



U.S. Department of Justice

Executive Office for United States Attorneys
Freedom of Information/Privacy Act Staff
600 E Street, N.W., Room 7300
Washington, D.C. 20530
202-616-6757 Fax 202-616-6478

Requester: Catherine Crump Request Number: 07-4123

Subject of Request: Mobile Phone Tracking (Item 1-4)/CAC

OCT 9 2003

Dear Requester:

Your request for records under the Freedom of Information Act/Privacy Act has been processed. This letter constitutes the third interim reply from the Executive Office for United States Attorneys, the official record-keeper for all records located in this office and the various United States Attorneys' Offices. To provide you the greatest degree of access authorized by the Freedom of Information Act and the Privacy Act, we have considered your request in light of the provisions of both statutes.

The records you seek are located in a Privacy Act system of records that, in accordance with regulations promulgated by the Attorney General, is exempt from the access provisions of the Privacy Act, 28 C.F.R. § 16.81. We have also processed your request under the Freedom of Information Act and are making all records required to be released, or considered appropriate for release as a matter of discretion, available to you. This letter constitutes a partial denial. The enclosed material is responsive to item number one of your request.

Enclosed please find:

67 page(s) are being released in full (RIF);
28 page(s) are being released in part (RIP);
0 page(s) are withheld in full (WIF). **The redacted/withheld documents were reviewed to determine if any information could be segregated for release.**

The exemption(s) cited for withholding records or portions of records are marked below. An enclosure to this letter explains the exemptions in more detail.

Section 552

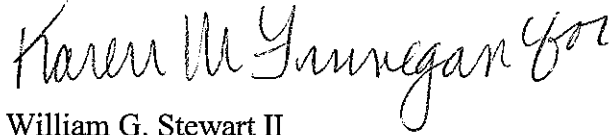
<input type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(7)(B)
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Section 552a

<input checked="" type="checkbox"/> (j)(2)
<input type="checkbox"/> (k)(2)
<input type="checkbox"/> (k)(5)
<input type="checkbox"/> _____

Although I am aware that this request is the subject of ongoing litigation and that appeals are not ordinarily acted on in such situations, I am required by statute and regulation to inform you that if you consider my response to be a denial of your request, you have the right to file an administrative appeal by writing within 60 days from the date of this letter to the **Office of Information and Privacy, United States Department of Justice, 1425 New York Avenue, Suite 11050, Washington, D.C. 20530-0001**. In light of the fact that this is an interim response, I would ask that you wait until the EOUSA has issued its final response in this request before you file an appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen M. Gunningham" with a stylized flourish at the end.

William G. Stewart II
Assistant Director

Enclosure(s)

Requester: Catherine Crump
FOIA #: 07-4123

Continuation Sheet:

Please note that your original letter has been split into nineteen separate files ('requests'), for processing purposes, depending on the nature of what you sought. Each file will have a separate Request Number (listed below), for which you will receive a separate response: 07-4120 through 07-4138.

This response is to FOIA No. 07-4123 only and does not include search results associated with the other requests listed above.

EXPLANATION OF EXEMPTIONS

FOIA: TITLE 5, UNITED STATES CODE, SECTION 552

- (b)(1) (A) specifically authorized under criteria established by and Executive order to be kept secret in the in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant 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 the 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 the extent that the production of such law enforcement records or information (A) could 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 reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of 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.

PRIVACY ACT: 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 Executive Order 12356 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 qualification 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 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 the 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 identity would be held in confidence.

Wilkison, Tracy (USACAC)

From: Wilkison, Tracy (USACAC)
Sent: Tuesday, June 26, 2007 7:15 PM
To: USACAC-AUSAs Criminal
Subject: Cell site and GPS information forms

There are now new forms to obtain cell site and GPS information for the cellular telephones of your crooks and fugitives. Yay!

***Following a delicate negotiation dance (which resembles an Irish jig, FYI) with the magistrate judges, please follow these rules:

- (1) Do not change the forms without running the changes by me or Dan Goodman. Preferably Dan.
- (2) For the next month or so, whenever you file any of the various versions of the forms, please email the finalized version to me - when I have one of every kind, we can stop. ***

The forms are located at S:\Criminal Forms\Pen Registers\Cell Site and GPS apps, and are broken down into the following categories:

(1) Historical cell site app and order: Use this when you want cell site information for your cell phone that is historical (i.e., between May 1, 2007 and today). [b7E]
[b7E] This is a fairly short application based on your proffer of the agent's information, and a conclusion that the information obtained would be relevant and material to your ongoing (or fugitive) investigation. No agent declaration needed, and you can do repeatedly to get updates.

(2) Prospective cell site and GPS app and orders:

(A) Investigation: Use this when you are doing an ongoing investigation, and [b7E]
[b7E] You can ask for (1) cell site only; (2) cell site and GPS information; or (3) GPS info only. [b7E]
[b7E] The agent must provide a declaration in support demonstrating probable cause to believe that the information will provide evidence of the crimes being investigated. [b7E]

[b7E] If the reason why (for any of this) is of interest to you, please call or email me. Please note that the tracking device procedures of Rule 41 are somewhat onerous - including notice provisions - so please read what the order commands you to do, and follow it. If you need an extension of the notice provisions, please see the notice extension form at S:\Criminal Forms\Complaint\ Tracking Devices. Also note that because the request for cell site information is based on the "hybrid" theory (again - if you're actually interested, let me know), you must provide a certification at the end of the application that the information is relevant to an ongoing investigation.

If you seek cell site data, attach the Hodor declaration as well to your application. If you seek GPS data, attach the Kischer declaration as well. Both are in .pdf files in the same location as the forms.

(B) Fugitive: Use this form when you are trying to find a fugitive. Because the request for cell site information is based on the All Writs act, you don't need to do a certification, and [b7E]
[b7E] Otherwise, the forms are basically the same, and again, if you seek GPS information, you must follow the tracking device procedures for Rule 41. Please attach the Hodor or Kischer declarations as appropriate.

RIP
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For those who are still reading, this seems like an appropriate time to remind you that if you want to [b7E]
[b7E] you must now get a Rule 41 warrant - please
see S:\Criminal Forms\Complaint\ Tracking Devices for the forms.

1 ***Note: if you are requesting only cell site data, use this
2 form, the Hodor declaration, and your agent's declaration. If
3 you are requesting only GPS info, use this form, the Kischer
4 declaration, and your agent's declaration. If you are requesting
5 both, use all of the declarations.***

6 ***Note:

b7E

7]***

8 ***Note: if you are requesting continued information, state that
9 throughout, and insert into the app. that a previous order was
10 obtained, and provide the case number and magistrate judge***

11 GEORGE S. CARDONA
12 United States Attorney
13 THOMAS P. O'BRIEN
14 Assistant United States Attorney
15 Chief, Criminal Division
16 [YOU] (CA Bar No. _____)
17 Assistant United States Attorney
18 XX00 United States Courthouse
19 312 North Spring Street
20 Los Angeles, California 90012
21 Telephone: (213) 894-XXXX
22 Facsimile: (213) 894-XXXX
23 Email: XXXX@usdoj.gov

24 Attorneys for Applicant
25 United States of America

26 UNITED STATES DISTRICT COURT
27 FOR THE CENTRAL DISTRICT OF CALIFORNIA

28 IN RE CELLULAR) No. _____
TELEPHONE[S])
) GOVERNMENT'S EX PARTE APPLICATION
) FOR AN ORDER AUTHORIZING THE
) DISCLOSURE OF CELL SITE
) INFORMATION UNDER THE ALL WRITS
) ACT [AND GPS INFORMATION];
) DECLARATIONS OF HENRY HODOR, ERIC
) A. KISCHER AND [AGENT]
)
) (UNDER SEAL)

1 The United States of America, by and through its counsel of
2 record, the United States Attorney for the Central District of
3 California, hereby applies for an order authorizing the
4 disclosure of cell site information, [IF WANT GPS INFO: as well
5 as "GPS information"] at such intervals and times as the
6 government may request, and the furnishing of all information,
7 facilities, and technical assistance necessary to accomplish said
8 disclosure unobtrusively, which disclosure will establish the
9 approximate location of the following cellular telephone[s] for a
10 period of 45 [IF REQUESTING ONLY CELL SITE, MAY REQUEST 60 DAYS]
11 days [IF MORE THAN ONE, USE SUBPARAGRAPH STRUCTURE BELOW]:

12 (a) [TARGET NUMBER], a cellular telephone issued by
13 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
14 believed to be used by [USER] ("Subject Telephone #1");

15 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
16 Telephone #2, and concurrently with Subject Telephone #1 referred
17 to as "the Subject Telephones").

18 [IF REQUESTING GPS INFO: This application also seeks
19 authorization under 18 U.S.C. § 3103a(b), for reasonable cause
20 shown, to delay notification of the above order to the subscriber
21 and users of the Subject Telephone for a period of 30 days from
22 the date that the disclosure ends. [YOU MAY ASK FOR A LONGER
23 PERIOD OF DELAY NOW TO A DATE CERTAIN IF YOU CAN STATE WHY THE
24 FACTS OF THIS CASE JUSTIFY SUCH AN ORDER, OR YOU MAY ASK FOR
25 CONTINUANCES OF THE DELAY AS NEEDED]

26 This application involves a fugitive investigation, and is
27 based on the attached memorandum of points and authorities, and
28 declarations of the following individuals: (1) Henry Hodor (a

1 declaration previously prepared outside of this district); (2)
2 [IF REQUESTING GPS INFO: Eric A. Kischer (a declaration
3 previously prepared within this district)]; and (3) [AGENT].
4

5 DATED: _____

Respectfully submitted,

6 GEORGE S. CARDONA
United States Attorney

7 THOMAS P. O'BRIEN
8 Assistant United States Attorney
Chief, Criminal Division
9

10 _____
[YOU]
Assistant United States Attorney

11 Attorneys for Applicant
12 United States of America
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 INTRODUCTION

4 By this application, the government seeks an order that
5 cellular telephone service provider[s] furnish the [AGENCY
6 ("INITIALS")] with cell site [and "GPS"] information for a
7 cellular telephone being used by a fugitive who is the subject of
8 a federal arrest warrant [, and by associates of the fugitive],
9 under circumstances where there is probable cause to believe that
10 the information likely to be received concerning the approximate
11 location of the following Subject Telephone[s], currently within
12 the Central District of California, will constitute or yield
13 evidence of the approximate location of the fugitive [IF MORE
14 THAN ONE, USE SUBPARAGRAPH STRUCTURE BELOW]:

15 (a) [TARGET NUMBER], a cellular telephone issued by
16 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
17 believed to be used by [USER] ("Subject Telephone #1");

18 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
19 Telephone #2, and concurrently with Subject Telephone #1 referred
20 to as "the Subject Telephones").

21 The information sought by this application includes
22 information about the location (physical address) of the "cell
23 sites"¹ linked to the Subject Telephone[s] at call origination

24
25 ¹. In order for a cellular telephone to make or receive a
26 call, it must be within radio range of a "cell site," or cell
27 tower, which connects it to a carrier's wireless network. Each
28 tower transmits and receives radio signals across 360 degrees;
wireless carriers typically divide that 360 degree circle into
three equal slices of 120 degrees, each of which is called a
"sector." Carriers control multiple towers through the use of a

1 (for outbound calling), call termination (for incoming calls),²
2 and, if reasonably available, during the progress of a call.
3 This information, which is acquired in the first instance by the
4 cellular telephone service provider, includes any information,
5 apart from the content of any communication, that is reasonably
6 available to the service provider and that is requested by the
7 [AGENCY], concerning the cell sites/sectors receiving and
8 transmitting signals to and from the Subject Telephone[s],

9 [b7E] This information is sought
10 based on the legal authority of the All Writs Act, 28 U.S.C. §
11 1651(a), as well as on the Court's inherent authority.³

12 [IF SEEKING GPS INFO, USE THE FOLLOWING TWO PARAGRAPHS: This
13 application further seeks latitude and longitude data gathered
14 for the Subject Telephone[s], including Global Positioning
15 Satellite ("GPS") and/or network timing information, and
16 including information from such programs as Nextel Mobile
17 Locator, Boost Mobile Loopt, Sprint/Nextel Findum Wireless, or a

18
19 "base station." Sensors within the base station detect which
20 tower and sector makes radio contact with a cellular telephone.
(Hodor Decl. ¶¶ 9-11, at 6-7).

21 ² The telephone at "call origination" is the cellular
22 telephone that is calling another telephone. The telephone at
23 "call termination" is the cellular telephone that is receiving
the call. (Hodor Decl. ¶ 21, at 15-16).

24 ³ The government does not concede that a showing of
25 probable cause is required for this Court to issue orders
26 authorizing the government to obtain cell site and GPS
27 information. In light of the applicability of the All Writs Act
28 to this situation, as discussed below, this application does not
rely on, and this Court need not consider the validity of, the
government's theory that courts may issue orders based on the
combined effect of 18 U.S.C. § 3123 and 18 U.S.C. § 2703
authorizing the government to obtain this information.

1 similar program, which will establish the approximate location of
2 the Subject Telephone[s], and which information is acquired in
3 the first instance by the cellular telephone service provider
4 (referred to herein as "GPS information"). This information is
5 sought based on the authority in Federal Rule of Criminal
6 Procedure 41(b) (1) and (2) and the All Writs Act, and will be
7 obtained in conformity with the procedures of Federal Rule of
8 Criminal Procedure 41.

9 Also, this application seeks authorization under 18 U.S.C.
10 § 3103a(b), for reasonable cause shown, to delay notification of
11 the above order to the subscriber and users of the Subject
12 Telephone for a period of 30 days from the date that the
13 disclosure ends. [YOU MAY ASK FOR A LONGER PERIOD OF DELAY NOW TO
14 A DATE CERTAIN IF YOU CAN STATE WHY THE FACTS OF THIS CASE
15 JUSTIFY SUCH AN ORDER, OR YOU MAY ASK FOR CONTINUANCES OF THE
16 DELAY AS NEEDED] As discussed in the attached declaration of
17 [AGENT], immediate notification of this order to the user of the
18 Subject Telephone[s] may have an adverse result.]

19 This application further seeks an order that: (1) authorizes
20 the disclosure of the requested information whether the Subject
21 Telephone[s] [is/are] located within this District, outside of
22 the District, or both; (2)

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and (3) orders the [AGENCY] to reimburse the applicable cellular telephone service provider for its reasonable expenses directly incurred in providing the requested information and any related technical assistance.

The application is made in connection with the arrest warrant for [FUGITIVE], which is a [federal arrest warrant for [FEDERAL CHARGES]][federal arrest warrant for Unlawful Flight to Avoid Prosecution, in violation of 18 U.S.C. 1073], and is based upon declarations from the following individuals: (1) Henry Hodor (a declaration previously prepared outside of this district); (2) [IF REQUESTING GPS INFO: Eric A. Kischer (a declaration previously prepared within this district)]; and (3) [AGENT].

