)~~.

COMMITTEE NOTE

Subdivision (c). Rule 45(c) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. This amendment parallels the change in Federal Rule of Civil Procedure 6(e). Three days are added after the prescribed period otherwise expires under Rule 45(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday. The effect of invoking the day that the rule would otherwise expire under Rule 45(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 45(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 45(a) the period expires on Tuesday. Three days are then added — Wednesday, Thursday, and Friday as the third and final day to act unless that is a legal holiday. If the prescribed period ends on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

Application of Rule 45(c) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 45(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 45(c) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If

Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No change was made in the rule as published for public comment.

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Rule 49.1. Privacy Protection For Filings Made with the Court

(a) **Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) **Immigration Cases.** A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) **Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) **Protective Orders.** For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) **Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) **Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be

construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 49.1 (a) as to the person's own information by filing it without redaction and not under seal.

COMMITTEE NOTE

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy is that documents in case files generally should be made

available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Criminal Rule 16(d) and Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or nonparty making the filing.

Subdivision (e) provides that the court can order in a particular case more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to nonparties of sensitive or private information. Nothing in this subdivision is

intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (g) allows the option to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (f) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a person to waive the protections of the rule as to that person's own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 49.1 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets

out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

> The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
>
> - unexecuted summonses or warrants of any kind (*e.g.*, search warrants, arrest warrants);
> - pretrial bail or presentence investigation reports;
> - statements of reasons in the judgment of conviction;
> - juvenile records;
> - documents containing identifying information about jurors or potential jurors;
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
> - ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
> - sealed documents (*e.g.*, motions for downward departure for substantial assistance, plea agreements indicating cooperation).

To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by

the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Numerous changes were made in the rule after publication in response to the public comments as well as continued consultation among the reporters and chairs of the advisory committees as each committee reviewed its own rule.

A number of revisions were made in all of the e-government rules. These include: (1) using of the term "individual" rather than "person" where possible, (2) clarifying that the responsibility for redaction lies with the person making the filing, (3) rewording the exemption from redaction for information necessary to identify property subject to forfeiture, so that it is clearly applicable in ancillary proceedings related to forfeiture, and (4) rewording the exemption from redaction for judicial decisions that were not subject to redaction when originally filed. Additionally, some changes of a technical or stylistic nature (involving matters such as hyphenation and the use of "a" or "the") were made to achieve clarity as well as consistency among the various e-government rules.

Two changes were made to the provisions concerning actions under §§ 2241, 2254, and 2255, which the published rule exempted from the redaction requirement. First, in response to criticism that the original exemption was unduly broad, the Committee limited the exemption to pro se filings in these actions. Second, a new subdivision (c) was added to provide that all actions under § 2241 in which immigration claims were made would be governed exclusively.

by Civil Rule 5.2. This change (which was made after the Advisory Committee meeting) was deemed necessary to ensure consistency in the treatment of redaction and public access to records in immigration cases. The addition of the new subdivision required renumbering of the subdivisions designated as (c) to (g) at the time of publication.

The provision governing protective orders was revised to employ the flexible "cause shown" standard that governs protective orders under the Federal Rules of Civil Procedure.

Finally, language was added to the Note clarifying the impact of the CACM policy that is reprinted in the Note: if the materials enumerated in the CACM policy are not exempt from disclosure under the rule, the sealing and protective order provisions of the rule are applicable.

* * * * *

Federal Rulemaking

The Rulemaking Process

A Summary for the Bench and Bar
April 2006

THE FEDERAL RULES OF PRACTICE AND PROCEDURE
ADMINISTRATIVE OFFICE OF THE U.S. COURTS

JAMES C. DUFF, DIRECTOR

The federal rules govern procedure, practice, and evidence in the federal courts. They set forth the procedures for the conduct of court proceedings and serve as a pattern for the procedural rules adopted by many state court systems.

Authority

The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

The Judicial Conference of the United States is also required by statute to "carry on a continuous study of the operation and effect of the general rules of practice and procedure." 28 U.S.C. § 331. As part of this continuing obligation, the Conference is authorized to recommend amendments and additions to the rules to promote:

- simplicity in procedure,
- fairness in administration,
- the just determination of litigation, and
- the elimination of unjustifiable expense and delay.

The Rules Committees

The Judicial Conference's responsibilities as to rules are coordinated by its Committee on Rules of Practice and Procedure, commonly referred to as the "Standing Committee." 28 U.S.C. § 2073(b). The Judicial Conference has authorized the appointment of five advisory committees to assist the Standing Committee, dealing respectively with the appellate, bankruptcy, civil, criminal, and evidence rules. 28 U.S.C. § 2073(a)(2). The Standing Committee reviews and coordinates the recommendations of the five advisory committees, and it recommends to the Judicial

Conference proposed rules changes "as may be necessary to maintain consistency and otherwise promote the interests of justice." 28 U.S.C. § 2073(b).

The Standing Committee and the advisory committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice. Each committee has a reporter, a prominent law professor, who is responsible for coordinating the committee's agenda and drafting appropriate amendments to the rules and explanatory committee notes.

The Assistant Director for Judges Programs of the Administrative Office of the United States Courts currently serves as secretary to the Standing Committee, coordinates the operational aspects of the rules process, and maintains the records of the committees. The Rules Committee Support Office of the Administrative Office provides the day to day administrative and legal support for the secretary and the committees.

Open Meetings and Records

Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, reports of the committees, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office. The proposed amendments are also published on the Judiciary's website <http:\\www.uscourts.gov>.

HOW THE RULES ARE AMENDED

The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule.

The process, however, may be expedited when there is an urgent need to amend the rules.

All interested individuals and organizations are provided an opportunity to comment on proposed rules amendments and to recommend alternative proposals. The comments received from this extensive and thorough public examination are studied very carefully by the committees and generally improve the amendments. The committees actively encourage the submission of comments, both positive and negative, to ensure that proposed amendments have been considered by a broad segment of the bench and bar.

STEP 1. INITIAL CONSIDERATION BY THE ADVISORY COMMITTEE

Making suggestions for changes

Proposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations. They are considered in the first instance by appropriate advisory committees (appellate, bankruptcy, civil, criminal, or evidence). Suggestions for changes, additions, or deletions must be submitted in writing to the secretary, who acknowledges each letter and distributes it to the chair of the Standing Committee and the chair and reporter of the advisory committee.

The reporter normally analyzes the suggestions and makes appropriate recommendations to the advisory committee. The suggestions from the public and the recommendations of the reporter are placed on the advisory committee's agenda and are normally discussed at its next meeting. The advisory committees usually meet twice a year in the spring and fall, and they also conduct business by telephone and correspondence.

Consideration of suggestions

In considering a suggestion for a change in the rules, the advisory committee may take several courses of action, including:

1. Accepting the suggestion, either completely or with modifications or limitations;

2. Deferring action on the suggestion or seeking additional information regarding its operation and impact;

3. Rejecting a suggestion because it does not have merit or would be inconsistent with other rules or a statute; or

4. Rejecting a suggestion because, although it may be meritorious, it simply is not necessary or important enough to warrant the significant step of an amendment to the federal rules.

The secretary is required, to the extent feasible, to advise the person making a suggestion of the action taken on it by the advisory committee.

Drafting Rules Changes

When an advisory committee decides initially that a particular change in the rules would be appropriate, it normally asks its reporter to prepare a draft amendment to the rules and an explanatory committee note. The draft amendment and committee note are discussed and voted upon at a committee meeting.

