AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

109th Congress, 2d Session – – – – – – – – – – – – – House Document 109–104

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE THAT HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2072

MAY 8, 2006.—Referred to the Committee on the Judiciary and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
27–395 WASHINGTON : 2006

LETTER OF SUBMITTAL

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 12, 2006.

Hon. J. DENNIS HASTERT,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 5, 6, 32.1, 40, 41, and 58.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

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.

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

November 10, 2005

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 5, 6, 32.1, 40, 41, and 58 of the Federal Rules of Criminal Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

Leonidas Ralph Mecham
Secretary

Attachments

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules proposed amendments to Rules 5, 6, 32.1, 40, 41, and 58 with a recommendation that they be approved and transmitted to the Judicial Conference. The scheduled public hearings on the amendments were canceled because no person submitted a request to testify.

The proposed amendments to Rules 5(c), 32.1, and 41 authorize a magistrate judge to handle discrete transactions in certain proceedings by reliable electronic means, including by facsimile. The amendments recognize the growing number of courts accepting electronic filings and are intended to facilitate the use of electronic transmissions of official documents as an efficient and convenient means of conducting business. In determining which electronic means are reliable, a court is advised to consider the expected quality, security, and clarity of the transmission.

Under the proposed amendment to Rule 5(c), a magistrate judge may accept an arrest warrant transmitted by reliable electronic means when ordering the transfer of a defendant arrested in a district other than where the offense was allegedly committed to the district where the offense allegedly was committed. The present rule requires the government to produce the warrant, a certified copy, or a facsimile copy of either document.

Under the proposed amendment to Rule 32.1, a magistrate judge may accept a certified copy of a judgment, warrant, or warrant application by reliable electronic means, including by facsimile, when ordering the transfer of a defendant arrested in a district that does not have jurisdiction to hold a revocation hearing to the district that has jurisdiction to conduct a probation or supervised release revocation or modification hearing.

The proposed amendment to Rule 41 authorizes a magistrate judge to issue a search and seizure warrant based on information communicated by reliable electronic means or by telephone.

The proposed amendment to Rule 6 makes technical changes to the language added to the rule by the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458) in order to conform the new language with the conventions adopted during the comprehensive restyling of the Criminal Rules. No substantive change is made. The amendments were not published for comment because they are entirely technical and conforming in nature.

The proposed amendment to Rule 40 authorizes a magistrate judge to set conditions of release for a defendant arrested for violating any condition of release set originally in another district. The present rule authorizes a magistrate judge to set release conditions for a defendant who fails to appear in another district as ordered by the court in that other district. The advisory committee concluded that it is inconsistent to empower a magistrate judge to release a defendant who fails to appear altogether, but not to release one who only violated conditions of release in a minor way.

The proposed amendment to Rule 41 provides procedural guidance to a judge issuing a "tracking device" warrant authorized under 18 U.S.C. § 3117 and case law. These warrants may be required to monitor devices when they are used to track persons or property in areas where

there is a reasonable expectation of privacy. The proposed amendment regulates the installation of the device; the contents, execution, and return of a tracking-device warrant; and the notice to the person who had been subject to the tracking device. The proposed amendment conforms to the USA PATRIOT ACT (Pub. L. No. 107-56) and includes a provision authorizing a judge to delay any notice required in conjunction with issuing any search warrant. The proposed amendment to Rule 41 had been approved by the Committee at its June 2003 meeting, but it was later withdrawn at the request of the Department of Justice. After further review, the Department of Justice had no additional recommendations and voted in favor of the proposal.

The proposed amendment to Rule 58 clarifies that a defendant's right to a preliminary hearing is governed by Rule 5.1, and it is not limited to defendants held in custody.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 5, 6, 32.1, 40, 41, and 58 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

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

1 * * * * *

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

4 * * * * *

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

10 * * * * *

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

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

14 (D) the magistrate judge must transfer the
15 defendant to the district where the offense
16 was allegedly committed if:
17 (i) the government produces the warrant,
18 a certified copy of the warrant, ~~a~~
19 ~~facsimile of either,~~ or ~~other~~
20 ~~appropriate~~ a reliable electronic form
21 of either; and
22 * * * * *

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

1 * * * * *

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

3 * * * * *

4 (3) ***Exceptions.***

5 * * * * *

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

11 6(e)(3)(D)(iii)) to any federal law
12 enforcement, intelligence, protective,
13 immigration, national defense, or national
14 security official to assist the official
15 receiving the information in the
16 performance of that official's duties. An
17 attorney for the government may also
18 disclose any grand-jury matter involving,
19 within the United States or elsewhere, a
20 threat of attack or other grave hostile acts of
21 a foreign power or its agent, a threat of
22 domestic or international sabotage or
23 terrorism, or clandestine intelligence
24 gathering activities by an intelligence
25 service or network of a foreign power or by
26 its agent, to any appropriate federal ~~Federal~~,
27 state~~State~~, state~~State~~ subdivision, Indian