II

DISCUSSION

A. The All Writs Act Permits Disclosure of Cell Site Information [and GPS information] to Effect a Federal Arrest Warrant

The All Writs Acts permits courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); see also Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942) ("unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids

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1 is calculated in its sound judgement to achieve the ends of
2 justice entrusted to it."). Because a federal court has already
3 issued an arrest warrant for the fugitive, an order that a
4 cellular telephone service provider provide the requested cell
5 site information [and GPS information] to law enforcement is an
6 order in furtherance of the jurisdiction of the Court. See,
7 e.g., United States v. X, 601 F. Supp. 1039, 1042 (D. Md. 1984)
8 ("other Orders, such as an arrest warrant, may also serve as the
9 predicate for an All Writs Act Order"). [INCLUDE THIS FOOTNOTE
10 ONLY IF YOU ARE **NOT** GETTING GPS: ⁴]

11 Nine years before the pen register statute was enacted, the
12 Supreme Court ruled that the All Writs Act could be used to
13 command a telephone company to provide certain assistance to the
14 USMS in connection with the placement of a pen register on a
15 telephone line.⁵ In that case, United States v. New York
16 Telephone Co., 434 U.S. 159, 98 S. Ct. 364, 54 L. Ed. 2d 376
17 (1977), an FBI agent submitted an affidavit that the district
18 judge found to set forth probable cause that an illegal gambling
19 enterprise using facilities of interstate commerce was being
20 conducted at a particular location, and that the two telephones

21
22 ⁴ As discussed in the attached declaration of Mr. Hodor,
23 this application does not seek latitude and longitude data (often
24 colloquially referred to as "GPS information") either via the
25 "handset based" or "network based" systems. (Hodor Decl. ¶¶ 30-
26 37). Accordingly, this application is not made pursuant to
27 Federal Rule of Criminal Procedure 41.

28 ⁵ "Prior to the 1986 enactment of the pen registers statute
(effective January 1987), . . . authorization for pen registers
was to be found in the provisions of the 'All Writs Act' . . .
and Rule 41, Fed.R.Crim.P." In the Matter of the Interception of
Wire And Oral Communications, 682 F. Supp. 669, 670 n.1 (D.N.H.
1988).

1 at issue had been, were being, and would continue to be used in
2 connection with those offenses. 434 U.S. at 162. The district
3 court's order authorized the FBI to operate pen registers on the
4 two telephones for a certain time period. Id. The telephone
5 company declined to comply fully with the court order: it agreed
6 to identify for the FBI the specific pairs of wires that
7 constituted the circuits of the two telephone lines, but refused
8 to lease lines to the FBI that "were needed to install the pen
9 registers in an unobtrusive fashion." Id.

10 The Supreme Court in New York Telephone agreed with the
11 district court's ruling that a pen register could be authorized
12 under Rule 41 of the Federal Rules of Criminal Procedure. A key
13 distinction between New York Telephone and this case, however, is
14 that in this case the Court has already issued an arrest warrant,
15 such that the cell site order sought is in furtherance of the
16 Court's jurisdiction, whereas in New York Telephone there was no
17 such arrest warrant, so that an order to implement a pen register
18 was arguably not in furtherance of the district court's
19 jurisdiction. Cf. United States v. Hall, 583 F. Supp. 717, 719,
20 721 (E.D. Va. 1984) ("The Supreme Court, mindful that the All
21 Writs Act cannot be used to extend jurisdiction, looked first at
22 the independent authority the district court had to issue that
23 portion of the pen register order authorizing agents of the FBI
24 to install and use pen registers."). More importantly for the
25 purposes of the instant application, the Supreme Court in New
26 York Telephone held that the All Writs Act permitted issuance of
27 an order compelling the telephone company to provide the
28 assistance sought. 434 U.S. at 171-78.

1 In recognizing the authority of the district court to issue
2 an order under the All Writs Act compelling the requested
3 assistance from the telephone company, the Supreme Court
4 described broadly the scope of judicial power under the All Writs
5 Act. "Indeed," the Supreme Court wrote, "[u]nless appropriately
6 confined by Congress, a federal court may avail itself of all
7 auxiliary writs as aids in the performance of its duties, when
8 the use of such historic aids is calculated in its sound judgment
9 to achieve the ends of justice entrusted to it." 434 U.S. at
10 172-73. The Supreme Court took note of other facts supporting
11 the conclusion that the order compelling the phone company to
12 provide assistance was consistent with the All Writs Act, which
13 facts are present here: that there was probable cause to believe
14 the phone company's facilities were being used to facilitate the
15 crime, that the telephone company was a highly regulated public
16 utility with the duty to serve the public, and that the use of a
17 pen register was by no means offensive to the phone company. Id.
18 at 174.

19 Here, there is, firstly, probable cause to believe that the
20 Subject Telephone[s] are enhancing the fugitive's ability to
21 remain a fugitive. See Declaration of [AGENT], ¶ [NUMBER]. It
22 is not necessary that the telephone calls themselves be illegal,
23 although that happened to be the case in New York Telephone. See
24 Hall, 583 F. Supp. at 720. Secondly, the cellular telephone
25 market is heavily regulated by the Federal Communications
26 Commission, see, e.g., Metro Mobile CTS, Inc. v. NewVector
27 Communications, Inc., 892 F.2d 62, 63 (9th Cir. 1989) (discussing
28 the cellular telephone market in Phoenix), just as the hard-line

1 telephone market was heavily regulated in New York Telephone.
2 Thirdly, law enforcement's acquisition of the cell site
3 information [and GPS information] is by no means offensive to the
4 cellular telephone service provider, which collects this
5 information for itself anyway. See Hodor Declaration, ¶¶ 8-25.
6 As one court said in the similar context of an All Writs Act
7 application for credit card records, "Withholding information
8 that could lead to apprehension of a fugitive in no way serves"
9 the company's interest. Hall, 583 F. Supp. at 721.

10 Although one district court case, Hall, 583 F. Supp. at 719,
11 721, has stated that New York Telephone required that an order
12 under the All Writs Act may issue only where the assistance of a
13 third-party is "absolutely necessary," the government disagrees
14 that this requirement is found in New York Telephone. In
15 contending that this requirement is found in New York Telephone,
16 the Hall decision did not cite to any place in the New York
17 Telephone decision, instead citing only to a (student) case
18 comment from the Suffolk University Law Review in 1978. See
19 Comment, 12 Suffolk U.L. Rev. 1027 (1978). Contrary to the
20 language in Hall, although the Supreme Court in New York
21 Telephone noted that the assistance of the telephone company was
22 essential to the fulfillment of the purpose of the pen register
23 order, see 434 U.S. at 175-76, it did not say that the assistance
24 of a third party must be essential before an order under the All
25 Writs Act could issue to that party.⁶

26
27 ⁶ Nor does the Comment in the Suffolk University Law Review
28 quote any language from New York Telephone establishing this
supposed requirement of absolute necessity. Rather, the Comment

RIF

1 Even if Hall's "absolutely necessary" requirement were
2 imposed in this case, however, it is satisfied here. The
3 district judge in Hall stated that "the absolute necessity refers
4 not to catching the fugitive but to obtaining the . . . records"
5 -- that is, the supposed requirement looks at whether the
6 assistance of the company receiving the order is absolutely
7 necessary in producing the records sought, as in the case where
8 no one else could produce those records. See 583 F. Supp. at
9 721-22 & n.2. Here, no one but the cellular telephone service
10 provider could produce the information sought. See [AGENT] Dec.
11 at ¶ [NUMBER].

12 In conclusion, "[t]he All Writs Act, read with the New York
13 Telephone gloss, permits the district court, in aid of a valid
14 warrant, to order a third party to provide nonburdensome
15 technical assistance to law enforcement officers." Plum Creek
16 Lumber Co. v. Hutton, 608 F.2d 1283, 1289 (9th Cir. 1979). Here,
17 an order pursuant to the All Writs Act is "necessary or
18 appropriate" -- to use the language of the Act -- in light of the
19 agent's declaration. That declaration explains the assistance
20 necessary from the cellular telephone service provider and notes
21 that efforts to locate the fugitive have been unsuccessful, and

22
23 cites only to two pages and a footnote from New York Telephone,
24 see 12 Suffolk U.L. Rev. at 1032 & n.29, which portions of the
25 opinion do not, as just noted in text, say that necessity is a
26 requirement before a court may issue an order under the All Writs
27 Act. The invention of the necessity requirement in the Comment
28 likely arises from the fact that the Comment focuses considerable
attention on discussing the limits to the New York Telephone
Court's reliance on the concept -- mentioned in a footnote in New
York Telephone, see 434 U.S. at 374 n.24 -- that citizens have a
duty to assist law enforcement. See 12 Suffolk U.L. Rev. at
1035-38.

1 that there is probable cause to believe that the requested
2 location information will cast light on the fugitive's current
3 whereabouts. See United States v. X, 601 F. Supp. at 1042
4 ("Here, as in the case before Judge Nickerson, an Order pursuant
5 to the All Writs Act is 'necessary and [sic] appropriate,' in the
6 light of the Special Agent's statements that defendant X has
7 disappeared; that efforts to locate him have been unsuccessful;
8 that it is likely the defendant maintains telephone contact with
9 his close relatives; and that is likely the requested toll
10 records will provide information concerning defendant's current
11 whereabouts, thereby preventing frustration of this Court's
12 earlier-issued arrest warrant.").

13 The application and order in this case are supported by
14 probable cause. Under these circumstances, the issuance of the
15 proposed order is in aid of this Court's jurisdiction because it
16 will prevent "frustration of this Court's earlier-issued arrest
17 warrant." United States v. X, 601 F. Supp. at 1042. Finally,
18 the order may also lawfully be based on this Court's inherent
19 authority -- either standing alone or in conjunction with the All
20 Writs Act. See United States v. Illinois Bell Telephone Co., 531
21 F.2d 809, 811 & n.2, 814 (7th Cir. 1976) (district court had
22 inherent authority to order telephone company's assistance;
23 inherent authority is not directly derived from Fed. R. Crim. P.
24 41; district court's order was not in form of search warrant but
25 was in the nature of one).

26 Because of the particular features of this application,
27 including the fact that it seeks an order based upon the Court's
28 authority under the All Writs Act, the showing of probable cause

1 and the fact that an arrest warrant for the fugitive already
2 exists, the cell site information [and GPS information] sought by
3 the government [b7E]

4 [ME] b7E
5 [ME]
6 [IF SEEKING GPS INFO, USE SECTIONS B AND C:

7 B. Federal Rule of Criminal Procedure Rule 41

8 Federal Rules of Criminal Procedure 41(b)(1) and (2), and
9 (c), as well as 18 U.S.C. § 2703(c)(1)(A) and the All Writs Act,
10 also authorize the Court to order the provision of GPS
11 information upon a showing of probable cause to believe that the
12 monitoring sought will lead to the discovery of evidence of
13 identified criminal activity.⁷

14 As detailed in the declaration of Drug Enforcement
15 Administration Special Agent Eric A. Kischer, some, but not all,
16 cellular telephone service providers have the technical means to
17 obtain GPS information. GPS information is not generated
18 specifically for law enforcement, but is the product of a federal
19 law that requires cellular telephone service providers to
20 maintain and access location information for emergency
21 responders. Kischer Dec., ¶ 5. [b7E]

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27 ⁷ Again, the government does not concede that probable
28 cause must be shown to obtain the GPS information sought, but
nonetheless provides probable cause in this case. See fn. [3],
supra.

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The proposed order establishes a procedure that is in conformity with Rule 41(e)(2)(B) and (f)(2). These procedures include obtaining a court order for the information that states (1) the property to be tracked; (2) that the device may be used for no longer than 45 days, unless extensions are obtained; (3) that the device must be installed within 10 days; (4) that a return will be provided to the court; and (5) that notice will be provided after the use has ended, unless an order allowing delayed notice is obtained.

C. Delayed Notice

18 U.S.C. § 3103a(b) states that any notice required following the issuance of a court order may be delayed if, *inter alia*, the court finds reasonable cause to believe that providing immediate notification of the execution of the court order may

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1 have an adverse result. An adverse result is defined in 18
2 U.S.C. § 2705(a)(2) as including endangering the life or physical
3 safety of a person, flight from prosecution, destruction of or
4 tampering with evidence, intimidation of potential witnesses, and
5 serious jeopardy of an investigation. Moreover, the Advisory
6 Committee Notes for Fed. R. Crim. P. 41(f)(3) (2006 Amendments)
7 state that delay of notice may be appropriate where "the officer
8 establishes that the investigation is ongoing and that disclosure
9 of the warrant will compromise that investigation." The attached
10 declaration of [AGENT] provides reasonable cause to believe that
11 immediate notification of the execution of the order may have an
12 adverse result, and the proposed order both provides for the
13 giving of such notice within 30 days after the date that the
14 disclosure ends and prohibits, as part of the receipt of the
15 requested information, the seizure of any tangible property or
16 any other prohibited wire or electronic information as stated in
17 18 U.S.C. § 3103a(b)(2).]

18 III

19 CONCLUSION

20 Applicant respectfully requests that the Court issue the
21 order in the form presented herewith.
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1 ***Note: this declaration goby is designed to ensure that the
2 same language that is in the application makes it into the
3 declaration - it is not a strict structural requirement, nor are
4 the headings required****

5 ***Note Also: IF YOU ARE SEEKING GPS INFO, we are following the
6 procedures of Rule 41 - which means that the agent should be
7 available so that the judge can make inquiries of him or her if
8 the judge wants per Rule 41(d)(2)****

9
10 DECLARATION OF [AGENT]

11 I, [AGENT], do hereby declare and affirm:

12 1. [STATEMENT OF BACKGROUND/TRAINING/EXPERIENCE, ETC.].

13 PURPOSE OF DECLARATION

14 2. This declaration is made in support of an application
15 for an order authorizing the disclosure of cell site information,
16 [as well as "GPS" information], as defined within the
17 application, at such intervals and times as the government may
18 request, and the furnishing of all information, facilities, and
19 technical assistance necessary to accomplish said disclosure
20 unobtrusively, which disclosure will establish the approximate
21 location of the following cellular telephone[s] for a period of
22 45 [IF REQUESTING ONLY CELL SITE, MAY REQUEST 60 DAYS] days [IF
23 MORE THAN ONE, USE SUBPARAGRAPH STRUCTURE BELOW]:

24 (a) [TARGET NUMBER], a cellular telephone issued by
25 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
26 believed to be used by [USER] ("Subject Telephone #1");

1 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
2 Telephone #2, and concurrently with Subject Telephone #1, referred
3 to as "the Subject Telephones").

4 [IF REQUESTING GPS INFO: 3. I also seek authorization under
5 18 U.S.C. § 3103a(b), for reasonable cause shown below, to delay
6 notification of the proposed order for a period of 30 days from
7 the date that the disclosure ends. [YOU MAY ASK FOR A LONGER
8 PERIOD OF DELAY NOW TO A DATE CERTAIN IF YOU CAN STATE WHY THE
9 FACTS OF THIS CASE JUSTIFY SUCH AN ORDER, OR YOU MAY ASK FOR
10 CONTINUANCES OF THE DELAY AS NEEDED]]

11 4. The facts set forth in this declaration are based upon
12 my own personal observations, my training and experience, and
13 information obtained during this investigation from other
14 sources. This declaration is intended to show that there is
15 cause to obtain the information herein sought, and does not
16 purport to set forth all my knowledge of, or investigation into,
17 this matter.