The Standing Committee has a style subcommittee that works with the respective advisory committees in reviewing proposed amendments to ensure that the rules are written in clear and consistent language. In addition, the reporter of the Standing Committee and the reporters of the five advisory committees are encouraged to work together to promote clarity and consistency among the various sets of federal rules.

STEP 2. PUBLICATION AND PUBLIC COMMENT

Once an advisory committee votes initially to recommend an amendment to the rules, it must obtain the approval of the Standing Committee, or its chair, to publish the proposed amendment for public comment. In seeking publication, the advisory committee must explain to the Standing Committee the reasons for its proposal, including any minority or separate views.

After publication is approved, the secretary arranges for printing and distribution of the proposed amendment to the bench and bar, to publishers, and to the general public. More than 10,000 persons and organizations are on the mailing list, including

- federal judges and other federal court officers,
- United States attorneys,
- other federal government agencies and officials,
- state chief justices,
- state attorneys general,
- legal publications,
- law schools,
- bar associations, and
- interested lawyers, individuals, and organizations requesting distribution.

In order to promote public comment, the proposed amendments are sent to points of contact that have been established with 53 state bar associations.

The public is normally given 6 months to comment in writing to the secretary regarding the proposed amendment. In an emergency, a shorter time period may be authorized by the Standing Committee.

During the 6-month comment period, the advisory committee schedules one or more public hearings on the proposed amendments. Persons who wish to appear and testify at the hearings are required to contact the secretary at least 30 days before

the hearings.

STEP 3. CONSIDERATION OF THE PUBLIC COMMENTS AND FINAL APPROVAL BY THE ADVISORY COMMITTEE

At the conclusion of the public comment period, the reporter is required to prepare a summary of the written comments received from the public and the testimony presented at the hearings. The advisory committee then takes a fresh look at the proposed rule changes in light of the written comments and testimony.

If the advisory committee decides to make a substantial change in its proposal, it may provide a period for additional public notice and comment.

Once the advisory committee decides to proceed in final form, it submits the proposed amendment to the Standing Committee for approval. Each proposed amendment must be accompanied by a separate report summarizing the comments received from the public and explaining any changes made by the advisory committee following the original publication. The advisory committee's report must also include minority views of any members who wish to have their separate views recorded.

STEP 4. APPROVAL BY THE STANDING COMMITTEE

The Standing Committee considers the final recommendations of the advisory committee and may accept, reject, or modify them. If the Standing Committee approves a proposed rule change, it will transmit it to the Judicial Conference with a recommendation for approval, accompanied by the advisory committee's reports and the Standing Committee's own report explaining any modifications it made. If the Standing Committee makes a modification that constitutes a substantial change from the recommendation of the advisory committee, the proposal will normally be returned to the advisory committee with appropriate instructions.

STEP 5. JUDICIAL CONFERENCE APPROVAL

The Judicial Conference normally considers proposed amendments to the rules at its September session each year. If approved by the Conference, the amendments are transmitted promptly to the Supreme Court.

STEP 6. SUPREME COURT APPROVAL

The Supreme Court has the authority to prescribe the federal rules, subject to a statutory waiting period. 28 U.S.C. §§ 2072, 2075. The Court must transmit proposed amendments to Congress by May 1 of the year in which the amendment is to take effect. 28 U.S.C. §§ 2074, 2075.

STEP 7. CONGRESSIONAL REVIEW

The Congress has a statutory period of at least 7 months to act on any rules prescribed by the Supreme Court. If the Congress does not enact legislation to reject, modify, or defer the rules, they take effect as a matter of law on December 1. 28 U.S.C. §§ 2074, 2075.

SUMMARY OF PROCEDURES

Action	Date
STEP 1	
• Suggestion for a change in the rules. *(Submitted in writing to the secretary.)*	At any time.
• Referred by the secretary to the appropriate advisory committee.	Promptly after receipt.
• Considered by the advisory committee.	Normally at the next committee meeting.
• If approved, the advisory committee seeks authority from the Standing Committee to circulate to bench and bar for comment.	Normally at the same meeting or the next committee meeting.
STEP 2	
• Public comment period.	6 months.
• Public hearings.	During the public comment period.
STEP 3	
• Advisory committee considers the amendment afresh in light of public comments and testimony at the hearings.	About one or two months after the close of the comment period.
• Advisory committee approves amendment in	About one or two months after

final form and transmits it to the Standing Committee.	the close of the comment period.
SSTEP 4	
• Standing Committee approves amendment, with or without revisions, and recommends approval by the Judicial Conference.	Normally at its June meeting.
SSTEP 5	
• Judicial Conference approves amendment and transmits it to the Supreme Court.	Normally at its September session.
SSTEP 6	
• The Supreme Court prescribes the amendment.	By May 1.
SSTEP 7	
• Congress has statutory time period in which to enact legislation to reject, modify, or defer the amendment.	By December 1.
• Absent Congressional action, the amendment becomes law.	December 1.

SENSITIVE BUT UNCLASSIFIED

SENSITIVE BUT UNCLASSIFIED

Recipient	Read
	Read: 11/3/2006 11:44 AM

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CELL/010 006270

(Rev. 01-31-2003)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date:
~~10/02/2006~~11/03/2006

To: All Field Offices Attn: SAC
CDC

From: Office of the General Counsel
Investigative Law Unit
Contact: SSA [redacted]

Approved By: [redacted]

Drafted By: [redacted]

b6
b7C

Case ID #: 66F-HQ-1085159 (Pending)

Title: PROPOSED AMENDMENT TO RULE 41
FEDERAL RULES OF CRIMINAL PROCEDURE
EFFECTIVE DECEMBER 1, 2006

Synopsis: To advise field offices of a proposed amendment to Rule 41 of the Federal Rules of Criminal Procedure, which addresses procedures for issuing tracking device warrants, and is effective December 1, 2006, absent Congressional action to the contrary.

Details: Effective December 1, 2006, and absent Congressional action to the contrary[1], Rule 41 of the Federal Rules of Criminal Procedure will be amended to reflect the following procedures for issuing tracking device warrants:

Rule 41(a) Scope and Definitions will include the following definition:

[1] Contact with the Office of Congressional Affairs has revealed that there is not any Congressional Action pending as of the date of this communication that would affect this provision and therefore it appears likely that this amendment will take effect on December 1, 2006.

(E) "Tracking device" has the meaning set out in 18 U.S.C. §3117(b).[2]

Rule 41(b) Authority to Issue a Warrant, will be amended to include the following:

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

Rule 41(d) Obtaining a Warrant, will be amended to read as follows (amended language has been italicized and underlined):

(1) In General. After receiving an affidavit or other information, a magistrate judge-or if authorized by Rule 41(b) a judge of a state court of record-must issue the warrant if there is probable cause to search for and seize a person or property *or to install and use a tracking device*.

Rule 41(e)(2) Contents of the Warrant, will be amended to read as follows (amended language has been italicized and underlined):
(A) Warrant to Search for and Seize a Person or Property. *Except for a tracking-device-warrant*, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 10 days;
(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and
(iii) return the warrant to the magistrate judge designated in the warrant.

(B) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

[2]A "tracking device" is defined to mean "an electronic or mechanical device which permits the tracking of the movement of a person or object." 18 U.S.C. § 3117(b).

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;
(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and
(iii) return the warrant to the judge designated in the warrant.