28 tribal, or foreign government official, for
29 the purpose of preventing or responding to
30 such threat or activities.
31 (i) Any official who receives information
32 under Rule 6(e)(3)(D) may use the
33 information only as necessary in the
34 conduct of that person's official duties
35 subject to any limitations on the
36 unauthorized disclosure of such
37 information. Any state~~State~~, state~~State~~
38 subdivision, Indian tribal, or foreign
39 government official who receives
40 information under Rule 6(e)(3)(D)
41 may use the information ~~only~~
42 ~~consistent with such guidelines as the~~
43 ~~Attorney General and the Director of~~
44 ~~National Intelligence shall jointly~~

45 ~~issue~~ only in a manner consistent with
46 any guidelines issued by the Attorney
47 General and the Director of National
48 Intelligence.
49 * * * * *
50 (7) ***Contempt.*** A knowing violation of Rule 6, or of
51 any guidelines jointly issued by the Attorney
52 General and the Director of National Intelligence
53 ~~pursuant to~~ under Rule 6, may be punished as a
54 contempt of court.
55 * * * * *

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

1 **(a) Initial Appearance.**

2 * * * * *

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

7 * * * * *

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

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

16 (ii) the judge finds that the person is the

17 same person named in the warrant.

18 * * * * *

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 <u>or for Violating Conditions of Release Set in Another District</u>

1 ~~**(a) In General.** If a person is arrested under a warrant~~

2 ~~issued in another district for failing to appear — as~~

3 ~~required by the terms of that person's release under 18~~

4 ~~U.S.C. §§ 3141–3156 or by a subpoena — the person~~
5 ~~must be taken without unnecessary delay before a~~
6 ~~magistrate judge in the district of the arrest.~~
7 **(a) In General.** A person must be taken without
8 unnecessary delay before a magistrate judge in the
9 district of arrest if the person has been arrested under
10 a warrant issued in another district for:
11 (i) failing to appear as required by the terms of that
12 person's release under 18 U.S.C. §§ 3141-3156
13 or by a subpoena; or
14 (ii) violating conditions of release set in another
15 district.
16 * * * * *

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

1 **(a) Scope and Definitions.**

2 * * * * *

3 **(2)** ***Definitions.*** The following definitions apply

4 under this rule:

5 * * * * *

6 (D) "Domestic terrorism" and "international

7 terrorism" have the meanings set out in 18

8 U.S.C. § 2331.

9 (E) "Tracking device" has the meaning set out
10 in 18 U.S.C. § 3117(b).
11 **(b) Authority to Issue a Warrant.** At the request of a
12 federal law enforcement officer or an attorney for the
13 government:
14 **(1)** a magistrate judge with authority in the district
15 — or if none is reasonably available, a judge of a
16 state court of record in the district — has
17 authority to issue a warrant to search for and
18 seize a person or property located within the
19 district;
20 **(2)** a magistrate judge with authority in the district
21 has authority to issue a warrant for a person or
22 property outside the district if the person or
23 property is located within the district when the
24 warrant is issued but might move or be moved

25 outside the district before the warrant is
26 executed; ~~and~~
27 **(3)** a magistrate judge — in an investigation of
28 domestic terrorism or international terrorism ~~(as~~
29 ~~defined in 18 U.S.C. § 2331) having~~ — with
30 authority in any district in which activities
31 related to the terrorism may have occurred~~,~~ ~~may~~
32 has authority to issue a warrant for a person or
33 property within or outside that district~~.~~; and
34 **(4)** a magistrate judge with authority in the district
35 has authority to issue a warrant to install within
36 the district a tracking device; the warrant may
37 authorize use of the device to track the
38 movement of a person or property located within
39 the district, outside the district, or both.
40 * * * * *
41 **(d) Obtaining a Warrant.**

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

49 * * * * *

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

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

57 (B) *Recording Testimony.* Upon learning that
58 an applicant is requesting a warrant under
59 Rule 41(d)(3)(A), a magistrate judge must:
60 (i) place under oath the applicant and any
61 person on whose testimony the
62 application is based; and
63 (ii) make a verbatim record of the
64 conversation with a suitable recording
65 device, if available, or by a court
66 reporter, or in writing.
67 * * * * *
68 **(e) Issuing the Warrant.**
69 **(1)** ***In General.*** The magistrate judge or a judge of a
70 state court of record must issue the warrant to an
71 officer authorized to execute it.
72 **(2)** ***Contents of the Warrant.***