18 PROBABLE CAUSE

19 5. [INSERT PARAGRAPHS DISCUSSING THE FEDERAL ARREST
20 WARRANT OR THE UFAP WARRANT OBTAINED, THAT EFFORTS TO LOCATE THE
21 FUGITIVE HAVE BEEN UNSUCCESSFUL, AND WHY THERE IS PROBABLE CAUSE
22 TO BELIEVE THAT THE INFORMATION SOUGHT WILL CAST LIGHT ON THE
23 FUGITIVE'S CURRENT WHEREABOUTS.]

24
25 [IF SEEKING GPS INFO:

26 GROUND'S FOR DELAYING NOTICE

27 6. Based on my training and experience and my
28 investigation of this matter, I believe that reasonable cause

RLF

1 exists to delay the service of the order as normally required for
2 a period of 30 days beyond the end of the disclosure period
3 because [INSERT FACTS RELATING TO WHY GOOD CAUSE EXISTS; INCLUDE
4 REFERENCE TO A PARTICULAR ADVERSE RESULT. FOR EXAMPLE: [

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] Note that for each extension of the delay,
you must make an updated showing of the need for further delay.]]

I declare and affirm under penalty of perjury that the
foregoing is true and correct to the best of my knowledge.

Executed on [DATE], at [LOCATION], California.

[AGENT]
[AGENCY]

RIP

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United States of America
9

10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12) No. _____
13)
14 IN RE CELLULAR) [proposed] ORDER
TELEPHONE[S])
15)
16) (UNDER SEAL)
17)

18 Upon application by the United States of America, supported
19 by the declarations of Henry Hodor, [IF REQUESTING GPS INFO: Eric
20 A. Kischer], and [AGENT], for orders relating to the following
21 cellular telephone[s] [IF MORE THAN ONE, USE SUBPARAGRAPH
22 STRUCTURE BELOW]:

23 (a) [TARGET NUMBER], a cellular telephone issued by
24 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
25 believed to be used by [USER] ("Subject Telephone #1"); and

26 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
27 Telephone #2, and concurrently with Subject Telephone #1 referred
28 to as "the Subject Telephones"),

THIS COURT FINDS THAT there is probable cause to believe that cell site information, [as well as GPS information,] likely to be received concerning the approximate location of the Subject Telephone[s], currently within the Central District of California, will constitute or yield evidence of the approximate location of a fugitive from a federal arrest warrant.

[IF SEEKING GPS INFO: THIS COURT FURTHER FINDS reasonable cause exists to believe that providing immediate notification of this order to the user of the Subject Telephone[s] may have an adverse result.]

GOOD CAUSE HAVING BEEN SHOWN, THIS COURT HEREBY ORDERS THAT:

1. [TELEPHONE COMPANY] shall disclose, at such intervals and times as directed by [AGENCY], information concerning the location (physical address) of the cell site at call origination (for outbound calling), call termination (for incoming calls), and, if reasonably available, during the progress of a call, for the Subject Telephone[s], as well as such other information, apart from the content of any communication, that is reasonably available to the cellular telephone service provider and that is requested by the [AGENCY] or any law enforcement agency working with the [AGENCY], concerning the cell sites/sectors receiving and transmitting signals to and from the Subject Telephone[s],

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[IF REQUESTING GPS INFO, ADD PARAGRAPHS 2 THROUGH 5:

2. [TELEPHONE COMPANY] shall disclose at such intervals and times as directed by [AGENCY], latitude and longitude data gathered for the Subject Telephone[s], including Global Positioning Satellite ("GPS") and/or network timing information,

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1 and including information from such programs as Nextel Mobile
2 Locator, Boost Mobile Loopt, Sprint/Nextel Findum Wireless, or a
3 similar program, which will establish the approximate location of
4 the Subject Telephone[s] (referred to herein as "GPS
5 information"), and shall furnish all information, facilities, and
6 technical assistance necessary to accomplish said disclosure
7 unobtrusively.

8 3. As part of the receipt of the requested GPS
9 information, the [AGENCY] is prohibited from seizing any tangible
10 property pursuant to this order, or any other prohibited wire or
11 electronic information as stated in 18 U.S.C. § 3103a(b)(2). The
12 [AGENCY] is not prohibited from doing so in relation to any other
13 investigation authorized by law.

14 4. The [AGENCY] shall make a return of this order for GPS
15 information to the duty United States Magistrate Judge within 10
16 calendar days after the disclosure of information ceases. The
17 return shall state the date and time the telephone company began
18 providing information pursuant to this order, and the period
19 during which information was provided, including pursuant to any
20 orders permitting continued disclosure.

21 5. The [AGENCY] is permitted to delay service of this
22 order for GPS information to the subscriber[s] of the Subject
23 Telephone[s] [for a period of 30 days from the date that the
24 disclosure ends] [until DATE] [USE LATTER ONLY IF YOU HAVE
25 JUSTIFIED AS DISCUSSED ABOVE]].

26 6. The disclosure of the requested information by the
27 cellular telephone service provider[s] shall begin during the
28 daytime on the earlier of the day on which law enforcement

1 officers first begin to receive information pursuant to this
2 order or ten days after the date of this order, and continue for
3 up to 45 [IF REQUESTING ONLY CELL SITE, MAY REQUEST 60 DAYS] days
4 thereafter unless additional orders are made continuing the
5 period of the disclosure.

6 7. The disclosure of the requested information shall occur
7 whether the Subject Telephone[s] [is/are] located within this
8 District, outside of the District, or both.

9 8. [

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21 9. [TELEPHONE COMPANY] shall execute the Court's order as
22 soon as practicable after it is signed. If a copy of the order
23 is given to any cellular telephone service provider, the copy may
24 be redacted by law enforcement to exclude the Target Subjects or
25 fugitive and any description of the offenses under investigation.

26 10. The [AGENCY] shall reimburse the applicable cellular
27 telephone service provider for their reasonable expenses directly
28 incurred by the cellular telephone service provider in providing
the requested information and any related technical assistance.

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1 11. To avoid prejudice to this criminal fugitive
2 investigation, the applicable cellular telephone service
3 providers and their agents and employees shall not disclose to or
4 cause a disclosure of this Court's order, or the request for
5 information by the [AGENCY] or other law enforcement agencies
6 involved in the investigation, or the existence of this
7 investigation, except as necessary to accomplish the assistance
8 hereby ordered. In particular, the cellular telephone service
9 providers and their agents and employees are ordered not to make
10 any disclosure to the lessees of the telephone or telephone
11 subscribers.

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13 DATED: _____

14 HONORABLE [judge]
15 UNITED STATES MAGISTRATE JUDGE
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10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12

13
14 IN RE CELLULAR
15 TELEPHONE[S]
16
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) No. _____
)
) GOVERNMENT'S EX PARTE APPLICATION
) FOR AN ORDER AUTHORIZING THE
) DISCLOSURE OF HISTORICAL CELL
) SITE INFORMATION
)

) (UNDER SEAL)
)

19
20 The United States of America, by and through its counsel of
21 record, the United States Attorney for the Central District of
22 California, hereby applies for an order pursuant to 18 U.S.C.
23 §§ 2703(c) and (d) authorizing the disclosure of historical "cell
24 site" information for the following cellular telephone[s] for the
25 dates [DATE] through [DATE]:

26 (a) [TARGET NUMBER], a cellular telephone issued by
27 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
28 believed to be used by [USER] ("Subject Telephone #1");

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1 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
2 Telephone #2, and concurrently with Subject Telephone #1 referred
3 to as "the Subject Telephones").

4 This application further seeks orders regarding the
5 reimbursement of the cellular telephone service provider and
6 directing the cellular telephone service provider not to disclose
7 the existence or content of the order, except to the extent
8 necessary to carry out the order.

9 I.

10 DISCUSSION

11 A. 18 U.S.C. § 2703(c) and (d) Permit Disclosure of Historical
12 Cell Site Records

13 In the present case, the government seeks to obtain
14 historical cell site information for the Subject Telephone[s].
15 To obtain basic subscriber information, the government needs only
16 a subpoena. See 18 U.S.C. § 2703(c)(2). To obtain additional
17 records and other information pertaining to subscribers of an
18 electronic communications service, the government must comply
19 with the dictates of section 2703(d), which provides, in
20 pertinent part, that:

21 [A] court order for disclosure . . . may be
22 issued . . . if the governmental entity
23 offers specific and articulable facts showing
24 that there are reasonable grounds to believe
25 that . . . the records of other information
26 sought, are relevant and material to an
27 ongoing criminal investigation.
28

1 Here, the government seeks historical cell site records,
2 that is, information, apart from the content of any
3 communication, concerning the cell sites/sectors that received or
4 transmitted signals to and from the Subject Telephone[s] during
5 the requested period.

6 B. Offer of Specific and Articulable Facts

7 In support of this application, the government offers the
8 following specific and articulable facts that show that there is
9 reasonable cause to believe that the historical cell site records
10 sought are relevant and material to an ongoing criminal
11 investigation. The following facts were learned from [AGENCY]
12 Special Agent [AGENT], who either has personal knowledge of the
13 facts or learned them from the sources detailed below.

14 1. [AGENCY] is investigating possible violations of
15 [STATUTES AND DESCRIPTIONS] by [TARGETS] and others.

16 2. [INSERT FACTS RELATING TO INVESTIGATION, AND HOW
17 HISTORICAL CELL SITE RECORDS FOR EACH SUBJECT TELEPHONE FOR THE
18 TIME PERIOD SOUGHT ARE RELEVANT AND MATERIAL TO THAT
19 INVESTIGATION]

20 II

21 CONCLUSION

22 Applicant respectfully requests that the Court issue the
23 order in the form presented herewith.

24
25 DATED: August 1, 2008

Respectfully submitted,

26 GEORGE S. CARDONA
United States Attorney

27 THOMAS P. O'BRIEN
Assistant United States Attorney
28 Chief, Criminal Division

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[YOU]
Assistant United States Attorney

Attorneys for Applicant
United States of America

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10
11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
13

14 IN RE CELLULAR) No. _____
15 TELEPHONE[S])
16) [proposed] ORDER
17) (UNDER SEAL)
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20 Upon application by the United States of America relating to
21 an order pursuant to 18 U.S.C. §§ 2703(c) and (d) authorizing the
22 disclosure of historical cell site information for the following
23 cellular telephone[s] for the dates [DATE] through [DATE][IF MORE
24 THAN ONE, USE SUBPARAGRAPH STRUCTURE BELOW]:

25 (a) [TARGET NUMBER], a cellular telephone issued by
26 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
27 believed to be used by [USER] ("Subject Telephone #1"); and
28

1 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
2 Telephone #2, and concurrently with Subject Telephone #1 referred
3 to as "the Subject Telephones"),

4 THIS COURT FINDS THAT the government has offered specific
5 and articulable facts showing that there are reasonable grounds
6 to believe that the records or other information sought are
7 relevant and material to an ongoing criminal investigation.

8 GOOD CAUSE HAVING BEEN SHOWN, THIS COURT HEREBY ORDERS THAT:

9 1. [TELEPHONE COMPANY/IES] shall provide to the [AGENCY]
10 all historical cell site information for the Subject Telephone[s]
11 that was gathered by the above-named cellular telephone service
12 provider[s] from [DATE] through [DATE].

13 2. [TELEPHONE COMPANY/IES] shall execute the Court's order
14 as soon as practicable after it is signed. If a copy of the
15 order is given to any cellular telephone service provider, the
16 copy may be redacted by law enforcement to exclude the Target
17 Subjects and any description of the offenses under investigation.

18 3. The [AGENCY] shall reimburse the applicable cellular
19 telephone service provider[s] for [its/ their] reasonable
20 expenses directly incurred by the cellular telephone service
21 provider in providing the requested information and any related
22 technical assistance.

23 4. To avoid prejudice to this criminal investigation, the
24 applicable cellular telephone service provider[s] and [its/
25 their] agents and employees shall not disclose or cause a
26 disclosure of this Court's order, or the request for information
27 by the [AGENCY] or other law enforcement agencies involved in the
28 investigation, or the existence of this investigation, except as

1 necessary to accomplish the assistance hereby ordered. In
2 particular, the cellular telephone service providers and their
3 agents and employees are ordered not to make any disclosure to
4 the lessees of the telephone or telephone subscribers.

5

6 IT IS SO ORDERED.

7

8 DATED: _____

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HONORABLE [judge]
UNITED STATES MAGISTRATE JUDGE

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1 ***Note: if you want EITHER GPS data, or cell site info for
2 whenever the phone is turned on, you must include the procedures
3 under Rule 41 and CALL THE ORDER A WARRANT. If you only want cell
4 site info during the progress of a call, you need not follow
5 those procedures.***

6 ***Note: if you are requesting only cell site data, use this
7 form, the Hodor declaration, and your agent's declaration. If
8 you are requesting only GPS info, use this form, the Kischer
9 declaration, and your agent's declaration. If you are requesting
10 both, use all of the declarations.***

11 ***Note: if you are requesting continued information, state that
12 throughout, and insert into the app. that a previous Warrant was
13 obtained. Direct it to the same judge that signed this
14 warrant/order***

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28 Attorneys for Applicant
United States of America

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

IN RE CELLULAR
TELEPHONE[S]

) No. _____
)
) GOVERNMENT'S EX PARTE APPLICATION
) FOR [A WARRANT] [AN ORDER]
) AUTHORIZING THE DISCLOSURE OF
) CELL SITE INFORMATION [AND GPS
) INFORMATION] ;DECLARATIONS OF
) HENRY HODOR, ERIC A. KISCHER AND
) [AGENT]
)
) (UNDER SEAL)

RIF

1 The United States of America, by and through its counsel of
2 record, the United States Attorney for the Central District of
3 California, hereby applies for [a warrant] [an order] authorizing
4 the disclosure of cell site information, [IF WANT GPS INFO: as
5 well as "GPS information"] at such intervals and times as the
6 government may request, and the furnishing of all information,
7 facilities, and technical assistance necessary to accomplish said
8 disclosure unobtrusively, which disclosure will establish the
9 approximate location of the following cellular telephone[s] for a
10 period of 45 [IF REQUESTING ONLY CELL SITE, MAY REQUEST 60 DAYS]
11 days [IF MORE THAN ONE, USE SUBPARAGRAPH STRUCTURE BELOW]:

12 (a) [TARGET NUMBER], a cellular telephone issued by
13 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
14 believed to be used by [USER] ("Subject Telephone #1");

15 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
16 Telephone #2, and concurrently with Subject Telephone #1 referred
17 to as "the Subject Telephones").