Rule 41(f) Executing and Returning the Warrant, will be amended as follows (amended language has been italicized and underlined):

(1) Warrant to Search for and Seize a Person or Property.
(A) Noting the Time. The officer executing the warrant must enter it on the exact date and time it was executed.
(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.
(C) Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.
(D)Return. The officer executing the warrant must promptly return it-together with a copy of the inventory-to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) Warrant for a Tracking Device.
(A) Noting the Time. The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.
(B) Return. Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant.
(C) Service. Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's

residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) Delayed Notice. Upon the government's request, a magistrate judge-or if authorized by Rule 41(b), a judge of a state court of record-may delay any notice required by this rule if the delay is authorized by statute.

Proposed amendments to the Advisory Committee Notes state that the Committee "did not intend by this amendment to expand or contract the definition of what might constitute a tracking device." See F.R.Crim.P 41(b) advisory committee's note. The Advisory Committee indicated that the changes to Rule 41(b) were intended to provide procedural guidance for judicial officers who were asked to issue tracking device warrants. The Committee Notes indicate that the amendment "reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain a warrant." Id. The Committee Notes also recognize that 18 U.S.C. § 3117, "does not specify the standard an applicant must meet to install a tracking device" and state that the "amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate judge must issue the warrant." See F.R.Crim.P 41(d) advisory committee's note.

INVESTIGATIVE LAW UNIT ANALYSIS:

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[redacted]

[redacted]

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[redacted]

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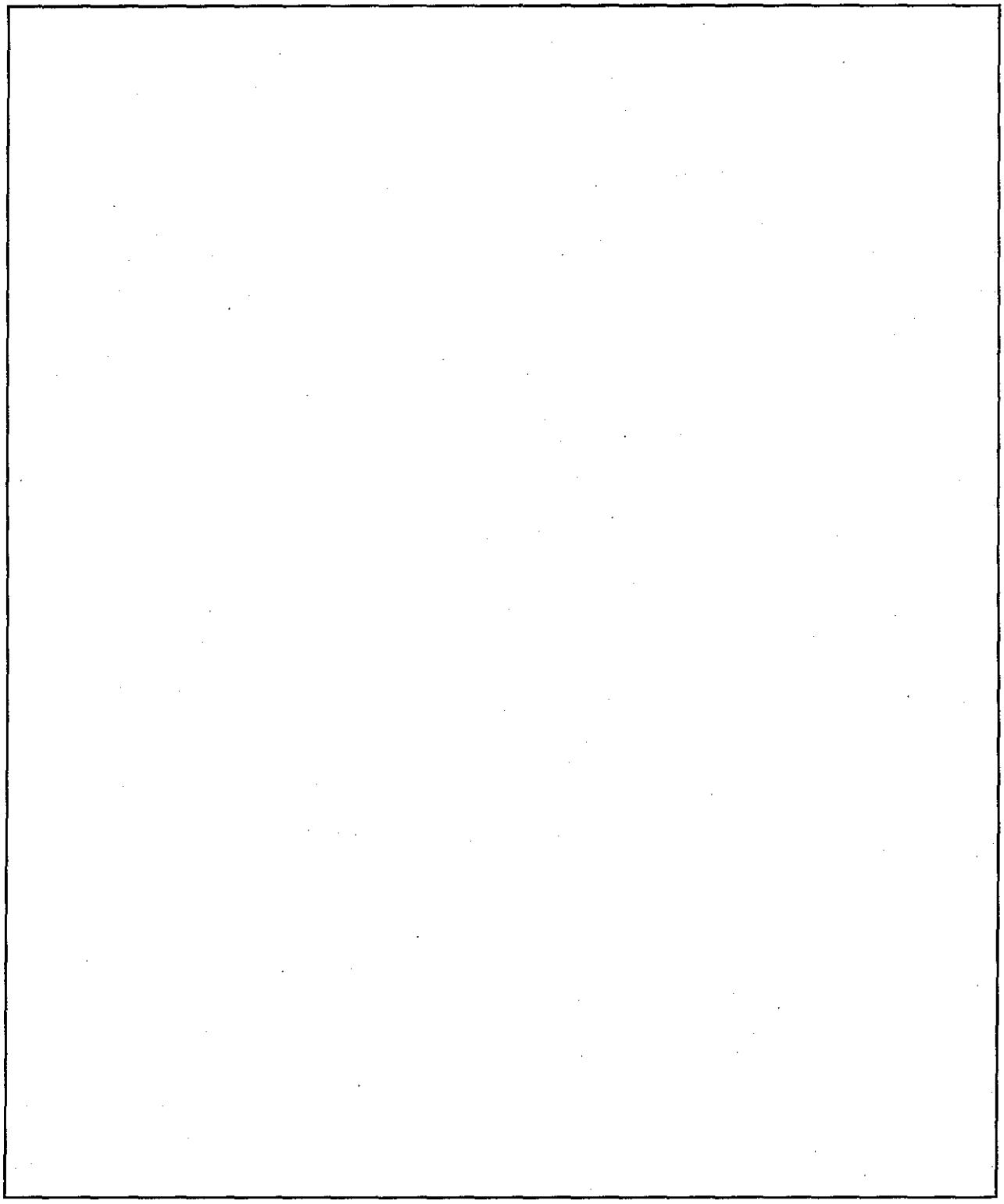

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CELL/OTD 006278

Any questions regarding this matter should be directed to the Investigative Law Unit [redacted] or the Science and Technology Law Unit [redacted] b7E

LEAD(s):

Set Lead 1: (Action)

ALL RECEIVING OFFICES

Please distribute to appropriate personnel.

♦♦

(Rev. 01-31-2003)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 11/03/2006

To: All Field Offices Attn: SAC
CDC

From: Office of the General Counsel
Investigative Law Unit
Contact: SSA [redacted]

Approved By: [redacted]

Drafted By: [redacted]

b6
b7C

Case ID #: 66F-HQ-1085159 (Pending)

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FEDERAL RULES OF CRIMINAL PROCEDURE
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Rule 41(a) Scope and Definitions will include the following definition:

(E) "Tracking device" has the meaning set out in 18 U.S.C. §3117(b).[2]

---

[1] Contact with the Office of Congressional Affairs has revealed that there is not any Congressional Action pending as of the date of this communication that would affect this provision and therefore it appears likely that this amendment will take effect on December 1, 2006.

[2] A "tracking device" is defined to mean "an electronic or mechanical device which permits the tracking of the movement of a person or object." 18 U.S.C. § 3117(b).

Rule 41(b) Authority to Issue a Warrant, will be amended to include the following:

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

Rule 41(d) Obtaining a Warrant, will be amended to read as follows (amended language has been italicized and underlined):

(1) In General. After receiving an affidavit or other information, a magistrate judge-or if authorized by Rule 41(b) a judge of a state court of record-must issue the warrant if there is probable cause to search for and seize a person or property *or to install and use a tracking device*.

Rule 41(e)(2) Contents of the Warrant, will be amended to read as follows (amended language has been italicized and underlined):
(A) Warrant to Search for and Seize a Person or Property. *Except for a tracking-device-warrant*, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 10 days;
(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and
(iii) return the warrant to the magistrate judge designated in the warrant.

(B) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;
(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and
(iii) return the warrant to the judge designated in the warrant.

