

## 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]

Approved By: [REDACTED]

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
DATE 10-31-2011 BY 65179 DMH/STW

b6  
b7C

Drafted By: [REDACTED] dem

Case ID #: [REDACTED] (Pending)

b7A

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.

To: All Field Offices From: Office of the General Counsel  
Re: [REDACTED] 03/06/2007

b7A

INVESTIGATIVE LAW UNIT ANALYSIS:

b7E

At the outset, it is important to note that the amendments to Rule 41 do not change Fourth Amendment law regarding whether a court order is needed for a tracking device. The Supreme Court has already determined that when law enforcement authorities monitor a tracking device placed in a car there is no violation of the Fourth Amendment because "a person traveling in an automobile on a public thoroughfare has no reasonable expectation of privacy in his movements from one place to another." United States v. Knotts, 460 U.S. 276, 281 (1983).<sup>2</sup> However, when the utilization of a tracking device

<sup>1</sup>To the extent tracking may be used to develop evidence, the MIOG provides the following guidance:

b7E

(2) [REDACTED]

<sup>2</sup>Consideration must also be given to whether the installation of the tracking device itself requires entry into an area where there is a reasonable expectation of privacy against such intrusion and would thus require a warrant to permit entry for the purpose of installing the tracking device. Note, however, that "[t]he existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, however, for an actual trespass is neither necessary nor sufficient to establish a constitutional violation." U.S. v. Karo, 468 U.S. 705 (1984); see U.S. v. McIver, 186 F.3d 1119 (9th Cir. 1999) (No seizure occurred by placement of two magnetized

To: All Field Offices From: Office of the General Counsel  
Re: [REDACTED] 03/06/2007

b7A

reveals something that could not have been obtained through visual surveillance from a public area, it is subject to the restrictions of the Fourth Amendment and may require a court order. See United States v. Karo, 468 U.S. 705, 715 (1984). In Karo, the Supreme Court stated, "[i]ndiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." Id. at 716.

b7E

The amendments provide that a magistrate judge has the authority to issue a warrant and that the warrant may authorize the installation and use of the device to track the movement of a person or property within the district, outside the district, or both. This provision is consistent with the tracking device statute, 18 U.S.C. § 3117, which provides that if a court is empowered to issue a warrant, the order may authorize the use of the device within the jurisdiction of the court and outside that jurisdiction, if the device is installed in that jurisdiction.

The amendments standardize the procedures for issuing tracking device warrants when a warrant is required by law, by specifically delineating what must be included in a warrant for a tracking device: (1) The duration of the warrant must not exceed 45 days from the date of issuance; (2) the installation of the tracking device must occur during a specified time period within

---

electronic tracking devices (gps device and Birdog beeper) on the undercarriage of defendant's vehicle parked in defendant's driveway outside the curtilage of his residence placement because the officers did not meaningfully interfere with the defendant's possessory interest in the vehicle). A non-consensual entry into the interior of a vehicle, or a private container to install a device would likely require a warrant. See United States v. Huford, 539 F.2d 32, 34 (9th Cir.), cert denied, 429 U.S. 1002 (1976) (absent warrant, entrance into private garage and opening truck's hood would have been an invasion of privacy).

To: All Field Offices From: Office of the General Counsel  
Re: [REDACTED] 03/06/2007

b7A

10 calendar days of the date of issuance; and (3) the installation of the tracking device must occur during the daytime unless the judge for good cause authorizes otherwise. See Fed.R. Crim.P 41(e) (2) (B).

The amendments also delineate specific procedures that must be followed when executing a tracking device warrant and provide that notice must be served on the person who was tracked or whose property was tracked. Pursuant to the changes in Rule 41(f), Agents executing the warrant must enter the date and time when the tracking device was installed and the time period during which it was used. Within ten (10) calendar days after the use of the tracking device has ended, the Agent must return the warrant to the issuing magistrate. Within ten (10) calendar days after the tracking has ended, Agents must also serve notice on the person who was tracked or whose property was tracked. This required notice can be further delayed, however, upon the government's request if the delay is authorized by statute. 18 U.S.C. §3103a(b) provides for delay of notice in conjunction with the issuance of search warrants.<sup>3</sup> The court may grant the government's request to delay notice beyond 10 calendar days after the use of the tracking device has ended if good cause is shown.

b7E

---

<sup>3</sup>Notice may be delayed if:

(1) the court finds reasonable cause to believe that providing immediate notification of the warrant may have an adverse result (as defined in section 2705); and

(3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown. 18 U.S.C. § 3103a(b). Subsection (1) is apparently addressed in the proposed amendment to Rule 41(f) (2) as implicit in the surreptitious nature of tracking devices. Presumably the "reasonable period" required by subsection (3) of section 3103a(b) would be that such notice be given "within 10 calendar days after use of the tracking device has ended" as is required for a warrant issued in accordance with the proposed Rule 41(f) (2) (C). This period, however, may be extended by a court for good cause shown.

To: All Field Offices From: Office of the General Counsel  
Re: [REDACTED] 03/06/2007

b7A

b7E

[REDACTED]

Any questions regarding this matter may be directed to the Investigative Law Unit (202)324-5640 or the Science and Technology Law Unit (202)324-5643.

To: All Field Offices From: Office of the General Counsel  
Re: [REDACTED] 03/06/2007

b7A

**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).<sup>4</sup>

**(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

---

<sup>4</sup> 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).

To: All Field Offices From: Office of the General Counsel  
Re: [REDACTED] 03/06/2007

b7A

(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

To: All Field Offices From: Office of the General Counsel  
Re: [REDACTED] 03/06/2007

b7A

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;

To: All Field Offices From: Office of the General Counsel  
Re: [REDACTED] 03/06/2007

b7A

(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.

To: All Field Offices From: Office of the General Counsel  
Re: [REDACTED] 03/06/2007

b7A

(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

To: All Field Offices From: Office of the General Counsel  
Re: [REDACTED] 03/06/2007

b7A

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: [REDACTED] 03/06/2007

b7A

Please distribute to appropriate personnel.

♦♦