18 [IF REQUESTING GPS INFO: This application also seeks
19 authorization under 18 U.S.C. § 3103a(b), for reasonable cause
20 shown, to delay notification of the above Warrant to the
21 subscriber and users of the Subject Telephone for a period of 30
22 days from the date that the disclosure ends. [YOU MAY ASK FOR A
23 LONGER PERIOD OF DELAY NOW TO A DATE CERTAIN IF YOU CAN STATE WHY
24 THE FACTS OF THIS CASE JUSTIFY SUCH AN ORDER, OR YOU MAY ASK FOR
25 CONTINUANCES OF THE DELAY AS NEEDED. IF YOU SEEK A CONTINUANCE,
26 GO FIRST TO THE JUDGE WHO SIGNED THIS ORDER/ WARRANT]

1 This application is based on the attached memorandum of
2 points and authorities, including the certification by the
3 attorney for the government, and declarations of the following
4 individuals: (1) Henry Hodor (a declaration previously prepared
5 outside of this district); (2) [IF REQUESTING GPS INFO: Eric A.
6 Kischer (a declaration previously prepared within this
7 district)]; and (3) [AGENT].

8 DATED: _____

Respectfully submitted,

9 THOMAS P. O'BRIEN
United States Attorney

10 CHRISTINE C. EWELL
11 Assistant United States Attorney
12 Chief, Criminal Division

13 _____
14 [YOU]
Assistant United States Attorney
15 Attorneys for Applicant
16 United States of America
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RIF

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 INTRODUCTION

4 By this application, the government seeks [a warrant] [an
5 order] that cellular telephone service provider[s] furnish the
6 [AGENCY ("INITIALS")] with cell site [and "GPS"] information for
7 a cellular telephone being used by the subject of a federal
8 investigation, under circumstances where there is probable cause
9 to believe that [a federal crime is / federal crimes are] being
10 committed and that the information likely to be received
11 concerning the approximate location of the following Subject
12 Telephone[s], currently within the Central District of
13 California, will constitute or yield evidence of [that crime /
14 those crimes] [IF MORE THAN ONE, USE SUBPARAGRAPH STRUCTURE
15 BELOW]:

16 (a) [TARGET NUMBER], a cellular telephone issued by
17 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
18 believed to be used by [USER] ("Subject Telephone #1");

19 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
20 Telephone #2, and concurrently with Subject Telephone #1 referred
21 to as "the Subject Telephones").

22 The information sought by this application includes
23 information about the location (physical address) of the "cell
24 sites"¹ linked to the Subject Telephone[s] at call origination

25 ¹ In order for a cellular telephone to make or receive a
26 call, it must be within radio range of a "cell site," or cell
27 tower, which connects it to a carrier's wireless network. Each
tower transmits and receives radio signals across 360 degrees;

1 (for outbound calling), call termination (for incoming calls),²
2 and, if reasonably available, during the progress of a call.
3 This information, which is acquired in the first instance by the
4 cellular telephone service provider, includes any information,
5 apart from the content of any communication, that is reasonably
6 available to the service provider and that is requested by the
7 [AGENCY], concerning the cell sites/sectors receiving and
8 transmitting signals to and from the Subject Telephone[s] [ONLY IF
9 SEEKING GPS OR FOLLOWING RULE 41 PROCEDURES:, [b7E
10 b7E] This information is sought based on the
11 combined authority of 18 U.S.C. § 3121 et seq. (the "Pen Register
12 Statute") and 18 U.S.C. §§ 2701-11 (the "Stored Communications
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22 wireless carriers typically divide that 360 degree circle into
23 three equal slices of 120 degrees, each of which is called a
24 "sector." Carriers control multiple towers through the use of a
25 "base station." Sensors within the base station detect which
26 tower and sector makes radio contact with a cellular telephone.
27 (Hodor Decl. ¶¶ 9-11, at 6-7).

28 ² The telephone at "call origination" is the cellular
telephone that is calling another telephone. The telephone at
"call termination" is the cellular telephone that is receiving
the call. (Hodor Decl. ¶ 21, at 15-16).

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1 Act").³ The attorney for the government has made the required
2 certification at the end of this application.

3 [IF SEEKING GPS INFO, USE THE FOLLOWING TWO PARAGRAPHS: This
4 application further seeks latitude and longitude data gathered
5 for the Subject Telephone[s], including Global Positioning
6 Satellite ("GPS") and/or network timing information, and
7 including information from such programs as Nextel Mobile
8 Locator, Boost Mobile Loopt, Sprint/Nextel Findum Wireless, or a
9 similar program, which will establish the approximate location of
10 the Subject Telephone[s], and which information is acquired in
11 the first instance by the cellular telephone service provider
12 (referred to herein as "GPS information"). This information is
13 sought based on the authority in Federal Rule of Criminal
14 Procedure 41(b)(1) and (2) and 28 U.S.C. § 1651 (the All Writs
15 Act), and will be obtained in conformity with the procedures of
16 Federal Rule of Criminal Procedure 41.

17 Also, this application seeks authorization under 18 U.S.C.
18 § 3103a(b), for reasonable cause shown, to delay notification of
19 the above Warrant to the subscriber and users of the Subject
20 Telephone for a period of 30 days from the date that the

21 _____
22 ³ In light of the government's showing of probable cause
23 herein, this application does not rely on, and this Court need
24 not consider the validity of, the government's continuing
25 position that courts may issue orders authorizing the government
26 to obtain cell site and GPS information based on the combined
27 effect of the Pen Register Statute and the Stored Communications
28 Act even where the government does not show probable cause.
(That theory has been advanced in support of applications for
cell site information in various districts and is discussed in a
number of court opinions). The government continues to maintain
that probable cause is not required to properly request and
obtain the information it seeks herein.

1 disclosure ends. [YOU MAY ASK FOR A LONGER PERIOD OF DELAY NOW
2 TO A DATE CERTAIN IF YOU CAN STATE WHY THE FACTS OF THIS CASE
3 JUSTIFY SUCH AN ORDER, OR YOU MAY ASK FOR CONTINUANCES OF THE
4 DELAY AS NEEDED. AGAIN, CONTINUANCES SHOULD GO TO THE SAME
5 JUDGE]. As discussed in the attached declaration of [AGENT],
6 immediate notification of this order to the user of the Subject
7 Telephone[s] may have an adverse result.]

8 This application further seeks an order that: (1) authorizes
9 the disclosure of the requested information whether the Subject
10 Telephone[s] [is/are] located within this District, outside of
11 the District, or both; (2)[b7E

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21 and (3) orders the
22 [AGENCY] to reimburse the applicable cellular telephone service
23 provider for its reasonable expenses directly incurred in
24 providing the requested information and any related technical
25 assistance.

26 The application is made in connection with an investigation
27 of offenses committed by [TARGET], specifically violations of

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1 [STATUTES AND DESCRIPTIONS], and is based upon the certification
2 by the attorney for the government as well as declarations from
3 the following individuals: (1) Henry Hodor (a declaration
4 previously prepared outside of this district); (2) [IF REQUESTING
5 GPS INFO: Eric A. Kischer (a declaration previously prepared
6 within this district)]; and (3) [AGENT].

7 II

8 DISCUSSION

9 A. The Pen Register Statute and the Stored Communications Act

10 The Pen Register Statute and the Stored Communications Act,
11 in combination, authorize the disclosure of cell site
12 information.

13 1. 18 U.S.C. § 3127: The Pen Register Statute

14 The Pen Register Statute, as amended by the USA PATRIOT Act,
15 permits courts to issue ex parte orders permitting telephone
16 service providers or law enforcement officials to install and use
17 pen registers and trap and trace devices. The statute defines a
18 "pen register" as "a device or process which records or decodes
19 dialing, routing, addressing, or signaling information
20 transmitted by an instrument or facility from which a wire or
21 electronic communication is transmitted, provided, however, that
22 such information shall not include the contents of any
23 communication." 18 U.S.C. § 3127(3) (emphasis added). The
24 statute defines a "trap and trace device" as "a device or process
25 which captures the incoming electronic or other impulses which
26 identify the originating number or other dialing, routing,
27 addressing, or signaling information reasonably likely to

28

1 identify the source of a wire or electronic communication,
2 provided, however, that such information shall not include the
3 contents of any communication." 18 U.S.C. § 3127(4) (emphasis
4 added).

5 The definitions of a "pen register" and a "trap and trace
6 device" in the Pen Register Statute include the cell site
7 information the government seeks here. As explained in the Hodor
8 declaration, a cellular telephone transmits signals to the
9 nearest cell tower or towers when the user makes a call and also
10 transmits information to such towers when the cell phone is on,
11 even if a call is not in progress, in order for the cellular
12 telephone to register its presence in the network. (Hodor Decl.
13 ¶¶ 9-11). These transmissions constitute "signaling information"
14 under the definitions in the Pen Register Statute, which are set
15 forth above, and thus the statute permits an order for cell site
16 information upon an appropriate application by the government.
17 See In Re: Application of the United States for an Order for
18 Prospective Cell Site Location Information on a Certain Cellular
19 Telephone, 460 F. Supp. 2d 448, 455 (S.D.N.Y. 2006).

20 2. 18 U.S.C. § 2703: The Stored Communication Act

21 The Pen Register Statute would be enough to authorize the
22 government's acquisition of cell site information were it not for
23 a statute known as the Communications Assistance for Law
24 Enforcement Act of 1994 ("CALEA"), codified at 47 U.S.C. §§ 1001-
25 1021. CALEA creates a statutory impediment to law enforcement
26 obtaining cell site information based on the Pen Register Statute
27 alone. However, that impediment is itself overcome by the

1 provisions of the Stored Communication Act, which also governs
2 cell site information.

3 Section 1002(a)(2) of CALEA requires telecommunications
4 carriers to ensure that their equipment is, among other things,
5 capable of the following:

6 expeditiously isolating and enabling the government,
7 pursuant to a court order or other lawful
8 authorization, to access call-identifying information
9 that is reasonably available to the carrier . . .
10 except that, with regard to information acquired solely
11 pursuant the authority for pen registers and trap and
12 trace devices (as defined in section 3127 of Title 18),
13 such call-identifying information shall not include any
14 information that may disclose the physical location of
15 subscriber (except to the extent that the location may
16 be determined from the telephone number).

17 47 U.S.C. § 1002(a)(2) (emphasis added). The government
18 recognizes that cell site information "may disclose the physical
19 location of the subscriber" and that the "solely pursuant" clause
20 of CALEA set forth above prevents the government from obtaining
21 such cell site information pursuant to the Pen Register Statute
22 alone. Section 1002 does not, however, preclude entirely the
23 disclosure of cell site information under the Pen Register
24 Statute, but, rather, permits such disclosure pursuant to a
25 combination of the Pen Register Statute and some additional
26 authority. That additional authority is the Stored
27 Communications Act.

1 Section 2703(c)(1)(B) of the Stored Communications Act
2 provides that "[a] government entity may require a provider of
3 electronic communication service to disclose a record or other
4 information pertaining to a subscriber to or customer of such
5 service (not including the contents of communications). . . when
6 the governmental entity" obtains a court order for such
7 disclosure pursuant to Section 2703(d). 18 U.S.C.
8 § 2703(c)(1)(B).

9 The definition of terms in the Stored Communications Act
10 makes clear that the "record or other information" that a court
11 may order a provider to disclose to the government under Section
12 2703(d) includes cell site information. First, the Stored
13 Communications Act expressly adopts the definition of statutory
14 terms set forth in 18 U.S.C. § 2510. See 18 U.S.C. § 2711 ("As
15 used in this chapter . . . (1) the terms defined in section 2510
16 of this title have, respectively, the definitions given such
17 terms in that section"). Thus, the term "provider of electronic
18 communication service" used in Section 2703(c) covers cellular
19 telephone service providers, because 18 U.S.C. § 2510(15) defines
20 "electronic communications service" as "any service which
21 provides to users thereof the ability to send or receive wire or
22 electronic communications." 18 U.S.C. § 2510(15). Further,
23 cell site information is "a record or other information
24 pertaining to a subscriber to or customer of" an electronic
25 communications service -- another term used in Section 2703(c) --
26 because, as indicated by the Hodor declaration, cellular
27 telephone service providers receive and store the information, if

1 sometimes only momentarily, before forwarding it to law
2 enforcement officials. (Hodor Decl. ¶¶ 14, 17-25). See In Re:
3 Application of the United States for an Order for Prospective
4 Cell Site Location Information on a Certain Cellular Telephone,
5 460 F. Supp. 2d 448, 457-60 (S.D.N.Y. 2006).

6 [INCLUDE THIS FOOTNOTE ONLY IF YOU ARE NOT GETTING GPS⁴]
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25 ⁴ As discussed in the attached declaration of Mr. Hodor,
26 this application does not seek latitude and longitude data (often
27 colloquially referred to as "GPS information") either via the
"handset based" or "network based" systems. (Hodor Decl. ¶¶ 30-
28 37). Accordingly, this application is not made pursuant to
Federal Rule of Criminal Procedure 41.

Prospective Cell site [and GPS]/ investigation / July 28, 2008

1 [IF SEEKING GPS INFO, USE SECTIONS B AND C:

2 B. Federal Rule of Criminal Procedure Rule 41 and the All Writs

3 Act

4 Federal Rules of Criminal Procedure 41(b)(1) and (2), and
5 (c), as well as the above discussed sections and 18 U.S.C.
6 § 2703(c)(1)(A), authorize the court to order the provision of
7 GPS information upon a showing of probable cause to believe that
8 the monitoring sought will lead to the discovery of evidence of
9 identified criminal activity.⁵ Because the GPS information is
10 being sought under this authority, and because as discussed below
11 the procedures of Rule 41(e)(2)(B) and (f)(2) are being followed,
12 the GPS information may be provided regardless of whether a call
13 is in progress.

14 As detailed in the declaration of Drug Enforcement
15 Administration Special Agent Eric A. Kischer, some, but not all,
16 cellular telephone service providers have the technical means to
17 obtain GPS information. GPS information is not generated
18 specifically for law enforcement, but is the product of a federal
19 law that requires cellular telephone service providers to
20 maintain and access location information for emergency
21 responders. Kischer Dec., ¶ 5. [b7E

22 [b7E

23 [b7E

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25 _____
26 ⁵ Again, the government does not concede that probable cause
27 must be shown to obtain the GPS information sought, but
28 nonetheless provides probable cause in this case. See fn. 3,
supra.

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In addition, the All Writs Acts permits courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); see also Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942) ("unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.").

The proposed warrant establishes a procedure that is in conformity with Rule 41(e)(2)(B) and (f)(2). These procedures include obtaining a court warrant for the information that states

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1 (1) the property to be tracked; (2) that the device may be used
2 for no longer than 45 days, unless extensions are obtained; (3)
3 that the device must be installed within 10 days; (4) that a
4 return will be provided to the court; and (5) that notice will be
5 provided after the use has ended, unless an order allowing
6 delayed notice is obtained.