Rule 41(f) Executing and Returning the Warrant, will be amended as follows (amended language has been italicized and underlined):

(1) Warrant to Search for and Seize a Person or Property.
(A) Noting the Time. The officer executing the warrant must enter it on the exact date and time it was executed.
(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.
(C) Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.
(D) Return. The officer executing the warrant must promptly return it-together with a copy of the inventory-to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) Warrant for a Tracking Device.
(A) Noting the Time. The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.
(B) Return. Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant.
(C) Service. Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) Delayed Notice. Upon the government's request, a magistrate judge-or if authorized by Rule 41(b), a judge of a state court of record-may delay any notice required by this rule if the delay is authorized by statute.

Proposed amendments to the Advisory Committee Notes state that the Committee "did not intend by this amendment to expand or contract the definition of what might constitute a tracking device." See F.R.Crim.P 41(b) advisory committee's note. The Advisory Committee indicated that the changes to Rule 41(b) were intended to provide procedural guidance for judicial officers who were asked to issue tracking device warrants. The Committee Notes indicate that the amendment "reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain a warrant." Id. The Committee Notes also recognize that 18 U.S.C. § 3117, "does not specify the standard an applicant must meet to install a tracking device" and state that the "amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate judge must issue the warrant." See F.R.Crim.P 41(d) advisory committee's note.

INVESTIGATIVE LAW UNIT ANALYSIS:

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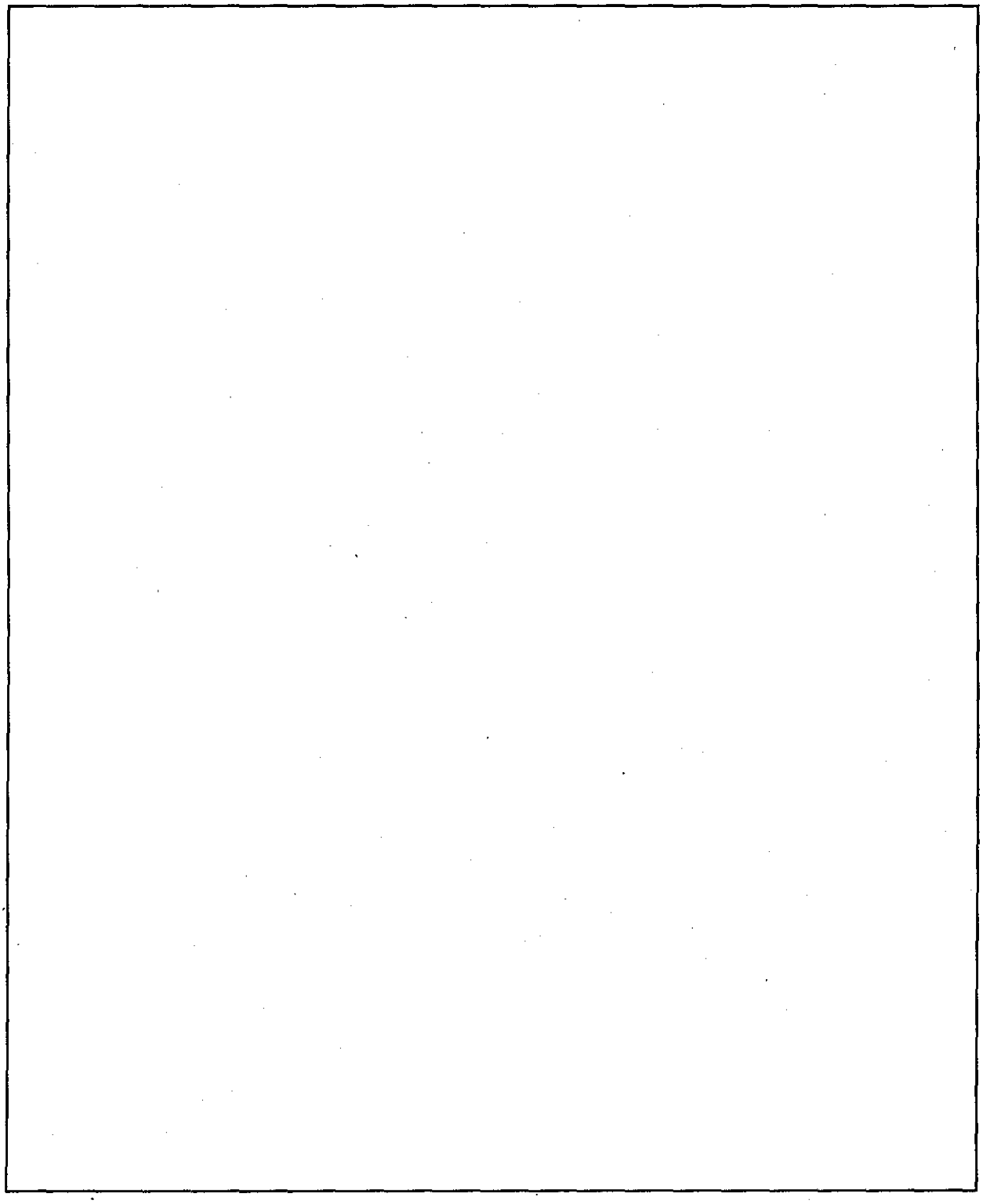

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Any questions regarding this matter should be directed to the Investigative Law Unit [redacted] or the Science and Technology Law Unit [redacted] b7E

To: All Field Offices From: Office of the General Counsel
Re: 66F-HQ-1085159, 11/03/2006

LEAD(s):

Set Lead 1: (Action)

ALL RECEIVING OFFICES

Please distribute to appropriate personnel.

♦♦

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Briefs and Other Related Documents

U.S. v. GarciaC.A.7 (Wis.),2007.Only the Westlaw citation is currently available.

United States Court of Appeals,Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Bernardo GARCIA, Defendant-Appellant.

No. 06-2741.

Argued Jan. 10, 2007.
Decided Feb. 2, 2007.

Background: Following denial of his motion to suppress, 2006 WL 1601716, defendant was convicted in the United States District Court for the Western District of Wisconsin, Barbara B. Crabb, J., of crimes relating to the manufacture of methamphetamine. Defendant appealed.

Holding: The Court of Appeals, Posner, Circuit Judge, held that there was no search or seizure under Fourth Amendment when police placed GPS tracking unit underneath defendant's vehicle.

Affirmed.

[1] **Searches and Seizures 349 ⚿124**

349 Searches and Seizures
349II Warrants
349k123 Form and Contents of Warrant; Signature
349k124 k. Particularity or Generality and Overbreadth in General. Most Cited Cases
Under the Fourth Amendment, a warrant must describe with particularity the object of the search or seizure and must be supported both by an oath or affirmation and by probable cause. U.S.C.A. Const.Amend. 4.

[2] **Searches and Seizures 349 ⚿101**

349 Searches and Seizures
349II Warrants
349k101 k. In General. Most Cited Cases
The warrant requirement forces the police to make a record before the search, rather than allowing them to conduct the search without prior investigation in the expectation that if the search is fruitful a rationalization for it will not be difficult to construct, working backwards. U.S.C.A. Const.Amend. 4.

[3] **Searches and Seizures 349 ⚿21**

349 Searches and Seizures
349I In General
349k13 What Constitutes Search or Seizure
349k21 k. Use of Electronic Devices; Tracking Devices or "Beepers.". Most Cited Cases
There was no search or seizure within meaning of Fourth Amendment when police placed a global positioning system (GPS) tracking unit underneath bumper of vehicle driven by defendant; device did not affect vehicle's driving qualities, did not draw power from vehicle's engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, did not alter vehicle's appearance, and police could follow a car around or observe its route by means of cameras or satellite imaging without it being a search. U.S.C.A. Const.Amend. 4.

