Requester: Catherine Crump  Request Number: 07-4123

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

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 enclosure to this letter explains the exceptions in more detail.

Section 552  Section 552a
[ ] (b)(1) [ ] (b)(4) [ ] (b)(7)(B) [ X ] (j)(2)
[ ] (b)(2) [ ] (b)(5) [ ] (b)(7)(C) [ ] (k)(2)
[ ] (b)(3) [ ] (b)(6) [ ] (b)(7)(D) [ ] (k)(5)
________________ [ ] (b)(7)(A) [ X ] (b)(7)(E) [ ]
________________ [ ] (b)(7)(F) [ ]
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,

[Signature]

Karen M. Youngren
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;

(f)(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/her identity would be held in confidence;

(k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service 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.
There are 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 orders:** Use this when you want cell site information for your cell phone that is historical (i.e., between May 1, 2007 and today). 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 you can ask for (1) cell site only; (2) cell site and GPS information; or (3) GPS info only. The agent must provide a declaration in support demonstrating probable cause to believe that the information will provide evidence of the crimes being investigated. 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 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.
For those who are still reading, this seems like an appropriate time to remind you that if you want to\[\text{\textbackslash R}1\text{\textbackslash E}\] you must now get a Rule 41 warrant - please see S:\Criminal Forms\Complaint\ Tracking Devices for the forms.
***Note: if you are requesting only cell site data, use this form, the Hodor declaration, and your agent's declaration. If 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.***

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

GEORGE S. CARDONA
United States Attorney
THOMAS P. O' BRIEN
Chief, Criminal Division

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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 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)

Prospective Cell site [and GPS]/Fugitive/June 22, 2007

RIP

h7E
The United States of America, by and through its counsel of record, the United States Attorney for the Central District of California, hereby applies for an order authorizing the disclosure of cell site information, [IF WANT GPS INFO: as well as "GPS information"] at such intervals and times as the government may request, and the furnishing of all information, facilities, and technical assistance necessary to accomplish said disclosure unobtrusively, which disclosure will establish the approximate location of the following cellular telephone[s] for a period of 45 [IF REQUESTING ONLY CELL SITE, MAY REQUEST 60 DAYS] days [IF MORE THAN ONE, USE SUBPARAGRAPH STRUCTURE BELOW]:

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

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

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

This application involves a fugitive investigation, and is based on the attached memorandum of points and authorities, and declarations of 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].

DATED: ____________

Respectfully submitted,

GEORGE S. CARDONA
United States Attorney

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

[YOU]
Assistant United States Attorney

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

I

INTRODUCTION

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

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

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

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

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

This information is sought based on the legal authority of the All Writs Act, 28 U.S.C. §
1651(a), as well as on the Court's inherent authority.¹

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

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

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).

³ The government does not concede that a showing of
probable cause is required for this Court to issue orders
authorizing the government to obtain cell site and GPS
information. In light of the applicability of the All Writs Act
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
authorizing the government to obtain this information.
similar program, which will establish the approximate location of
the Subject Telephone[s], and which information is acquired in
the first instance by the cellular telephone service provider
(referred to herein as "GPS information"). This information is
sought based on the authority in Federal Rule of Criminal
Procedure 41(b)(1) and (2) and the All Writs Act, and will be
obtained in conformity with the procedures of Federal Rule of
Criminal Procedure 41.

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

This application further seeks an order that: (1) authorizes
the disclosure of the requested information whether the Subject
Telephone[s] [is/are] located within this District, outside of
the District, or both; (2)
[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..."
is calculated in its sound judgement to achieve the ends of justice entrusted to it."). Because a federal court has already issued an arrest warrant for the fugitive, an order that a cellular telephone service provider provide the requested cell site information [and GPS information] to law enforcement is an order in furtherance of the jurisdiction of the Court. See, e.g., United States v. X, 601 F. Supp. 1039, 1042 (D. Md. 1984) ("other Orders, such as an arrest warrant, may also serve as the predicate for an All Writs Act Order"). [INCLUDE THIS FOOTNOTE ONLY IF YOU ARE NOT GETTING GPS: ]