7 C. Delayed Notice

8 18 U.S.C. § 3103a(b) states that any notice required
9 following the issuance of a warrant may be delayed if, inter
10 alia, the court finds reasonable cause to believe that providing
11 immediate notification of the execution of the warrant may have
12 an adverse result. An adverse result is defined in 18 U.S.C. §
13 2705(a)(2) as including endangering the life or physical safety
14 of a person, flight from prosecution, destruction of or tampering
15 with evidence, intimidation of potential witnesses, and serious
16 jeopardy of an investigation. Moreover, the Advisory Committee
17 Notes for Fed. R. Crim. P. 41(f)(3) (2006 Amendments) state that
18 delay of notice may be appropriate where "the officer establishes
19 that the investigation is ongoing and that disclosure of the
20 warrant will compromise that investigation." The attached
21 declaration of [AGENT] provides reasonable cause to believe that
22 immediate notification of the execution of the warrant may have
23 an adverse result, and the proposed warrant both provides for the
24 giving of such notice within 30 days after the date that the
25 disclosure ends and prohibits, as part of the receipt of the
26 requested information, the seizure of any tangible property or

1 any other prohibited wire or electronic information as stated in
2 18 U.S.C. § 3103a(b)(2).]

3 III

4 CONCLUSION

5 Applicant respectfully requests that the Court issue the
6 warrant in the form presented herewith.

7 IV

8 CERTIFICATION

9 In support of this application, and pursuant to 18 U.S.C.
10 § 3122, I state that I, [YOUR NAME], am an "attorney for the
11 Government" as defined in Rule 1(b)(1) of the Federal Rules of
12 Criminal Procedure. I certify that the information likely to be
13 obtained from the requested order/ warrant is relevant to an
14 ongoing criminal investigation being conducted by the
15 [AGENCY/IES] of [LIST MAIN TARGET(S)] for violations of [LIST
16 STATUTES].

17 I declare under penalty of perjury under the laws of the
18 United States of America that the foregoing paragraph is true and
19 correct.

20 _____
21 DATE

[YOU]
Assistant United States Attorney
[INSERT SECTION] Section

1 ***Note: this declaration goby is designed to ensure that the
2 same language that is in the application makes it into the
3 declaration - it is not a strict structural requirement, nor are
4 the headings required****

5 ***Note Also: IF YOU ARE SEEKING GPS INFO, we are following the
6 procedures of Rule 41 - which means that the agent should be
7 available so that the judge can make inquiries of him/her if the
8 judge wants per Rule 41(d) (2)****

9
10 DECLARATION OF [AGENT]

11 I, [AGENT], do hereby declare and affirm:

12 1. [STATEMENT OF BACKGROUND/TRAINING/EXPERIENCE, ETC.].

13 PURPOSE OF DECLARATION

14 2. This declaration is made in support of an application
15 for [a warrant] [an order] authorizing the disclosure of "cell
16 site" information, [as well as "GPS" information,] as defined
17 within the application, at such intervals and times as the
18 government may request, and the furnishing of all information,
19 facilities, and technical assistance necessary to accomplish said
20 disclosure unobtrusively, which disclosure will establish the
21 approximate location of the following cellular telephone[s] for a
22 period of 45 [IF REQUESTING ONLY CELL SITE, MAY REQUEST 60 DAYS]
23 days [IF MORE THAN ONE, USE SUBPARAGRAPH STRUCTURE BELOW]:

24 (a) [TARGET NUMBER], a cellular telephone issued by
25 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
26 believed to be used by [USER] ("Subject Telephone #1");

1 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
2 Telephone #2, and concurrently with Subject Telephone #1 referred
3 to as "the Subject Telephones").

4 [IF REQUESTING GPS INFO: 3. I also seek authorization under
5 18 U.S.C. § 3103a(b), for reasonable cause shown below, to delay
6 notification of the proposed warrant for a period of 30 days from
7 the date that the disclosure ends. [YOU MAY ASK FOR A LONGER
8 PERIOD OF DELAY NOW TO A DATE CERTAIN IF YOU CAN STATE WHY THE
9 FACTS OF THIS CASE JUSTIFY SUCH AN ORDER, OR YOU MAY ASK FOR
10 CONTINUANCES OF THE DELAY AS NEEDED]]

11 4. The facts set forth in this declaration are based upon
12 my own personal observations, my training and experience, and
13 information obtained during this investigation from other
14 sources. This declaration is intended to show that there is
15 cause to obtain the information herein sought, and does not
16 purport to set forth all my knowledge of, or investigation into,
17 this matter.

18 PROBABLE CAUSE

19 5. [INSERT PARAGRAPHS DISCUSSING WHY THERE IS PROBABLE
20 CAUSE TO BELIEVE THAT FEDERAL CRIMES ARE BEING COMMITTED AND THAT
21 THE INFORMATION SOUGHT WILL PROVIDE EVIDENCE OF THE VIOLATIONS.]

22
23 [IF SEEKING GPS INFO:

24 GROUND FOR DELAYING NOTICE

25 6. Based on my training and experience and my
26 investigation of this matter, I believe that reasonable cause
27 exists to delay the service of the warrant as normally required

1 for a period of 30 days beyond the end of the disclosure period
2 because [INSERT FACTS RELATING TO WHY GOOD CAUSE EXISTS; INCLUDE
3 REFERENCE TO A PARTICULAR ADVERSE RESULT. FOR EXAMPLE: [

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11
12] Note that for each extension of the
13 delay, you must make an updated showing of the need for further
14 delay.]]

15
16 I declare and affirm under penalty of perjury that the
17 foregoing is true and correct to the best of my knowledge.

18 Executed on [DATE], at [LOCATION], California.

19
20 _____
21 [AGENT]
22 [AGENCY]
23
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27

RIP
ME

1 THOMAS P. O'BRIEN
United States Attorney
2 CHRISTINE C. EWELL
Assistant United States Attorney
3 Chief, Criminal Division
[YOU] (CA Bar No. _____)
4 Assistant United States Attorney
XX00 United States Courthouse
5 312 North Spring Street
Los Angeles, California 90012
6 Telephone: (213) 894-XXXX
Facsimile: (213) 894-XXXX
7 Email: XXXX@usdoj.gov

8 Attorneys for Applicant
United States of America
9

10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12

13 IN RE CELLULAR) No. _____
14 TELEPHONE[S]) [proposed] [WARRANT] [ORDER]
15)
16) (UNDER SEAL)
17)

18 Upon application by the United States of America, supported
19 by the declarations of Henry Hodor, [IF REQUESTING GPS INFO: Eric
20 A. Kischer], and [AGENT], for [a warrant and] orders relating to
21 the following cellular telephone[s] [IF MORE THAN ONE, USE
22 SUBPARAGRAPH STRUCTURE BELOW]:

23 (a) [TARGET NUMBER], a cellular telephone issued by
24 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
25 believed to be used by [USER] ("Subject Telephone #1"); and
26
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1 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
2 Telephone #2, and concurrently with Subject Telephone #1 referred
3 to as "the Subject Telephones"),

4 THIS COURT FINDS THAT there is probable cause to believe
5 that cell site information, [as well as GPS information,] likely
6 to be received concerning the approximate location of the Subject
7 Telephone[s], currently within the Central District of
8 California, will constitute or yield evidence of violations of
9 [STATUTES AND DESCRIPTIONS], being committed by [TARGET] [and
10 others [known and] unknown].

11 THIS COURT FURTHER FINDS THAT, pursuant to 18 U.S.C. § 3123,
12 the attorney for the government has certified that the
13 information likely to be obtained is relevant to an ongoing
14 criminal investigation of [LIST MAIN TARGET(S)] being conducted
15 by the [AGENCY/IES] for violations of [LIST STATUTES].

16 [IF SEEKING GPS INFO: THIS COURT FURTHER FINDS reasonable
17 cause exists to believe that providing immediate notification of
18 this warrant to the user of the Subject Telephone[s] may have an
19 adverse result.]

20 GOOD CAUSE HAVING BEEN SHOWN, THIS COURT HEREBY ISSUES THIS
21 WARRANT AND FURTHER ORDERS THAT:

22 1. [TELEPHONE COMPANY] shall disclose, at such intervals
23 and times as directed by [AGENCY], information concerning the
24 location (physical address) of the cell site at call origination
25 (for outbound calling), call termination (for incoming calls),
26 and, if reasonably available, during the progress of a call, for
27 the Subject Telephone[s], as well as such other information,

1 apart from the content of any communication, that is reasonably
2 available to the cellular telephone service provider and that is
3 requested by the [AGENCY] or any law enforcement agency working
4 with the [AGENCY], concerning the cell sites/sectors receiving
5 and transmitting signals to and from the Subject Telephone[s]

6 [b7E]
7 [b7E] 1.

8 [IF REQUESTING GPS INFO, ADD PARAGRAPHS 2 THROUGH 5:

9 2. [TELEPHONE COMPANY] shall disclose at such intervals
10 and times as directed by [AGENCY], latitude and longitude data
11 gathered for the Subject Telephone[s], including Global
12 Positioning Satellite ("GPS") and/or network timing information,
13 and including information from such programs as Nextel Mobile
14 Locator, Boost Mobile Loopt, Sprint/Nextel Findum Wireless, or a
15 similar program, which will establish the approximate location of
16 the Subject Telephone[s] (referred to herein as "GPS
17 information"), and shall furnish all information, facilities, and
18 technical assistance necessary to accomplish said disclosure
19 unobtrusively.

20 3. As part of the receipt of the requested GPS
21 information, the [AGENCY] is prohibited from seizing any tangible
22 property pursuant to this warrant, or any other prohibited wire
23 or electronic information as stated in 18 U.S.C. § 3103a(b)(2).
24 The [AGENCY] is not prohibited from doing so in relation to any
25 other investigation authorized by law.

26 4. The [AGENCY] is permitted to delay service of this
27 warrant for GPS information to the subscriber[s] of the Subject
28

1 Telephone[s] [for a period of 30 days from the date that the
2 disclosure ends] [until DATE] [USE LATTER ONLY IF YOU HAVE
3 JUSTIFIED AS DISCUSSED ABOVE]]. Any requests for a continuance
4 of this delay should be filed with this Court, unless directed to
5 the duty United States Magistrate Judge by this Court.

6 5. The [AGENCY] shall make a return of this warrant for
7 GPS information to this Court (unless directed to the duty United
8 States Magistrate Judge by this Court) within 10 calendar days
9 after the disclosure of information ceases. The return shall
10 state the date and time the telephone company began providing
11 information pursuant to this warrant, and the period during which
12 information was provided, including pursuant to any orders
13 permitting continued disclosure.

14 6. The disclosure of the requested information by the
15 cellular telephone service provider[s] shall begin during the
16 daytime on the earlier of the day on which law enforcement
17 officers first begin to receive information pursuant to this
18 warrant or ten days after the date of this warrant, and continue
19 for up to 45 [IF REQUESTING ONLY CELL SITE, MAY REQUEST 60 DAYS]
20 days thereafter unless additional orders are made continuing the
21 period of the disclosure.

22 7. The disclosure of the requested information shall occur
23 whether the Subject Telephone[s] [is/are] located within this
24 District, outside of the District, or both.

25 8. [

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anged telephone number(s) assigned to an

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9. [TELEPHONE COMPANY] shall execute the Court's warrant as soon as practicable after it is signed. If a copy of the warrant is given to any cellular telephone service provider, the copy may be redacted by law enforcement to exclude the Target Subjects and any description of the offenses under investigation.

10. The [AGENCY] shall reimburse the applicable cellular telephone service provider for their reasonable expenses directly incurred by the cellular telephone service provider in providing the requested information and any related technical assistance.

11. To avoid prejudice to this criminal investigation, the applicable cellular telephone service providers and their agents and employees shall not disclose to or cause a disclosure of this Court's warrant and orders, or the request for information by the [AGENCY] or other law enforcement agencies involved in the investigation, or the existence of this investigation, except as necessary to accomplish the assistance hereby ordered. In particular, the cellular telephone service providers and their

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1 agents and employees are ordered not to make any disclosure to
2 the lessees of the telephone or telephone subscribers.
3

4 _____
5 HONORABLE [judge]
6 UNITED STATES MAGISTRATE JUDGE

7 DATE/ TIME OF ISSUE: _____

8 AFFIANT NAME/ AGENCY: _____
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28 Prospective Cell site (and GPS)/ investigation / July 28, 2008

[illegible]

9 The Warrant authorized the disclosure of GPS and /or cell
10 site information relating to the following Telephone(s) (the
11 "Target Telephone(s)"): [IF PHONES DEFINED WITH SHORT NAMES IN
12 ORIGINAL WARRANT, insert the following: Target Telephone [# X]
13 [and Target Telephone # Y], as described in the Warrant.] [b7E]

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24 [FOR BOTH OPTIONS NO.1 AND NO. 2 - IF NO INFORMATION
25 RECEIVED ON ONE OR MORE PHONES ADD: No information was obtained
26 for [NAME OF PHONE. e.g, "Target Telephone 8"].
27 [IF ORIGINAL APP. AND Warrant FILED UNDER SEAL ADD: The
28 Warrant was filed under seal. Therefore, I request that this

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1 return be filed under seal as well, for the reasons set forth in
2 the Warrant, and to protect the integrity of the ongoing criminal
3 investigation.]

4
5 I swear that this is a true notation of the date and time of
6 installation and the period of use for the Target Telephone(s)
7 pursuant to the Warrant.

8
9 _____
10 [Agency] [Special Agent] [Agent Name] Date

11 [IF UNDER SEAL REQUESTED ADD: This return is received and shall
12 be sealed for the same reasons set forth in the original
13 Warrant.]

14 Subscribed, sworn to, and returned to me on this date.

15 _____
16 United States Magistrate Judge Date

1 ***Note: if you want EITHER GPS data, or cell site info for
2 whenever the phone is turned on, you must include the procedures
3 under Rule 41 and CALL THE ORDER A WARRANT. If you only want cell
site info during the progress of a call, you need not follow
those procedures.***

4 ***Note: if you are requesting only cell site data, use this
5 form, the Hodor declaration, and your agent's declaration. If
6 you are requesting only GPS info, use this form, the Kischer
declaration, and your agent's declaration. If you are requesting
both, use all of the declarations.***

7 ***Note: if you are requesting continued information, state that
8 throughout, and insert into the app. that a previous Warrant was
warrant/order***

9 THOMAS P. O'BRIEN
10 United States Attorney
CHRISTINE C. EWELL
11 Assistant United States Attorney
Chief, Criminal Division
12 [YOU] (CA Bar No. _____)
Assistant United States Attorney
13 XX00 United States Courthouse
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14 Los Angeles, California 90012
Telephone: (213) 894-XXXX
15 Facsimile: (213) 894-XXXX
Email: XXXX@usdoj.gov

16 Attorneys for Applicant
17 United States of America

18 UNITED STATES DISTRICT COURT
19 FOR THE CENTRAL DISTRICT OF CALIFORNIA
20

21) No. _____
22)
IN RE CELLULAR)
23) GOVERNMENT'S EX PARTE APPLICATION
TELEPHONE [S]) FOR [A WARRANT] [AN ORDER]
24) AUTHORIZING THE DISCLOSURE OF
25) CELL SITE INFORMATION [AND GPS
26) INFORMATION] ;DECLARATIONS OF
27) HENRY HODOR, ERIC A. KISCHER AND
28) [AGENT]
) (UNDER SEAL)

RIF

1 The United States of America, by and through its counsel of
2 record, the United States Attorney for the Central District of
3 California, hereby applies for [a warrant]. [an order] authorizing
4 the disclosure of cell site information, [IF WANT GPS INFO: as
5 well as "GPS information"] at such intervals and times as the
6 government may request, and the furnishing of all information,
7 facilities, and technical assistance necessary to accomplish said
8 disclosure unobtrusively, which disclosure will establish the
9 approximate location of the following cellular telephone[s] for a
10 period of 45 [IF REQUESTING ONLY CELL SITE, MAY REQUEST 60 DAYS]
11 days [IF MORE THAN ONE, USE SUBPARAGRAPH STRUCTURE BELOW]:

12 (a) [TARGET NUMBER], a cellular telephone issued by
13 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
14 believed to be used by [USER] ("Subject Telephone #1");

15 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
16 Telephone #2, and concurrently with Subject Telephone #1 referred
17 to as "the Subject Telephones").