Appeal from the United States District Court for the Western District of Wisconsin. No. 05-CR-155-C-Barbara B. Crabb, Chief Judge.

David Reinhard, Office of the United States Attorney, Madison, WI, for Plaintiff-Appellee.
Patrick J. Stangl, Stangl Law Offices, Madison, WI, for Defendant-Appellant.

Before POSNER, MANION, and SYKES, Circuit Judges.

POSNER, Circuit Judge.

*1 The defendant appeals from his conviction for crimes relating to the manufacture of methamphetamine. The only issue is whether evidence obtained as a result of a tracking device attached to his car should have been suppressed as the fruit of an unconstitutional search.

The defendant had served time for methamphetamine offenses. Shortly after his release from prison, a person who was a known user of meth reported to police that the defendant had brought meth to her and her husband, consumed it with them, and told them he wanted to start manufacturing meth again.

Another person told the police that the defendant had bragged that he could manufacture meth in front of a police station without being caught. A store's security video system recorded the defendant buying ingredients used in making the drug.

From someone else the police learned that the defendant was driving a borrowed Ford Tempo. They went looking for it and found it parked on a public street near where the defendant was staying. The police placed a GPS (global positioning system) "memory tracking unit" underneath the rear bumper of the Ford. Such a device, pocket-sized, battery-operated, commercially available for a couple of hundred dollars (see, e.g., Vehicle-Tracking, Incorporated, "GPS Vehicle Tracking with the Tracking Key," www.vehicle-tracking.com/products/Tracking-Key.html, visited Jan. 21, 2007), receives and stores satellite signals that indicate the device's location. So when the police later retrieved the device (presumably when the car was parked on a public street, as the defendant does not argue that the retrieval involved a trespass), they were able to learn the car's travel history since the installation of the device. One thing they learned was that the car had been traveling to a large tract of land. The officers obtained the consent of the tract's owner to search it and they did so and discovered equipment and materials used in the manufacture of meth. While the police were on the property, the defendant arrived in a car that the police searched, finding additional evidence.

The police had not obtained a warrant authorizing them to place the GPS tracker on the defendant's car. The district judge, however, found that they had had a reasonable suspicion that the defendant was engaged in criminal activity, and she ruled that reasonable suspicion was all they needed for a lawful search, although she added that they had had probable cause as well. The defendant argues that they needed not only probable cause to believe that the search would turn up contraband or evidence of crime, but also a warrant. The government argues that they needed nothing because there was no search or seizure within the meaning of the Fourth Amendment.

[1][2] The Fourth Amendment forbids unreasonable searches and seizures. There is nothing in the amendment's text to suggest that a warrant is required in order to make a search or seizure reasonable. All that the amendment says about warrants is that they must describe with particularity the object of the search or seizure and must be supported both by an oath or affirmation and by probable cause, which is understood, in the case of searches incident to criminal investigations, to mean probable cause that the search will turn up contraband or evidence of crime. *Zurcher v. Stanford Daily*, 436 U.S. 547, 554-55, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978). The Supreme Court, however, has created a presumption that a warrant is required, unless infeasible, for a search to be reasonable. E.g., *United States v. Leon*, 468 U.S. 897, 913-14 (1984); *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Henry v. United States*, 361 U.S. 98, 100, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); see *Nicholas v. Goord*, 430 F.3d 652, 678 (2d Cir.2005). "Although the framers of the Fourth Amendment were more fearful that the warrant would protect the police from the citizen's tort suit through operation of the doctrine of official immunity than hopeful that the warrant would protect the citizen against the police, see [Telford] Taylor, *Two Studies in Constitutional Interpretation* 23-43 (1969), and although the effective neutrality and independence of magistrates in ex parte proceedings for the issuance of search warrants may be doubted, there is a practical reason for requiring warrants where feasible: it forces the police to make a record before the search, rather than allowing them to conduct the search without prior investigation in the expectation that if the search is fruitful a rationalization for it will not be difficult to construct, working backwards." *United States v. Mazzone*, 782 F.2d 757, 759 (7th Cir.1986). But of course the presumption in favor of requiring a warrant, or for that matter the overarching requirement of reasonableness, does not come into play unless there is a search or seizure within the meaning of the Fourth Amendment.

*2 [3] The defendant's contention that by attaching the memory tracking device the police seized his car is untenable. The device did not affect the car's driving qualities, did not draw power from the car's engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, did not even alter the car's appearance, and in short did not "seize" the car in any intelligible sense of the word. But was there a search? The Supreme Court has held that the mere tracking of a vehicle on public streets by means of a similar though less sophisticated device (a beeper) is not a search. *United States v. Knotts*, 460 U.S. 276, 284-85, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). But the Court left open the question whether installing the device in the vehicle converted the subsequent tracking into a search. *Id.* at 279 n. 2; see also *United States v. Karo*, 468 U.S. 705, 713-14, 104 S.Ct. 3296, 82 L.Ed.2d

530 (1984). The courts of appeals have divided over the question. Compare *United States v. McIver*, 186 F.3d 1119, 1127 (9th Cir.1999), and *United States v. Pretzinger*, 542 F.2d 517, 520 (9th Cir.1976) (per curiam), holding (and *United States v. Michael*, 645 F.2d 252, 256 and n. 11 (5th Cir.1981) (en banc), and *United States v. Bernard*, 625 F.2d 854, 860-61 (9th Cir.1980), intimating) that there is no search, with *United States v. Bailey*, 628 F.2d 938, 944-45 (6th Cir.1980); *United States v. Shovea*, 580 F.2d 1382, 1387-88 (10th Cir.1978), and *United States v. Moore*, 562 F.2d 106, 110-12 (1st Cir.1977), holding the contrary. Several of the cases actually take intermediate positions, such as requiring reasonable suspicion rather than probable cause (a possible interpretation of *Michael*), or probable cause but no warrant-*Shovea* and *Moore*. This court has not spoken to the issue.

If a listening device is attached to a person's phone, or to the phone line outside the premises on which the phone is located, and phone conversations are recorded, there is a search (and it is irrelevant that there is a trespass in the first case but not the second), and a warrant is required. But if police follow a car around, or observe its route by means of cameras mounted on lampposts or of satellite imaging as in Google Earth, there is no search. Well, but the tracking in this case *was* by satellite. Instead of transmitting images, the satellite transmitted geophysical coordinates. The only difference is that in the imaging case nothing touches the vehicle, while in the case at hand the tracking device does. But it is a distinction without any practical difference.

There is a practical difference lurking here, however. It is the difference between, on the one hand, police trying to follow a car in their own car, and, on the other hand, using cameras (whether mounted on lampposts or in satellites) or GPS devices. In other words, it is the difference between the old technology-the technology of the internal combustion engine-and newer technologies (cameras are not new, of course, but coordinating the images recorded by thousands of such cameras is). But GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking.

*3 This cannot be the end of the analysis, however, because the Supreme Court has insisted, ever since *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), that the meaning of a Fourth Amendment search must change to keep pace with the march of science. So the use of a thermal imager to reveal details of the interior of a home that could not otherwise be discovered without a physical entry was held in *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), to be a search within the meaning of the Fourth Amendment. But *Kyllo* does not help our defendant, because his case unlike *Kyllo* is not one in which technology provides a substitute for a form of search unequivocally governed by the Fourth Amendment. The substitute here is for an activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment.