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

--

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

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

The Supreme Court in New York Telephone agreed with the
district court's ruling that a pen register could be authorized
under Rule 41 of the Federal Rules of Criminal Procedure. A key
distinction between New York Telephone and this case, however, is
that in this case the Court has already issued an arrest warrant,
such that the cell site order sought is in furtherance of the
Court's jurisdiction, whereas in New York Telephone there was no
such arrest warrant, so that an order to implement a pen register
was arguably not in furtherance of the district court's
721 (E.D. Va. 1984) ("The Supreme Court, mindful that the All
Writs Act cannot be used to extend jurisdiction, looked first at
the independent authority the district court had to issue that
portion of the pen register order authorizing agents of the FBI
to install and use pen registers."). More importantly for the
purposes of the instant application, the Supreme Court in New
York Telephone held that the All Writs Act permitted issuance of
an order compelling the telephone company to provide the
assistance sought. 434 U.S. at 171-78.
In recognizing the authority of the district court to issue an order under the All Writs Act compelling the requested assistance from the telephone company, the Supreme Court described broadly the scope of judicial power under the All Writs Act. "Indeed," the Supreme Court wrote, "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." 434 U.S. at 172-73. The Supreme Court took note of other facts supporting the conclusion that the order compelling the phone company to provide assistance was consistent with the All Writs Act, which facts are present here: that there was probable cause to believe the phone company's facilities were being used to facilitate the crime, that the telephone company was a highly regulated public utility with the duty to serve the public, and that the use of a pen register was by no means offensive to the phone company. Id. at 174.

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

Thirdly, law enforcement's acquisition of the cell site
information [and GPS information] is by no means offensive to the
 cellular telephone service provider, which collects this
information for itself anyway. See Hodor Declaration, ¶¶ 8-25.

As one court said in the similar context of an All Writs Act
application for credit card records, "Withholding information
that could lead to apprehension of a fugitive in no way serves"
the company's interest. Hall, 583 F. Supp. at 721.

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

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

Prospective Cell Site [and GPS] / Fugitive / June 22, 2007
8
Even if Hall's "absolutely necessary" requirement were imposed in this case, however, it is satisfied here. The district judge in Hall stated that "the absolute necessity refers not to catching the fugitive but to obtaining the . . . records" -- that is, the supposed requirement looks at whether the assistance of the company receiving the order is absolutely necessary in producing the records sought, as in the case where no one else could produce those records. See 583 F. Supp. at 721-22 & n.2. Here, no one but the cellular telephone service provider could produce the information sought. See [AGENT] Dec. at ¶ [NUMBER].

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

cites only to two pages and a footnote from New York Telephone, see 12 Suffolk U.L. Rev. at 1032 & n.29, which portions of the opinion do not, as just noted in text, say that necessity is a requirement before a court may issue an order under the All Writs Act. The invention of the necessity requirement in the Comment 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.
that there is probable cause to believe that the requested
location information will cast light on the fugitive's current
whereabouts. See United States v. X, 601 F. Supp. at 1042
"Here, as in the case before Judge Nickerson, an Order pursuant
to the All Writs Act is 'necessary and [sic] appropriate,' in the
light of the Special Agent's statements that defendant X has
disappeared; that efforts to locate him have been unsuccessful;
that it is likely the defendant maintains telephone contact with
his close relatives; and that is likely the requested toll
records will provide information concerning defendant's current
whereabouts, thereby preventing frustration of this Court's
earlier-issued arrest warrant.").

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

Because of the particular features of this application,
including the fact that it seeks an order based upon the Court's
authority under the All Writs Act, the showing of probable cause
and the fact that an arrest warrant for the fugitive already exists, the cell site information [and GPS information] sought by the government

[FREEI]

[...]

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

B. Federal Rule of Criminal Procedure Rule 41

Federal Rules of Criminal Procedure 41(b)(1) and (2), and (c), as well as 18 U.S.C. § 2703(c)(1)(A) and the All Writs Act, also 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.7

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. [FREEI]

7 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.