73 (A) *Warrant to Search for and Seize a Person*
74 *or Property.* Except for a tracking-device
75 warrant, ~~T~~ the warrant must identify the
76 person or property to be searched, identify
77 any person or property to be seized, and
78 designate the magistrate judge to whom it
79 must be returned. The warrant must
80 command the officer to:
81 ~~(A)~~(i) execute the warrant within a specified
82 time no longer than 10 days;
83 ~~(B)~~(ii) execute the warrant during the daytime,
84 unless the judge for good cause expressly
85 authorizes execution at another time; and
86 ~~(C)~~(iii) return the warrant to the magistrate judge
87 designated in the warrant.
88 (B) *Warrant for a Tracking Device.* A tracking-
89 device warrant must identify the person or

90 property to be tracked, designate the
91 magistrate judge to whom it must be
92 returned, and specify a reasonable length of
93 time that the device may be used. The time
94 must not exceed 45 days from the date the
95 warrant was issued. The court may, for
96 good cause, grant one or more extensions
97 for a reasonable period not to exceed 45
98 days each. The warrant must command the
99 officer to:
100 (i) complete any installation authorized
101 by the warrant within a specified time
102 no longer than 10 calendar days;
103 (ii) perform any installation authorized by
104 the warrant during the daytime, unless
105 the judge for good cause expressly

106 authorizes installation at another time;
107 and
108 (iii) return the warrant to the judge
109 designated in the warrant.
110 **(3)** ***Warrant by Telephonic or Other Means.*** If a
111 magistrate judge decides to proceed under Rule
112 41(d)(3)(A), the following additional procedures
113 apply:
114 (A) *Preparing a Proposed Duplicate Original*
115 *Warrant.* The applicant must prepare a
116 "proposed duplicate original warrant" and
117 must read or otherwise transmit the
118 contents of that document verbatim to the
119 magistrate judge.
120 (B) *Preparing an Original Warrant.* If the
121 applicant reads the contents of the proposed
122 duplicate original warrant, the ~~The~~

123 magistrate judge must enter ~~the~~ those
124 contents ~~of the proposed duplicate original~~
125 ~~warrant~~ into an original warrant. If the
126 applicant transmits the contents by reliable
127 electronic means, that transmission may
128 serve as the original warrant.
129 (C) *Modifications*. The magistrate judge may
130 modify the original warrant. The judge
131 must transmit any modified warrant to the
132 applicant by reliable electronic means under
133 Rule 41(e)(3)(D) or direct the applicant to
134 modify the proposed duplicate original
135 warrant accordingly. ~~In that case, the judge~~
136 ~~must also modify the original warrant.~~
137 (D) *Signing the ~~Original Warrant and the~~*
138 *~~Duplicate Original~~ Warrant.* Upon
139 determining to issue the warrant, the

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

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

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

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

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

157 from whose premises, the property was taken.
158 If either one is not present, the officer must
159 prepare and verify the inventory in the
160 presence of at least one other credible person.
161 ~~(3)~~(C) *Receipt.* The officer executing the warrant
162 must~~: (A)~~ give a copy of the warrant and a
163 receipt for the property taken to the person
164 from whom, or from whose premises, the
165 property was taken~~;~~ or ~~(B)~~ leave a copy of the
166 warrant and receipt at the place where the
167 officer took the property.
168 ~~(4)~~(D) *Return.* The officer executing the warrant
169 must promptly return it — together with a
170 copy of the inventory — to the magistrate
171 judge designated on the warrant. The judge
172 must, on request, give a copy of the inventory
173 to the person from whom, or from whose

174 premises, the property was taken and to the
175 applicant for the warrant.
176 **(2) *Warrant for a Tracking Device.***
177 (A) *Noting the Time.* The officer executing a
178 tracking-device warrant must enter on it the
179 exact date and time the device was installed
180 and the period during which it was used.
181 (B) *Return.* Within 10 calendar days after the
182 use of the tracking device has ended, the
183 officer executing the warrant must return it
184 to the judge designated in the warrant.
185 (C) *Service.* Within 10 calendar days after the
186 use of the tracking device has ended, the
187 officer executing a tracking-device warrant
188 must serve a copy of the warrant on the
189 person who was tracked or whose property
190 was tracked. Service may be accomplished

191 by delivering a copy to the person who, or
192 whose property, was tracked; or by leaving
193 a copy at the person's residence or usual
194 place of abode with an individual of
195 suitable age and discretion who resides at
196 that location and by mailing a copy to the
197 person's last known address. Upon request
198 of the government, the judge may delay
199 notice as provided in Rule 41(f)(3).
200 (3) ***Delayed Notice.*** Upon the government's
201 request, a magistrate judge — or if authorized by
202 Rule 41(b), a judge of a state court of record —
203 may delay any notice required by this rule if the
204 delay is authorized by statute.
205 * * * * *

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.

* * * * *

Rule 58. Petty Offenses and Other Misdemeanors

1 * * * * *

2 **(b) Pretrial Procedure.**

3 * * * * *

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

8 * * * * *

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

15 * * * * *

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.

* * * * *