But while the defendant's efforts to distinguish the GPS case from the satellite-imaging and lamppost-camera cases are futile, we repeat our earlier point that there is a difference (though it is not the difference involved in *Kyllo*) between all three of those situations on the one hand and following suspects around in a car on the other. The new technologies enable, as the old (because of expense) do not, wholesale surveillance. One can imagine the police affixing GPS tracking devices to thousands of cars at random, recovering the devices, and using digital search techniques to identify suspicious driving patterns. One can even imagine a law requiring all new cars to come equipped with the device so that the government can keep track of all vehicular movement in the United States. It would be premature to rule that such a program of mass surveillance could not possibly raise a question under the Fourth Amendment-that it could not be a search because it would merely be an efficient alternative to hiring another 10 million police officers to tail every vehicle on the nation's roads.

Of course the amendment cannot sensibly be read to mean that police shall be no more efficient in the twenty-first century than they were in the eighteenth. *United States v. Knotts*, *supra*, 460 U.S. at 283-84. There is a tradeoff between security and privacy, and often it favors security. Even at the height of the "Warren Court," the Court held over a strong dissent by Justice Brennan that the planting of an undercover agent in a criminal gang does not become a search just because the agent has a transmitter concealed on his person, even though the invasion of privacy is greater when the suspect's words are recorded and not merely recollected. *Lopez v. United States*, 373 U.S. 427, 439, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963).

Yet Chief Justice Warren, while concurring in the judgment in *Lopez*, remarked "that the fantastic

advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system." *Id.* at 441. These "fantastic advances" continue, and are giving the police access to surveillance techniques that are ever cheaper and ever more effective. Remember the beeper in *Knotts*? "Officers installed a beeper inside a five-gallon container of chloroform ... [and] followed the car in which the chloroform had been placed, maintaining contact by using both visual surveillance and a monitor which received the signals sent from the beeper." *United States v. Knotts, supra,* 460 U.S. at 278. That was only a modest improvement over following a car by means of unaided human vision.

*4 Technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive. Whether and what kind of restrictions should, in the name of the Constitution, be placed on such surveillance when used in routine criminal enforcement are momentous issues that fortunately we need not try to resolve in this case. So far as appears, the police of Polk County (a rural county in northwestern Wisconsin), where the events of this case unfolded, are not engaged in mass surveillance. They do GPS tracking only when they have a suspect in their sights. They had, of course, abundant grounds for suspecting the defendant. Should government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search. Cf. *Zurcher v. Stanford Daily, supra,* 436 U.S. at 566.

Affirmed.

C.A.7 (Wis.),2007.
U.S. v. Garcia
--- F.3d ----, 2007 WL 286534 (C.A.7 (Wis.))

Briefs and Other Related Documents (Back to top)

• 06-2741 (Docket) (Jun. 23, 2006)

END OF DOCUMENT

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(2) THE USE OF FBI ELECTRONIC SURVEILLANCE EQUIPMENT IN JOINT CASES WHERE STATE AND LOCAL LAW ENFORCEMENT AGENCIES OBTAINED AUTHORITY FOR ITS USE (SEE MIOG, PART 2, 10-10.3 (8).) (RCU)

| (a) A JOINT CASE, for purposes of this section, is an investigation in which there exists significant FBI interest in the subject or subjects of a local investigation and substantial FBI investigative resources have been utilized and/or will be utilized in the planned investigation with the local agency. (RCU)

| **(b) FBIHQ authority MUST be obtained prior to any use of FBI electronic surveillance equipment or personnel in furtherance of any order or authority obtained by state or local law enforcement agencies.** Should approval be granted for such use, the pertinent local or state order or authority MUST contain specific language authorizing FBI participation and specifying whether the assistance is for installation, monitoring, or whatever is required. (RCU)

| (c) In requesting FBIHQ authority, the field office is to set forth the following information: (RCU)

| 1. A synopsis of the investigation conducted to date by FBI and the local agency involved, to include the date the FBI
| case was opened, as well as when the joint investigation was initiated. (RCU)

| 2. the specific SAC comments as to the value of the assistance to the FBI investigation and extent of federal control
| over local electronic surveillance. (RCU)

| 3. the exact nature of equipment to be utilized and technical assistance required, and whether the equipment is on
| hand in the requesting division. (RCU) b7E

| 4. the specific comments of the [redacted] as to the complexity of the equipment and the ability of the
| local agency to properly utilize technical equipment requested. (RCU)

| 5. that the local agency has valid legal authority under state or local law to conduct the electronic
| surveillance for which equipment will be utilized, to include citation of the specific statute; (RCU)

| 6. that the Chief Division Counsel or the Assistant U.S. Attorney has reviewed the affidavits and orders to be
| filed and concurs in their sufficiency; and, (RCU)

| 7. that FBI policy in limiting disclosure as set forth in Part 2, Sections 10-10.13 and 10-10.16, of this manual, will
| be honored in any subsequent local proceedings. (RCU)

| The above information is to be provided by appropriate communication to the attention of the Operational Technology Division, as well as to either the Criminal Investigative Division or the [redacted] as appropriate. (RCU) b7D

(d) Any request for FBI assistance in the execution of a locally obtained court order which requires [redacted] will be handled separately and will require significant justification. Emergency requests for such | assistance are to be discouraged and likely will NOT be approved. (RCU)

-----Original Message-----

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CELL/OTD 006371

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED

[redacted] b6 b7C

Subject: Loan of ELSUR

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

[redacted] b5

62-3.3 Policy

(1) Upon receipt of requests for investigation from local or state law enforcement agencies involving matters in which there is no FBI jurisdictional interest, the FBI's cooperative role will be limited to the acquisition of records or information from the criminal files of local or state law enforcement agencies or records of nongovernmental organizations and concerns and other governmental agencies.

(a) Records or information are defined as material normally available to law enforcement agencies which can be obtained without a court order..
(b) When obtaining material outlined above, dissemination authority must be obtained from that agency providing the records/information, when appropriate.
(2) In addition to record gathering and dissemination noted above, [redacted] b7E

(4) Domestic Police Cooperation matters received in the field should be opened on an individual case basis, the subject of the record indexed to the general indices, resulting disclosures recorded in accordance with Privacy Act requirements and maintained in accordance with existing instructions pertaining to the destruction of field office files and records, MAOP, Part II, 2-4.5.
(5) SACs may approve use of FBI resources on behalf of local and state agencies providing such action falls within the above guidelines. No communication need be

forwarded to FBIHQ advising of the initiation of a Domestic Police Cooperation investigation.

(6) Name check requests for a review of pertinent information contained in our central records system received by FBIHQ from authorized state and local criminal justice agencies will be | processed by the|Executive Agencies Dissemination|Unit, Information|Management Division, in accordance with MAOP, Part II,9-3. Completed responses will be returned to the respective field office which covers the territory of the submitting agency for appropriate dissemination.
(7) Domestic Police Cooperation cases are not to be opened in the field for the purpose of conducting foreign inquiries through Interpol. All state and local law enforcement agencies in the United States have direct access to the United States National Central Bureau (USNCB), Interpol, by mail or via the National Law Enforcement Telecommunications System (NLETS). The USNCB mailing address is:Interpol, U.S. Department of Justice, Washington, D.C. 20530. The NLETS ORI is "DCINTER0/0/."