Prospective Cell site [and GPS]/ fugitive / June 22, 2007
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
have an adverse result. An adverse result is defined in 18
U.S.C. § 2705(a)(2) as including endangering the life or physical
safety of a person, flight from prosecution, destruction of or
tampering with evidence, intimidation of potential witnesses, and
serious jeopardy of an investigation. Moreover, the Advisory
state that delay of notice may be appropriate where "the officer
establishes that the investigation is ongoing and that disclosure
of the warrant will compromise that investigation." The attached
declaration of [AGENT] provides reasonable cause to believe that
immediate notification of the execution of the order may have an
adverse result, and the proposed order both provides for the
giving of such notice within 30 days after the date that the
disclosure ends and prohibits, as part of the receipt of the
requested information, the seizure of any tangible property or
any other prohibited wire or electronic information as stated in

III

CONCLUSION

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

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

DECLARATION OF [AGENT]

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

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

PURPOSE OF DECLARATION

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

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

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

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

PROBABLE CAUSE

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

[IF SEEKING GPS INFO:

GROUND FOR DELAYING NOTICE

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

Prospective Cell site [and GPS] / fugitive / June 22, 2007
exists to delay the service of the order as normally required for a period of 30 days beyond the end of the disclosure period because [INSERT FACTS RELATING TO WHY GOOD CAUSE EXISTS; INCLUDE REFERENCE TO A PARTICULAR ADVERSE RESULT. FOR EXAMPLE:

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]
GEORGE S. CARDONA  
United States Attorney  
THOMAS P. O'BRIEN  
Assistant United States Attorney  
Chief, Criminal Division  
[YOU] (CA Bar No. _____)  
Assistant United States Attorney  
XX00 United States Courthouse  
312 North Spring Street  
Los Angeles, California 90012  
Telephone: (213) 894-XXXX  
Facsimile: (213) 894-XXXX  
Email: XXXX@usdoj.gov  

Attorneys for Applicant  
United States of America  

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  

IN RE CELLULAR TELEPHONE[S]  

No.  
(proposed) ORDER  
(UNDER SEAL)  

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

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

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

[ ]

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

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

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

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

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

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

8. 

9. [TELEPHONE COMPANY] shall execute the Court's order as soon as practicable after it is signed. If a copy of the order is given to any cellular telephone service provider, the copy may be redacted by law enforcement to exclude the Target Subjects or fugitive 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 fugitive investigation, the applicable cellular telephone service providers and their agents and employees shall not disclose to or cause a disclosure of this Court's order, 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 agents and employees are ordered not to make any disclosure to the lessees of the telephone or telephone subscribers.

DATED: ____________________________

HONORABLE [judge]
UNITED STATES MAGISTRATE JUDGE.
The United States of America, by and through its counsel of record, the United States Attorney for the Central District of California, hereby applies for an order pursuant to 18 U.S.C. §§ 2703(c) and (d) authorizing the disclosure of historical “cell site” information for the following cellular telephone[s] for the dates [DATE] through [DATE]:

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

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

I.

DISCUSSION

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

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

[A] court order for disclosure . . . may be issued . . . if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that . . . the records of other information sought, are relevant and material to an ongoing criminal investigation.
Here, the government seeks historical cell site records, that is, information, apart from the content of any communication, concerning the cell sites/sectors that received or transmitted signals to and from the Subject Telephone[s] during the requested period.

B. *Offer of Specific and Articulable Facts*

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

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

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

II

**CONCLUSION**

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

DATED: August 1, 2008

Respectfully submitted,

GEORGE S. CARDONA
United States Attorney

THOMAS P. O’BRIEN
Assistant United States Attorney
Chief, Criminal Division
Assistant United States Attorney

Attorneys for Applicant
United States of America
GEORGE S. CARDONA  
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Attorneys for Applicant  
United States of America  

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  

IN RE CELLULAR TELEPHONE[S]  
[proposed] ORDER  
(UNDER SEAL)  