18 [IF REQUESTING GPS INFO: This application also seeks
19 authorization under 18 U.S.C. § 3103a(b), for reasonable cause
20 shown, to delay notification of the above Warrant to the
21 subscriber and users of the Subject Telephone for a period of 30
22 days from the date that the disclosure ends. [YOU MAY ASK FOR A
23 LONGER PERIOD OF DELAY NOW TO A DATE CERTAIN IF YOU CAN STATE WHY
24 THE FACTS OF THIS CASE JUSTIFY SUCH AN ORDER, OR YOU MAY ASK FOR
25 CONTINUANCES OF THE DELAY AS NEEDED. IF YOU SEEK A CONTINUANCE,
26 GO FIRST TO THE JUDGE WHO SIGNED THIS ORDER/ WARRANT]

RIF

1 This application is based on the attached memorandum of
2 points and authorities, including the certification by the
3 attorney for the government, and declarations of the following
4 individuals: (1) Henry Hodor (a declaration previously prepared
5 outside of this district); (2) [IF REQUESTING GPS INFO: Eric A.
6 Kischer (a declaration previously prepared within this
7 district)]; and (3) [AGENT].

8 DATED: _____

Respectfully submitted,

9 THOMAS P. O'BRIEN
United States Attorney

10 CHRISTINE C. EWELL
11 Assistant United States Attorney
12 Chief, Criminal Division

13 _____
14 [YOU]
Assistant United States Attorney

15 Attorneys for Applicant
16 United States of America

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 INTRODUCTION

4 By this application, the government seeks [a warrant] [an
5 order] that cellular telephone service provider[s] furnish the
6 [AGENCY ("INITIALS")] with cell site [and "GPS"] information for
7 a cellular telephone being used by the subject of a federal
8 investigation, under circumstances where there is probable cause
9 to believe that [a federal crime is / federal crimes are] being
10 committed and that the information likely to be received
11 concerning the approximate location of the following Subject
12 Telephone[s], currently within the Central District of
13 California, will constitute or yield evidence of [that crime /
14 those crimes] [IF MORE THAN ONE, USE SUBPARAGRAPH STRUCTURE
15 BELOW]:

16 (a) [TARGET NUMBER], a cellular telephone issued by
17 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
18 believed to be used by [USER] ("Subject Telephone #1");

19 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
20 Telephone #2, and concurrently with Subject Telephone #1 referred
21 to as "the Subject Telephones").

22 The information sought by this application includes
23 information about the location (physical address) of the "cell
24 sites"¹ linked to the Subject Telephone[s] at call origination

25
26 ¹ In order for a cellular telephone to make or receive a
27 call, it must be within radio range of a "cell site," or cell
tower, which connects it to a carrier's wireless network. Each
tower transmits and receives radio signals across 360 degrees;

1 (for outbound calling), call termination (for incoming calls),²
2 and, if reasonably available, during the progress of a call.
3 This information, which is acquired in the first instance by the
4 cellular telephone service provider, includes any information,
5 apart from the content of any communication, that is reasonably
6 available to the service provider and that is requested by the
7 [AGENCY], concerning the cell sites/sectors receiving and
8 transmitting signals to and from the Subject Telephone[s] [b7E.]

9 [b7E
10 [b7E
11 [b7E]. This information is sought based on the combined
12 authority of 18 U.S.C. § 3121 et seq. (the "Pen Register
13 Statute") and 18 U.S.C. §§ 2701-11 (the "Stored Communications
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22 wireless carriers typically divide that 360 degree circle into
23 three equal slices of 120 degrees, each of which is called a
24 "sector." Carriers control multiple towers through the use of a
25 "base station." Sensors within the base station detect which
26 tower and sector makes radio contact with a cellular telephone.
27 (Hodor Decl. ¶¶ 9-11, at 6-7).

28 ² The telephone at "call origination" is the cellular
telephone that is calling another telephone. The telephone at
"call termination" is the cellular telephone that is receiving
the call. (Hodor Decl. ¶ 21, at 15-16).

1 Act").³ The attorney for the government has made the required
2 certification at the end of this application.

3 [IF SEEKING GPS INFO, USE THE FOLLOWING TWO PARAGRAPHS: This
4 application further seeks latitude and longitude data gathered
5 for the Subject Telephone[s], including Global Positioning
6 Satellite ("GPS") and/or network timing information, and
7 including information from such programs as Nextel Mobile
8 Locator, Boost Mobile Loopt, Sprint/Nextel Findum Wireless, or a
9 similar program, which will establish the approximate location of
10 the Subject Telephone[s], and which information is acquired in
11 the first instance by the cellular telephone service provider
12 (referred to herein as "GPS information"). This information is
13 sought based on the authority in Federal Rule of Criminal
14 Procedure 41(b)(1) and (2) and 28 U.S.C. § 1651 (the All Writs
15 Act), and will be obtained in conformity with the procedures of
16 Federal Rule of Criminal Procedure 41.

17 Also, this application seeks authorization under 18 U.S.C.
18 § 3103a(b), for reasonable cause shown, to delay notification of
19 the above Warrant to the subscriber and users of the Subject
20 Telephone for a period of 30 days from the date that the

21 _____
22 ³ In light of the government's showing of probable cause
23 herein, this application does not rely on, and this Court need
24 not consider the validity of, the government's continuing
25 position that courts may issue orders authorizing the government
26 to obtain cell site and GPS information based on the combined
27 effect of the Pen Register Statute and the Stored Communications
28 Act even where the government does not show probable cause.
(That theory has been advanced in support of applications for
cell site information in various districts and is discussed in a
number of court opinions). The government continues to maintain
that probable cause is not required to properly request and
obtain the information it seeks herein.

1 disclosure ends. [YOU MAY ASK FOR A LONGER PERIOD OF DELAY NOW
2 TO A DATE CERTAIN IF YOU CAN STATE WHY THE FACTS OF THIS CASE
3 JUSTIFY SUCH AN ORDER, OR YOU MAY ASK FOR CONTINUANCES OF THE
4 DELAY AS NEEDED. AGAIN, CONTINUANCES SHOULD GO TO THE SAME
5 JUDGE]. As discussed in the attached declaration of [AGENT],
6 immediate notification of this order to the user of the Subject
7 Telephone[s] may have an adverse result.]

8 This application further seeks an order that: (1) authorizes
9 the disclosure of the requested information whether the Subject
10 Telephone[s] [is/are] located within this District, outside of
11 the District, or both; (2) [b7E

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21 [b7E] and (3) orders the

22 [AGENCY] to reimburse the applicable cellular telephone service
23 provider for its reasonable expenses directly incurred in
24 providing the requested information and any related technical
25 assistance.

26 The application is made in connection with an investigation
27 of offenses committed by [TARGET], specifically violations of

1 [STATUTES AND DESCRIPTIONS], and is based upon the certification
2 by the attorney for the government as well as declarations from
3 the following individuals: (1) Henry Hodor (a declaration
4 previously prepared outside of this district); (2) [IF REQUESTING
5 GPS INFO: Eric A. Kischer (a declaration previously prepared
6 within this district)]; and (3) [AGENT].

7 II

8 DISCUSSION

9 A. The Pen Register Statute and the Stored Communications Act

10 The Pen Register Statute and the Stored Communications Act,
11 in combination, authorize the disclosure of cell site
12 information.

13 1. 18 U.S.C. § 3127: The Pen Register Statute

14 The Pen Register Statute, as amended by the USA PATRIOT Act,
15 permits courts to issue ex parte orders permitting telephone
16 service providers or law enforcement officials to install and use
17 pen registers and trap and trace devices. The statute defines a
18 "pen register" as "a device or process which records or decodes
19 dialing, routing, addressing, or signaling information
20 transmitted by an instrument or facility from which a wire or
21 electronic communication is transmitted, provided, however, that
22 such information shall not include the contents of any
23 communication." 18 U.S.C. § 3127(3) (emphasis added). The
24 statute defines a "trap and trace device" as "a device or process
25 which captures the incoming electronic or other impulses which
26 identify the originating number or other dialing, routing,
27 addressing, or signaling information reasonably likely to

1 identify the source of a wire or electronic communication,
2 provided, however, that such information shall not include the
3 contents of any communication." 18 U.S.C. § 3127(4) (emphasis
4 added).

5 The definitions of a "pen register" and a "trap and trace
6 device" in the Pen Register Statute include the cell site
7 information the government seeks here. As explained in the Hodor
8 declaration, a cellular telephone transmits signals to the
9 nearest cell tower or towers when the user makes a call and also
10 transmits information to such towers when the cell phone is on,
11 even if a call is not in progress, in order for the cellular
12 telephone to register its presence in the network. (Hodor Decl.
13 ¶¶ 9-11). These transmissions constitute "signaling information"
14 under the definitions in the Pen Register Statute, which are set
15 forth above, and thus the statute permits an order for cell site
16 information upon an appropriate application by the government.
17 See In Re: Application of the United States for an Order for
18 Prospective Cell Site Location Information on a Certain Cellular
19 Telephone, 460 F. Supp. 2d 448, 455 (S.D.N.Y. 2006).

20 2. 18 U.S.C. § 2703: The Stored Communication Act

21 The Pen Register Statute would be enough to authorize the
22 government's acquisition of cell site information were it not for
23 a statute known as the Communications Assistance for Law
24 Enforcement Act of 1994 ("CALEA"), codified at 47 U.S.C. §§ 1001-
25 1021. CALEA creates a statutory impediment to law enforcement
26 obtaining cell site information based on the Pen Register Statute
27 alone. However, that impediment is itself overcome by the

1 provisions of the Stored Communication Act, which also governs
2 cell site information.

3 Section 1002(a)(2) of CALEA requires telecommunications
4 carriers to ensure that their equipment is, among other things,
5 capable of the following:

6 expeditiously isolating and enabling the government,
7 pursuant to a court order or other lawful
8 authorization, to access call-identifying information
9 that is reasonably available to the carrier . . .
10 except that, with regard to information acquired solely
11 pursuant the authority for pen registers and trap and
12 trace devices (as defined in section 3127 of Title 18),
13 such call-identifying information shall not include any
14 information that may disclose the physical location of
15 subscriber (except to the extent that the location may
16 be determined from the telephone number).

17 47 U.S.C. § 1002(a)(2) (emphasis added). The government
18 recognizes that cell site information "may disclose the physical
19 location of the subscriber" and that the "solely pursuant" clause
20 of CALEA set forth above prevents the government from obtaining
21 such cell site information pursuant to the Pen Register Statute
22 alone. Section 1002 does not, however, preclude entirely the
23 disclosure of cell site information under the Pen Register
24 Statute, but, rather, permits such disclosure pursuant to a
25 combination of the Pen Register Statute and some additional
26 authority. That additional authority is the Stored
27 Communications Act.

1 Section 2703(c)(1)(B) of the Stored Communications Act
2 provides that "[a] government entity may require a provider of
3 electronic communication service to disclose a record or other
4 information pertaining to a subscriber to or customer of such
5 service (not including the contents of communications). . . when
6 the governmental entity" obtains a court order for such
7 disclosure pursuant to Section 2703(d). 18 U.S.C.
8 § 2703(c)(1)(B).

9 The definition of terms in the Stored Communications Act
10 makes clear that the "record or other information" that a court
11 may order a provider to disclose to the government under Section
12 2703(d) includes cell site information. First, the Stored
13 Communications Act expressly adopts the definition of statutory
14 terms set forth in 18 U.S.C. § 2510. See 18 U.S.C. § 2711 ("As
15 used in this chapter . . . (1) the terms defined in section 2510
16 of this title have, respectively, the definitions given such
17 terms in that section"). Thus, the term "provider of electronic
18 communication service" used in Section 2703(c) covers cellular
19 telephone service providers, because 18 U.S.C. § 2510(15) defines
20 "electronic communications service" as "any service which
21 provides to users thereof the ability to send or receive wire or
22 electronic communications." 18 U.S.C. § 2510(15). Further,
23 cell site information is "a record or other information
24 pertaining to a subscriber to or customer of" an electronic
25 communications service -- another term used in Section 2703(c) --
26 because, as indicated by the Hodor declaration, cellular
27 telephone service providers receive and store the information, if

1 sometimes only momentarily, before forwarding it to law
2 enforcement officials. (Hodor Decl. ¶¶ 14, 17-25). See In Re:
3 Application of the United States for an Order for Prospective
4 Cell Site Location Information on a Certain Cellular Telephone,
5 460 F. Supp. 2d 448, 457-60 (S.D.N.Y. 2006).

6 [INCLUDE THIS FOOTNOTE ONLY IF YOU ARE NOT GETTING GPS⁴]

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25 ⁴ As discussed in the attached declaration of Mr. Hodor,
26 this application does not seek latitude and longitude data (often
27 colloquially referred to as "GPS information") either via the
28 "handset based" or "network based" systems. (Hodor Decl. ¶¶ 30-
Federal Rule of Criminal Procedure 41.

[IF SEEKING GPS INFO, USE SECTIONS B AND C:

B. Federal Rule of Criminal Procedure Rule 41 and the All Writs Act

Federal Rules of Criminal Procedure 41(b)(1) and (2), and (c), as well as the above discussed sections and 18 U.S.C. § 2703(c)(1)(A), authorize the court to order the provision of GPS information upon a showing of probable cause to believe that the monitoring sought will lead to the discovery of evidence of identified criminal activity.⁵ Because the GPS information is being sought under this authority, and because as discussed below the procedures of Rule 41(e)(2)(B) and (f)(2) are being followed, the GPS information may be provided regardless of whether a call is in progress.