This authority appears to also be codified by Regulation at 28 CFR 0.85(j)

See also Part I, Section 184-1 Investigative Authority

2) Under DOJ guidelines, the FBI's role in Domestic Police Cooperation, see this manual, Part 1, Section 62, entitled "Domestic Police Cooperation," is limited to: (1) FBI record checks; (2) record checks of other governmental agencies, nongovernmental organizations and concerns; (3) record checks of criminal files of local or state law enforcement agencies; (4) verifying the location of an individual whose interview is desired by local authorities; and (5) acting in a liaison capacity between local law enforcement agencies to facilitate one agency handling the investigative requests of another. [redacted] b5 b7E

[redacted]

[redacted]

(g) No Federal Bureau of Investigation personnel may be used to ***install the equipment or participate in the surveillance***, unless deemed necessary ***and authorized by the Director or his designee.*** This restriction does not prohibit maintenance and of the equipment when not installed.

the AG Order also expressly states that:

i The Director may delegate his authority to a designated representative ***(not lower than an appropriate Headquarters-level Section Chief)*** to approve loans of electronic surveillance equipment to state and local law enforcement agencies

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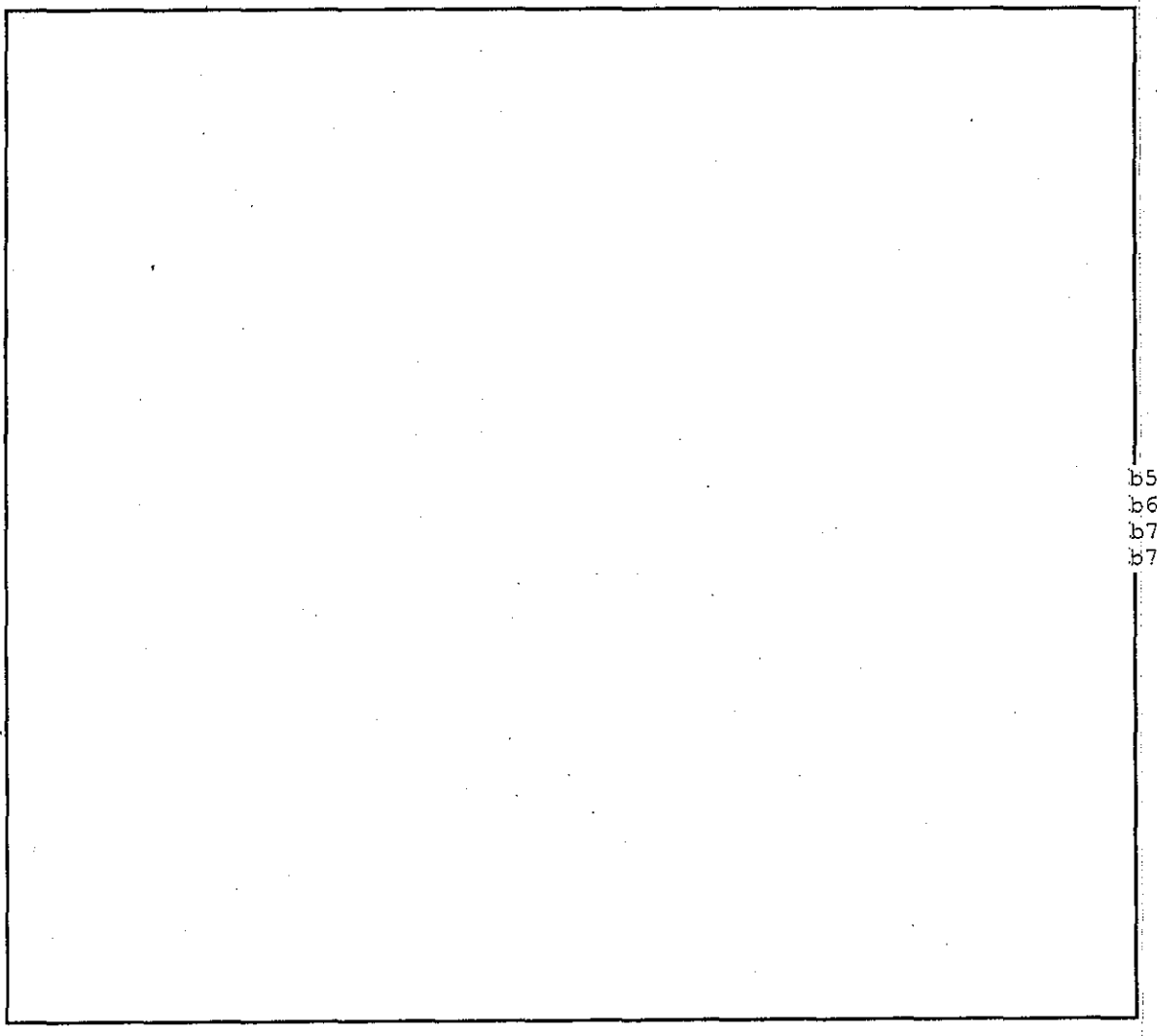

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(2) THE USE OF FBI ELECTRONIC SURVEILLANCE EQUIPMENT IN JOINT CASES WHERE STATE AND LOCAL LAW ENFORCEMENT AGENCIES OBTAINED AUTHORITY FOR ITS USE (SEE MIOG, PART 2, 10-10.3 (8).) (RCU)

| (a) A JOINT CASE, for purposes of this section, is an investigation in which there exists significant FBI interest in the subject or subjects of a local investigation and substantial FBI investigative resources have been utilized and/or will be utilized in the planned investigation with the local agency. (RCU)

| (b) FBIHQ authority MUST be obtained prior to any use of FBI electronic surveillance equipment or personnel in furtherance of any order or authority obtained by state or local law enforcement agencies. Should approval be granted for such use, the pertinent local or state order or authority MUST contain specific language authorizing FBI participation and specifying whether the assistance is for installation, monitoring, or whatever is required. (RCU)

| (c) In requesting FBIHQ authority, the field office is to set forth the following information: (RCU)

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| 2. the specific SAC comments as to the value of the assistance to the FBI investigation and extent of federal control
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| 3. the exact nature of equipment to be utilized and technical assistance required, and whether the equipment is on
| hand in the requesting division. (RCU)

| 4. the specific comments of the [redacted] as to the complexity of the equipment and the ability of the
| local agency to properly utilize technical equipment requested. (RCU)

| 5. that the local agency has valid legal authority under state or local law to conduct the electronic
| surveillance for which equipment will be utilized, to include citation of the specific statute; (RCU)

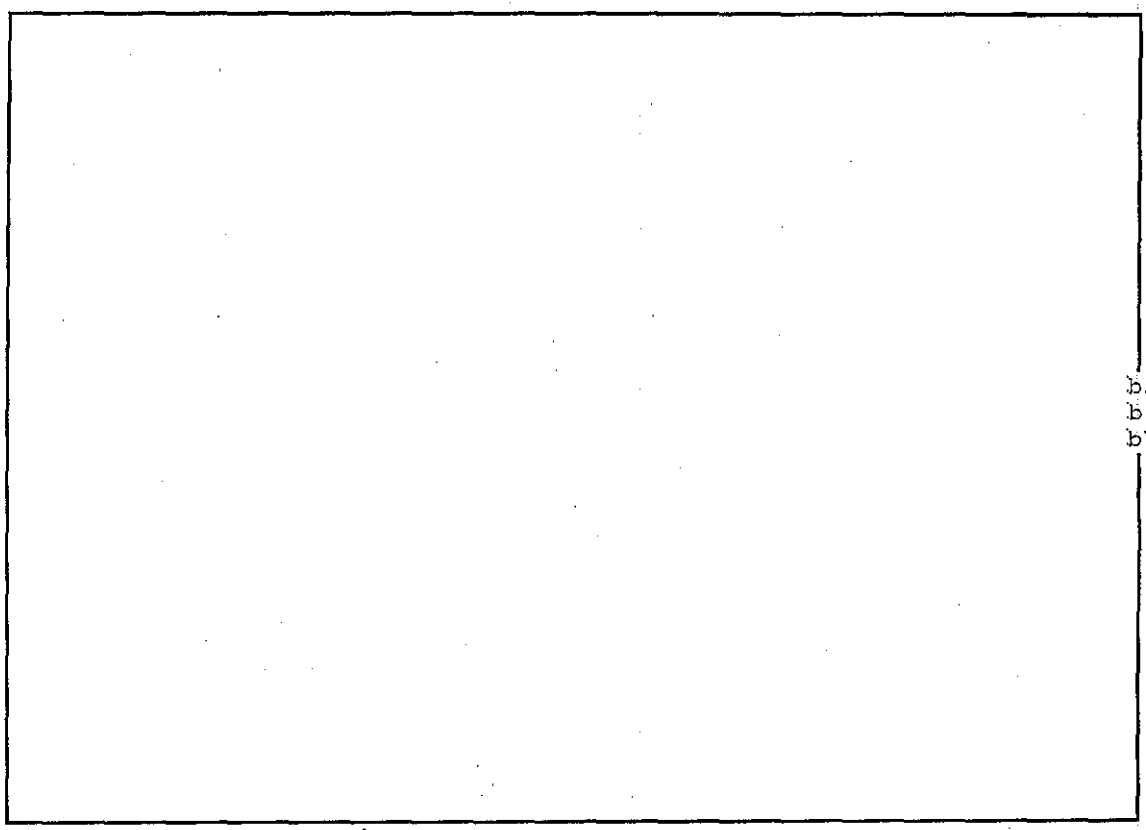
| 6. that the Chief Division Counsel or the Assistant U.S. Attorney has reviewed the affidavits and orders to be
| filed and concurs in their sufficiency; and, (RCU) b7E

| 7. that FBI policy in limiting disclosure as set forth in Part 2, Sections 10-10.13 and 10-10.16, of this manual, will
| be honored in any subsequent local proceedings. (RCU)

| The above information is to be provided by appropriate communication to the attention of the Operational Technology Division, as well as to either the Criminal Investigative Division or the [redacted] as appropriate. (RCU)

(d) Any request for FBI assistance in the execution of a locally obtained court order which requires [redacted] will be handled separately and will require significant justification. Emergency requests for such
| assistance are to be discouraged and likely will NOT be approved. (RCU) b5 b6 b7C b7E

[redacted]



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(Rev. 01-31-2003)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 03/06/2007

To: All Field Offices Attn: SAC
CDC

From: Office of the General Counsel
Investigative Law Unit
Contact: SSA [redacted]

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Approved By: [redacted]

Drafted By: [redacted] dem

Case ID #: 333-HQ-1551350 (Pending)

Title: AMENDMENT TO RULE 41
FEDERAL RULES OF CRIMINAL PROCEDURE
EFFECTIVE DECEMBER 1, 2006

Synopsis: To advise field offices of an amendment to Rule 41 of the Federal Rules of Criminal Procedure, which addresses procedures for issuing tracking device warrants, and became effective December 1, 2006.

Details: Effective December 1, 2006, Rule 41 of the Federal Rules of Criminal Procedure was amended to reflect procedures for issuing tracking device warrants (copy is attached). Amendments to the Advisory Committee Notes state that the Committee "did not intend by this amendment to expand or contract the definition of what might constitute a tracking device." See F.R.Crim.P 41(b) advisory committee's note. The Advisory Committee indicated that the changes to Rule 41(b) were intended to provide procedural guidance for judicial officers who were asked to issue tracking device warrants. The Committee Notes indicate that the amendment "reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain a warrant." Id. The Committee Notes also recognize that 18 U.S.C. § 3117, "does not specify the standard an applicant must meet to install a tracking device" and state that the "amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate judge must issue the warrant." See F.R.Crim.P 41(d) advisory committee's note.

INVESTIGATIVE LAW UNIT ANALYSIS:

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[redacted] personnel before employing an electronic tracking device in a particular case. b7E

Any questions regarding this matter may be directed to the Investigative Law Unit [redacted] or the Science and Technology Law Unit [redacted]

Federal Rules of Criminal Procedure, Rule 41

(a) Scope and Definitions.

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

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

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

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

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. §3117(b).[4]

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district - or if none is reasonably available, a judge of a state court of record in the district - has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; and

[4] A "tracking device" is defined to mean "an electronic or mechanical device which permits the tracking of the movement of a person or object." 18 U.S.C. § 3117(b).

(3) a magistrate judge - in an investigation of domestic terrorism or international terrorism - with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

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

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) In General. After receiving an affidavit or other information, a magistrate judge - or if authorized by Rule 41(b) a judge of a state court of record-must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.

(2) Requesting a Warrant in the Presence of a Judge.

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording

device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) Requesting a Warrant by Telephonic or Other Means.

(A) In General. A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

(B) Recording Testimony. Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

(D) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(e) Issuing the Warrant.

(1) In General. The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) Contents of the Warrant.

(A) Warrant to Search for and Seize a Person or Property. Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 10 days;

(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant.

(B) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(3) Warrant by Telephonic or Other Means. If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) Preparing a Proposed Duplicate Original Warrant. The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) Preparing an Original Warrant. If the applicant reads the contents of the proposed duplicate original warrant, the magistrate judge must enter those contents into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) Modification. The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly.

(D) Signing the Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

(A) Noting the Time. The officer executing the warrant must enter it on the exact date and time it was executed.

(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

(C) Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.

(D) Return. The officer executing the warrant must promptly return it-together with a copy of the inventory-to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) Warrant for a Tracking Device.

(A) Noting the Time. The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) Return. Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant.

(C) Service. Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking device warrant must serve a copy of the warrant on the person who

was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) Delayed Notice. Upon the government's request, a magistrate judge-or if authorized by Rule 41(b), a judge of a state court of record-may delay any notice required by this rule if the delay is authorized by statute.

(g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) Motion to Suppress. A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.

(i) Forwarding Papers to the Clerk. The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.

LEAD(s):

Set Lead 1: (Action)

ALL RECEIVING OFFICES

To: All Field Offices From: Office of the General Counsel
Re: 333-HQ-1551350, 03/06/2007

Please distribute to appropriate personnel.

♦♦

[redacted] b6 b7C b7E

From: [redacted]
Sent:
To:
Subject:

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

[redacted]

Per your request.... b6 b7C

[redacted]

The policy verbage reads:

Title 47 United States Code- TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5--WIRE OR RADIO COMMUNICATIONS

SUBCHAPTER III--SPECIAL PROVISIONS RELATING TO RADIO

Part I--General Provisions

Sec. 333. Willful or malicious interference

No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this chapter or operated by the United States Government.

[redacted] b3 b7E

SENSITIVE BUT UNCLASSIFIED