As detailed in the declaration of Drug Enforcement Administration Special Agent Eric A. Kischer, some, but not all, cellular telephone service providers have the technical means to obtain GPS information. GPS information is not generated specifically for law enforcement, but is the product of a federal law that requires cellular telephone service providers to maintain and access location information for emergency responders. Kischer Dec., ¶ 5.

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⁵ Again, the government does not concede that probable cause must be shown to obtain the GPS information sought, but nonetheless provides probable cause in this case. See fn. 3, supra.

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In addition, the All Writs Acts permits courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); see also Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942) ("unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.").

The proposed warrant establishes a procedure that is in conformity with Rule 41(e)(2)(B) and (f)(2). These procedures include obtaining a court warrant for the information that states

1 (1) the property to be tracked; (2) that the device may be used
2 for no longer than 45 days, unless extensions are obtained; (3)
3 that the device must be installed within 10 days; (4) that a
4 return will be provided to the court; and (5) that notice will be
5 provided after the use has ended, unless an order allowing
6 delayed notice is obtained.

7 C. Delayed Notice

8 18 U.S.C. § 3103a(b) states that any notice required
9 following the issuance of a warrant may be delayed if, *inter*
10 *alia*, the court finds reasonable cause to believe that providing
11 immediate notification of the execution of the warrant may have
12 an adverse result. An adverse result is defined in 18 U.S.C. §
13 2705(a)(2) as including endangering the life or physical safety
14 of a person, flight from prosecution, destruction of or tampering
15 with evidence, intimidation of potential witnesses, and serious
16 jeopardy of an investigation. Moreover, the Advisory Committee
17 Notes for Fed. R. Crim. P. 41(f)(3) (2006 Amendments) state that
18 delay of notice may be appropriate where "the officer establishes
19 that the investigation is ongoing and that disclosure of the
20 warrant will compromise that investigation." The attached
21 declaration of [AGENT] provides reasonable cause to believe that
22 immediate notification of the execution of the warrant may have
23 an adverse result, and the proposed warrant both provides for the
24 giving of such notice within 30 days after the date that the
25 disclosure ends and prohibits, as part of the receipt of the
26 requested information, the seizure of any tangible property or
27

1 any other prohibited wire or electronic information as stated in
2 18 U.S.C. § 3103a(b)(2).]

3 III

4 CONCLUSION

5 Applicant respectfully requests that the Court issue the
6 warrant in the form presented herewith.

7 IV

8 CERTIFICATION

9 In support of this application, and pursuant to 18 U.S.C.
10 § 3122, I state that I, [YOUR NAME], am an "attorney for the
11 Government" as defined in Rule 1(b)(1) of the Federal Rules of
12 Criminal Procedure. I certify that the information likely to be
13 obtained from the requested order/ warrant is relevant to an
14 ongoing criminal investigation being conducted by the
15 [AGENCY/IES] of [LIST MAIN TARGET(S)] for violations of [LIST
16 STATUTES].

17 I declare under penalty of perjury under the laws of the
18 United States of America that the foregoing paragraph is true and
19 correct.

20 _____
21 DATE

[YOU]
Assistant United States Attorney
[INSERT SECTION] Section

1 ***Note: this declaration goby is designed to ensure that the
2 same language that is in the application makes it into the
3 declaration - it is not a strict structural requirement, nor are
4 the headings required****

5 ***Note Also: IF YOU ARE SEEKING GPS INFO, we are following the
6 procedures of Rule 41 - which means that the agent should be
7 available so that the judge can make inquiries of him/her if the
8 judge wants per Rule 41(d)(2)****

9
10 DECLARATION OF [AGENT]

11 I, [AGENT], do hereby declare and affirm:

12 1. [STATEMENT OF BACKGROUND/TRAINING/EXPERIENCE, ETC.].

13 PURPOSE OF DECLARATION

14 2. This declaration is made in support of an application
15 for [a warrant] [an order] authorizing the disclosure of "cell
16 site" information, [as well as "GPS" information,] as defined
17 within the application, at such intervals and times as the
18 government may request, and the furnishing of all information,
19 facilities, and technical assistance necessary to accomplish said
20 disclosure unobtrusively, which disclosure will establish the
21 approximate location of the following cellular telephone[s] for a
22 period of 45 [IF REQUESTING ONLY CELL SITE, MAY REQUEST 60 DAYS]
23 days [IF MORE THAN ONE, USE SUBPARAGRAPH STRUCTURE BELOW]:

24 (a) [TARGET NUMBER], a cellular telephone issued by
25 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
26 believed to be used by [USER] ("Subject Telephone #1");

1 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
2 Telephone #2, and concurrently with Subject Telephone #1 referred
3 to as "the Subject Telephones").

4 [IF REQUESTING GPS INFO: 3. I also seek authorization under
5 18 U.S.C. § 3103a(b), for reasonable cause shown below, to delay
6 notification of the proposed warrant for a period of 30 days from
7 the date that the disclosure ends. [YOU MAY ASK FOR A LONGER
8 PERIOD OF DELAY NOW TO A DATE CERTAIN IF YOU CAN STATE WHY THE
9 FACTS OF THIS CASE JUSTIFY SUCH AN ORDER, OR YOU MAY ASK FOR
10 CONTINUANCES OF THE DELAY AS NEEDED]]

11 4. The facts set forth in this declaration are based upon
12 my own personal observations, my training and experience, and
13 information obtained during this investigation from other
14 sources. This declaration is intended to show that there is
15 cause to obtain the information herein sought, and does not
16 purport to set forth all my knowledge of, or investigation into,
17 this matter.

18 PROBABLE CAUSE

19 5. [INSERT PARAGRAPHS DISCUSSING WHY THERE IS PROBABLE
20 CAUSE TO BELIEVE THAT FEDERAL CRIMES ARE BEING COMMITTED AND THAT
21 THE INFORMATION SOUGHT WILL PROVIDE EVIDENCE OF THE VIOLATIONS.]

22
23 [IF SEEKING GPS INFO:

24 GROUND FOR DELAYING NOTICE

25 6. Based on my training and experience and my
26 investigation of this matter, I believe that reasonable cause
27 exists to delay the service of the warrant as normally required

1 for a period of 30 days beyond the end of the disclosure period
2 because [INSERT FACTS RELATING TO WHY GOOD CAUSE EXISTS; INCLUDE
3 REFERENCE TO A PARTICULAR ADVERSE RESULT. FOR EXAMPLE: [b7E

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12 [b7E] Note that for each extension of the
13 delay, you must make an updated showing of the need for further
14 delay.]]

16 I declare and affirm under penalty of perjury that the
17 foregoing is true and correct to the best of my knowledge.

18 Executed on [DATE], at [LOCATION], California.

[AGENT]

[AGENCY]

1 THOMAS P. O'BRIEN
United States Attorney
2 CHRISTINE C. EWELL
Assistant United States Attorney
3 Chief, Criminal Division
[YOU] (CA Bar No. _____)
4 Assistant United States Attorney
XX00 United States Courthouse
5 312 North Spring Street
Los Angeles, California 90012
6 Telephone: (213) 894-XXXX
Facsimile: (213) 894-XXXX
7 Email: XXXX@usdoj.gov

8 Attorneys for Applicant
United States of America
9

10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12

13 IN RE CELLULAR) No. _____
14 TELEPHONE[S]) [proposed] [WARRANT] [ORDER]
15) (UNDER SEAL)
16)
17 _____)

18 Upon application by the United States of America, supported
19 by the declarations of Henry Hodor, [IF REQUESTING GPS INFO: Eric
20 A. Kischer], and [AGENT], for [a warrant and] orders relating to
21 the following cellular telephone[s] [IF MORE THAN ONE, USE
22 SUBPARAGRAPH STRUCTURE BELOW]:

23 (a) [TARGET NUMBER], a cellular telephone issued by
24 [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and
25 believed to be used by [USER] ("Subject Telephone #1"); and
26
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1 (b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
2 Telephone #2, and concurrently with Subject Telephone #1 referred
3 to as "the Subject Telephones"),

4 THIS COURT FINDS THAT there is probable cause to believe
5 that cell site information, [as well as GPS information,] likely
6 to be received concerning the approximate location of the Subject
7 Telephone[s], currently within the Central District of
8 California, will constitute or yield evidence of violations of
9 [STATUTES AND DESCRIPTIONS], being committed by [TARGET] [and
10 others [known and] unknown].

11 THIS COURT FURTHER FINDS THAT, pursuant to 18 U.S.C. § 3123,
12 the attorney for the government has certified that the
13 information likely to be obtained is relevant to an ongoing
14 criminal investigation of [LIST MAIN TARGET(S)] being conducted
15 by the [AGENCY/IES] for violations of [LIST STATUTES].

16 [IF SEEKING GPS INFO: THIS COURT FURTHER FINDS reasonable
17 cause exists to believe that providing immediate notification of
18 this warrant to the user of the Subject Telephone[s] may have an
19 adverse result.]

20 GOOD CAUSE HAVING BEEN SHOWN, THIS COURT HEREBY ISSUES THIS
21 WARRANT AND FURTHER ORDERS THAT:

22 1. [TELEPHONE COMPANY] shall disclose, at such intervals
23 and times as directed by [AGENCY], information concerning the
24 location (physical address) of the cell site at call origination
25 (for outbound calling), call termination (for incoming calls),
26 and, if reasonably available, during the progress of a call, for
27 the Subject Telephone[s], as well as such other information,

1 apart from the content of any communication, that is reasonably
2 available to the cellular telephone service provider and that is
3 requested by the [AGENCY] or any law enforcement agency working
4 with the [AGENCY], concerning the cell sites/sectors receiving
5 and transmitting signals to and from the Subject Telephone[s]

6 [- - b7E]
7 [b7E]
8 [ME]

9 [IF REQUESTING GPS INFO, ADD PARAGRAPHS 2 THROUGH 5:

10 2. [TELEPHONE COMPANY] shall disclose at such intervals
11 and times as directed by [AGENCY], latitude and longitude data
12 gathered for the Subject Telephone[s], including Global
13 Positioning Satellite ("GPS") and/or network timing information,
14 and including information from such programs as Nextel Mobile
15 Locator, Boost Mobile Loopt, Sprint/Nextel Findum Wireless, or a
16 similar program, which will establish the approximate location of
17 the Subject Telephone[s] (referred to herein as "GPS
18 information"), and shall furnish all information, facilities, and
19 technical assistance necessary to accomplish said disclosure
20 unobtrusively.

21 3. As part of the receipt of the requested GPS
22 information, the [AGENCY] is prohibited from seizing any tangible
23 property pursuant to this warrant, or any other prohibited wire
24 or electronic information as stated in 18 U.S.C. § 3103a(b)(2).
25 The [AGENCY] is not prohibited from doing so in relation to any
26 other investigation authorized by law.

1 4. The [AGENCY] is permitted to delay service of this
2 warrant for GPS information to the subscriber[s] of the Subject
3 Telephone[s] [for a period of 30 days from the date that the
4 disclosure ends] [until DATE] [USE LATTER ONLY IF YOU HAVE
5 JUSTIFIED AS DISCUSSED ABOVE]]. Any requests for a continuance
6 of this delay should be filed with this Court, unless directed to
7 the duty United States Magistrate Judge by this Court.

8 5. The [AGENCY] shall make a return of this warrant for
9 GPS information to this Court (unless directed to the duty United
10 States Magistrate Judge by this Court) within 10 calendar days
11 after the disclosure of information ceases. The return shall
12 state the date and time the telephone company began providing
13 information pursuant to this warrant, and the period during which
14 information was provided, including pursuant to any orders
15 permitting continued disclosure.

16 6. The disclosure of the requested information by the
17 cellular telephone service provider[s] shall begin during the
18 daytime on the earlier of the day on which law enforcement
19 officers first begin to receive information pursuant to this
20 warrant or ten days after the date of this warrant, and continue
21 for up to 45 [IF REQUESTING ONLY CELL SITE, MAY REQUEST 60 DAYS]
22 days thereafter unless additional orders are made continuing the
23 period of the disclosure.

24 7. The disclosure of the requested information shall occur
25 whether the Subject Telephone[s] [is/are] located within this
26 District, outside of the District, or both.

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12 9. [TELEPHONE COMPANY] shall execute the Court's warrant as
13 soon as practicable after it is signed. If a copy of the warrant
14 is given to any cellular telephone service provider, the copy may
15 be redacted by law enforcement to exclude the Target Subjects and
16 any description of the offenses under investigation.

17 10. The [AGENCY] shall reimburse the applicable cellular
18 telephone service provider for their reasonable expenses directly
19 incurred by the cellular telephone service provider in providing
20 the requested information and any related technical assistance.

21 11. To avoid prejudice to this criminal investigation, the
22 applicable cellular telephone service providers and their agents
23 and employees shall not disclose to or cause a disclosure of this
24 Court's warrant and orders, or the request for information by the
25 [AGENCY] or other law enforcement agencies involved in the
26 investigation, or the existence of this investigation, except as
27 necessary to accomplish the assistance hereby ordered. In

1 particular, the cellular telephone service providers and their
2 agents and employees are ordered not to make any disclosure to
3 the lessees of the telephone or telephone subscribers.

4
5
6 HONORABLE [judge]
UNITED STATES MAGISTRATE JUDGE

7
8 DATE/ TIME OF ISSUE: _____

9 AFFIANT NAME/ AGENCY: _____



U.S. Department of Justice

United States Attorney
Eastern District of New York

United States Attorney's Office
610 Federal Plaza
Central Islip, New York 11722-4454

September 9, 2005

BY HAND

The Honorable James Orenstein
United States Magistrate Judge
Eastern District of New York
Long Island Federal Courthouse
924 Federal Plaza
Central Islip, New York 11722-4454

Re: In re Application For Pen Register
and Trap and Trace Device With
Cell Site Location Authority,
Magistrate's Docket No. 05-1093(JO)

Dear Magistrate Judge Orenstein:

The government respectfully moves the Court to reconsider its Memorandum and Order entered August 25, 2005, ___ F. Supp.2d ___, 2005 WL 2043543 (E.D.N.Y. Aug. 25, 2005) (the "August 25 Order"), denying the government's application for an order to disclose cell-site records relating to a specified cellular telephone number. For the reasons stated below, the government's application dated August 23, 2005 should be granted consistent with § 103 of the Communications Assistance for Law Enforcement Act ("CALEA"), P.L. 103-313, 108 Stat. 4279 (1994), codified at 47 U.S.C. § 1002(a)(2)(B), under authority of 18 U.S.C. § 2703(d) of the Stored Communications Act ("SCA") and 18 U.S.C. §§ 3121 et seq. (the pen register/trap and trace statute, or "Pen/Trap statute").¹

¹ A motion for reconsideration of a court order determining a motion in a civil matter may be made within ten days of the entry of the order, excluding holidays and weekends. Fed. R. Civ. Proc. 59(e) and Loc. Civ. R. 6.3. Loc. Civ. R. 6.3. Reconsideration under these rules is applicable to decisions of magistrate judges, and tolls the time for appeal to the district court. See Norex Petroleum, Ltd. v. Access Indus., Inc., 2003 WL 21872389, *1 (S.D.N.Y. 2003); Equal Employment Opportunity Commission v. Venator Group, 2001 WL 246376, *4 (S.D.N.Y. 2001); Yurman Design v. Chaindom Enterprises, 2000 WL 1871715, *1

A. Overview

The August 25 Order holds that disclosure of cell site information can only be compelled by a search warrant issued on a showing of probable cause. The Court has apparently concluded that because cell-site information is transmitted as "electronic communication," 18 U.S.C. § 2510(12), it is also the "contents of an electronic communication," 18 U.S.C. § 2510(8), unless it is the product of a "tracking device," 18 U.S.C. § 3117. August 25 Order at *1. We respectfully submit that these holdings are legally erroneous, for Congress has legislated to the contrary.

As we demonstrate below, an "electronic communication" may provide either "contents," see 18 U.S.C. §§ 2703(a) and 2703(b), or "information pertaining to a subscriber," see 18 U.S.C. § 2703(c). Cell-site information constitutes "information pertaining to a subscriber" under U.S.C. § 2703(c), not "contents" under U.S.C. § 2703(a) or (b), and is not the product of a "tracking device" or communications from it. Moreover, upon a showing under 18 U.S.C. § 2703(d) of specific and articulable facts demonstrating reasonable grounds to believe the information sought is relevant and material to an ongoing investigation, 18 U.S.C. § 2703(d) authorizes the Court to order cellular telephone providers to disclose existing cell-site usage records.

In addition, the Court is authorized to order disclosure of cell-site information on a prospective basis where, as here, the government's application is made not only under authority of SCA, but also under the Pen/Trap statute in a manner that demonstrates the prospective data to be relevant and material as the SCA requires, see 18 U.S.C. § 2703(d). CALEA prohibits the government from acquiring cell-site information prospectively if it is obtained "solely pursuant" to the Pen/Trap

(S.D.N.Y. 2000); Brown v. Mineta, E.D.N.Y., order issued March 22, 2005, at p. 5 n.5. Reconsideration is also authorized in criminal matters, either by extension of these rules or under common law principles. See United States v. Ibarra, 502 U.S. 1, 4 (1991); United States v. Dieter, 429 U.S. 6, 8 (1976); United States v. Healy, 376 U.S. 75, 78-80 (1964). While there is some question whether reconsideration of a district court decision in a criminal matter must be sought within 10 days or 30 days, see Canale v. United States, 969 F.2d 13 (2d Cir. 1992); United States v. Gross, 2002 WL 32096592, *1-*3 (E.D.N.Y. 2002), this motion is made within 10 days, excluding holidays and weekends, and is therefore timely on either view.

statute. 47 U.S.C. § 1002(a)(2)(B) (emphasis added). In contrast, however, an order that directs disclosure of cell-site information prospectively under authority of the SCA as well as the Pen/Trap statute complies with CALEA.

B. Cell-Site Data Constitutes "Records Or Other Information" Accessible To The Government Pursuant to the SCA

The holding of the August 25 Order is based on two erroneous conclusions: (1) that 18 U.S.C. § 2703 provides no authority for the Court to order disclosure of data relating to cell-site usage by a cellular telephone ("cell-site information"), August 25 Order at *1-2; and (2) that CALEA prohibits any use of the Pen/Trap statute to acquire cell-site information; August 25 Order at *3-4.

In reaching the first of these conclusions, the Court stated that "the only one" of 18 U.S.C. § 2703's provisions "that appears arguably to permit the disclosure of cell site location information is the language permitting the disclosure of 'the contents of a wire or electronic communication.'" August 25 Order at *1-2. The Court rejected that hypothesis, however, on the grounds that cell-site information constitutes a "communication from a tracking device," which is specifically exempted from the class of "electronic communications" discoverable under 18 U.S.C. §§ 2703(a) and 2703(b). August 25 Order at *1-2, relying on 18 U.S.C. § 2711(1) (incorporating by reference exceptions to definitions of "electronic communication," codified at U.S.C. § 2510(12), including communications from "tracking devices" under 18 U.S.C. § 3117).

While other aspects of the above rationale are also open to question,² we respectfully submit that the decisive error occurs at the outset: the August 25 Order ignores the controlling authority of 18 U.S.C. § 2703(c)(1)(B). In tandem with 18 U.S.C. § 2703(d), 18 U.S.C. §§ 2703(c)(1)(B) authorizes the government to apply for an order and for the court to compel disclosure of "record[s] or other information pertaining to a subscriber or customer of such service (not including the contents of

² As further discussed below, we respectfully submit that a cellular telephone cannot properly be characterized as a "tracking device" since the cell-site information that results from its use is far less precise than the information obtained by bona fide tracking devices under 18 U.S.C. § 3117, such as GPS transponders and "bumper beepers."

communications)." 18 U.S.C. § 2703(c)(1). The government's original application as well as its renewed application in this case (at ¶¶ 3, 10 and 11 of both applications) specifically relied on 18 U.S.C. § 2703(c)(1).

The "record[s] or other information" available to the government pursuant to 18 U.S.C. §§ 2703(c) include cell-site information. As a threshold matter, cell-site information is not the "contents of a communication" within the meaning of 18 U.S.C. §§ 2703(a) and 2703(b). In general, such "contents" includes only the "substance, purport, or meaning" of an electronic communication. 18 U.S.C. § 2510(12), incorporated by reference in the SCA at 18 U.S.C. § 2711(1). By contrast, cell-site information conveys what neighborhood or locale a person is in or is passing through when he operates a cellular telephone rather than what he said. Thus, cell-site information constitutes "information pertaining to a subscriber," rather than the "contents of a communication."

Secondly, the structure of the SCA, as first enacted and as later amended by CALEA, demonstrates an intention to authorize courts to order disclosure of a broad array of non-content information, including cell-site information. When it was first enacted, the SCA permitted the disclosure pursuant to court order (or subpoena) of the category of the catch-all category of "record[s] or other information pertaining to a subscriber or customer of such service (not including the contents of communications)," now codified at 18 U.S.C. § 2703(c)(1). See P.L. 99-508, 100 Stat. 1848, 1862 (1986). The accompanying 1986 Senate report emphasized the breadth of the "record or other information" language: "[t]he information involved is information about the customer's use of the service not the content of the customer's communications." S. Rep. No. 541, 99th Cong., 2d Sess., at 38 (1986).

Moreover, while Congress increased privacy protections with respect to detailed, non-content telephone transactional records when it enacted CALEA in 1994, CALEA's amendments to the SCA preserved the government's right of access to such data, including cell-site information. CALEA created a distinction between basic subscriber records (e.g., subscriber name and address, duration of call) and more detailed transactional data. Basic subscriber information could still be subpoenaed without notice, see 18 U.S.C. § 2703(c)(2). The government's access to "record[s] or other information pertaining to a subscriber to or customer of such service (not including the contents of communications)" and outside the scope of basic subscriber records was conditioned, however, on its obtaining a search

warrant or alternatively, a 2703(d) order, as newly defined by CALEA. See P.L. 103-322, Title XXXIII, 330003(b) (1994); P.L. 103-414, Title II, § 207(a) (1994).

As the August 25 Order acknowledges (at *1), under the SCA as amended by CALEA, courts are empowered to issue a 2703(d) order if the government offers "specific and articulable facts showing that there are reasonable grounds to believe that the . . . records or other information sought are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Congress intended this new "intermediate standard," midway between the standard required for issuance of a subpoena and for a search warrant, H.R. Rep. No. 827(I), 103rd Cong., 2d Sess., ("House CALEA Report") at 31 (1994), to apply to detailed transactional data, including cell-site information. In discussing the newly-added provisions of 18 U.S.C. §§ 2703(c)(1), the House Report emphasized that the drafters understood that "transactional records from on-line communication services reveal more than telephone records or mail records." House CALEA Report at 31. Accordingly, the government henceforth would be permitted to obtain the addresses used in email messages if (at minimum) it satisfied the "reasonable grounds" requirements of 18 U.S.C. § 2703(d). House CALEA Report at 31.

If anything, an individual's privacy interest in the identity of his email correspondents exceeds his privacy interest in the identity of the neighborhood or locale in which he operates a cellular telephone. That Congress expressly stated that the SCA as amended by CALEA was intended to authorize disclosure of email address information upon a proper showing under 18 U.S.C. § 2703(d), demonstrates that Congress likewise intended 18 U.S.C. § 2703(d) to govern arguably less intrusive categories of detailed, non-content telephone transactional records -- including cell-site information.

C. CALEA's Ban On Cell-Site Data Acquired
"Solely Pursuant" To The Pen/Trap Statute
Is Satisfied By An Order Issued Under
Dual Authority Of § 3123 and § 2703(d)

The August 25 Order, at *3, states that "[t]he government . . . does not rely on the pen register statute" and, in any event, "Congress appears to have prohibited it from doing so" to obtain cell-site information. As to the first point, we respectfully submit that the government did in fact invoke the authority of the Pen/Trap statute in its original and renewed applications for, inter alia, a cell-site location order. To the extent that there was previously a lack of clarity on that score,

we seek to dispel it now. The government seeks by this application to obtain authority under authority of both the SCA and the Pen/Trap statute.

As further explained below, cell-site information that the government seeks to obtain on a prospective basis is both "records or other information," see 18 U.S.C. §§ 2703(c), access to which is conditioned on a court issuing an order that complies with 18 U.S.C. § 2703(d) of the SCA, and information that requires installation of a pen register, access to which is conditioned on a court issuing an order under 18 U.S.C. §§ 3122 and 3123 of the Pen/Trap statute. Accordingly, each time in the government's applications (see ¶¶ 1, 6, 7 thereto) that we invoked 18 U.S.C. §§ 3122 and 3123 to seek pen register data in applications (see ¶¶ 3, 10 and 11 thereto) that also sought disclosure of cell-site information under the SCA, the citations to the Pen/Trap statute were likewise for the purpose of obtaining cell-site information.

As to the assertion that Congress has banned any use of pen registers to obtain cell-site information, we respectfully submit that the conclusion is at odds with CALEA's careful phrasing. CALEA authorizes the use of a pen register in circumstances such as these, in which the SCA's requisites of articulate facts demonstrating reasonable grounds are also satisfied. See 18 U.S.C. § 2703(d). The provision of CALEA that the August 25 Order cited to deny the government's application provides as follows:

(a) ... a telecommunications carrier shall ensure that its equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications are capable of -

...

(2) expeditiously isolating and enabling the government, pursuant to a court order or other lawful authorization, to access call-identifying information that is reasonably available to the carrier- . . .

except that, with regard to information acquired solely pursuant to the authority for pen registers and trap and trace devices (as defined in section 3127 of title 18, United States Code), such call-identifying information shall not include any information that may disclose the physical location of the subscriber (except to the extent that the location may be determined from the telephone number). . . .

CALEA § 103(a), codified at 47 U.S.C. § 1002 (emphasis added).

There is no dispute that "[i]nformation that may disclose the physical location of the subscriber" includes cell-site information of the kind in issue here. Congress' prohibition on the use of pen registers to obtain cell-site information, however, is limited to circumstances in which that data is "acquired solely pursuant" to the authority of 18 U.S.C. § 3127 of the Pen/Trap statute. Moreover, CALEA contains not only the "solely pursuant" clause governing the Pen/Trap statute, but also the provisions discussed above (at 3-4) that amend the SCA to authorize the disclosure of cell-site information, provided the government articulates facts demonstrating "reasonable grounds to believe" that the information sought is "relevant and material". 18 U.S.C. § 2703(d). Accordingly, by amending the SCA, CALEA created authority distinct from the Pen/Trap statute -- i.e., not "solely pursuant" to that statute -- that authorizes the release to the government of "information that may disclose the physical location of" a cellular telephone subscriber."

In this case, as is our practice, the government has not sought to acquire cell-site information "solely pursuant" to the Pen/Trap statute, but as well under the more demanding requirements of the SCA. Under the Pen/Trap statute, a court is empowered to authorize the installation of a pen register or trap and trace device upon the mere finding that a law enforcement officer "has certified . . . that the information sought is likely to be obtained . . . is relevant to an ongoing investigation. 18 U.S.C. § 3123(b). We do not seek authorization to obtain cell-site information based on a mere finding that the government has certified the information's likely relevance. Rather, we have sought it based on the provisions of the SCA that require the government to articulate and for a neutral magistrate to find "reasonable grounds to believe" that the information sought is "relevant and material to" that investigation. 18 U.S.C. § 2703(d). See Point B above.

That is not to say that the order that we propose could or should issue based solely on authority of the SCA. We agree with those portions of the August 25 Order (at *3-4) that recognize the Pen/Trap statute plays a governing role in the issuance of orders requiring the prospective disclosure of cell-site obtained from the installation by a provide of a special device or process. As amended by the USA PATRIOT ACT,³ the terms

³ P.L. 107-56, 115 Stat. 272 (2001).

"Pen register" and "trap and trace device" now include "dialing, routing, addressing and signaling information." See 18 U.S.C. §§ 3127(3) (pen register) and 3127(4) (trap and trace device). Service providers use cell-site information for several of those functions and in particular, the routing of calls from their point of origin to their intended destination. Accordingly, orders directing the prospective collection of cell-site information must issue under the complementary authority of the Pen/Trap statute and -- to comply with CALEA -- of the SCA.

D. Cell-Site Information Does Not
Convert A Cellular Telephone Into
A "Tracking Device" Requiring A Warrant

The August 25 Order expresses concern that disclosure of cell-site information pursuant to 18 U.S.C. § 2703 "would effectively allow the installation of a tracking device without the showing of probable cause normally required for a warrant" August 25 Order at *2. Underlying this concern is the assertion that cell-site information is the functional equivalent of physical surveillance of the cellular telephone because "it reveals that person's location at a given time" *Id.* We respectfully submit that these concerns are unfounded.

First, it is not the general rule that a "tracking device" requires a search warrant. For example, there is no requirement that law enforcement obtain a warrant for a proximity beeper installed in a car tracked on the open road. See United States v. Knotts, 460 U.S. 276 (1983). Second, although future improvements in cell-site technology may permit the location of a cellular phone user to be pinpointed, that is not the present state of the technology. Cell-sites only reveal the general vicinity of the person using a cellular telephone and the general direction in which they are moving if they are in transit.

Thus, it is inaccurate to say a law enforcement officer's access to cell-site information gives him a virtual view of a target's location. Rather, it only gives him access to routing information of the kind that is ordinarily used by the telephone service provider and as to which a subscriber has at best a limited privacy interest. See Smith v. Maryland, 442 U.S. 735, 744 (1979) (no "seizure" within meaning of Fourth Amendment occurred when police obtained data obtained via pen register installed on hardline telephone).⁴ Accordingly, Congress'

⁴ In Smith, the defendant "assumed the risk" that telephone numbers he dialed would be disclosed by telephone

decision to authorize the disclosure of cell-site information upon the showings required by the SCA and the Pen/Trap statute is entirely appropriate.

Respectfully submitted,

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company, since "the switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber".
Id.