Upon application by the United States of America relating to 
an order pursuant to 18 U.S.C. §§ 2703(c) and (d) authorizing the 
disclosure of historical cell site information for the following 
cellular telephone[s] for the dates [DATE] through [DATE][IF MORE  
THAN ONE, USE SUBPARAGRAPH STRUCTURE BELOW]:  
(a) [TARGET NUMBER], a cellular telephone issued by  
[TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and  
believed to be used by [USER] ("Subject Telephone #1"); and  

Cell site historical / June 22, 2007  
1
(b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject Telephone #2, and concurrently with Subject Telephone #1 referred to as "the Subject Telephones"),

THIS COURT FINDS THAT the government has offered 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.

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

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

2. [TELEPHONE COMPANY/IES] shall execute the Court’s order as soon as practicable after it is signed. If a copy of the order 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.

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

4. To avoid prejudice to this criminal investigation, the applicable cellular telephone service provider[s] and [its/ their] agents and employees shall not disclose or cause a disclosure of this Court's order, 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 agents and employees are ordered not to make any disclosure to the lessees of the telephone or telephone subscribers.

IT IS SO ORDERED.

DATED: ___________________________

HONORABLE [judge]
UNITED STATES MAGISTRATE JUDGE
***Note: if you want EITHER GPS data, or cell site info for whenever the phone is turned on, you must include the procedures 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.***

***Note: if you are requesting only cell site data, use this form, the Hodor declaration, and your agent's declaration. If 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.***

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

THOMAS P. O'BRIEN
United States Attorney
CHRISTINE C. EWELL
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Chief, Criminal Division
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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)

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

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

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

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

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

DATED: ______________

Respectfully submitted,

THOMAS P. O'BRIEN
United States Attorney

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

[YOU]
Assistant United States Attorney

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

I

INTRODUCTION

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

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

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

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

¹ In order for a cellular telephone to make or receive a 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;

Prospective Cell site (and GPS)/ investigation / July 28, 2008

RIF
(for outbound calling), call termination (for incoming calls),
and, if reasonably available, during the progress of a call.
This information, which is acquired in the first instance by the
cellular telephone service provider, includes any information,
apart from the content of any communication, that is reasonably
available to the service provider and that is requested by the
[AGENCY], concerning the cell sites/sectors receiving and
transmitting signals to and from the Subject Telephone[s] [ONLY IF
SEEKING GPS OR FOLLOWING RULE 41 PROCEDURES:]

This information is sought based on the
combined authority of 18 U.S.C. § 3121 et seq. (the "Pen Register
Statute") and 18 U.S.C. §§ 2701-11 (the "Stored Communications
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
"base station." Sensors within the base station detect which
tower and sector makes radio contact with a cellular telephone.
(Hodor Decl. ¶¶ 9-11, at 6-7).

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).
The attorney for the government has made the required certification at the end of this application.

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

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

---

3 In light of the government's showing of probable cause herein, this application does not rely on, and this Court need not consider the validity of, the government's continuing position that courts may issue orders authorizing the government to obtain cell site and GPS information based on the combined effect of the Pen Register Statute and the Stored Communications 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.
disclosure ends. [YOU MAY ASK FOR A LONGER PERIOD OF DELAY NOW
TO A DATE CERTAIN IF YOU CAN STATE WHY THE FACTS OF THIS CASE
JUSTIFY SUCH AN ORDER, OR YOU MAY ASK FOR CONTINUANCES OF THE
DELAY AS NEEDED. AGAIN, CONTINUANCES SHOULD GO TO THE SAME
JUDGE]. As discussed in the attached declaration of [AGENT],
immediate notification of this order to the user of the Subject
Telephone[s] may have an adverse result.]

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

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 an investigation
of offenses committed by [TARGET], specifically violations of

Prospective Cell site [and GPS]/ Investigation / July 26, 2008

R E P
b 7 E
[STATUTES AND DESCRIPTIONS], and is based upon the certification by the attorney for the government as well as 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 Pen Register Statute and the Stored Communications Act

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

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

The Pen Register Statute, as amended by the USA PATRIOT Act, permits courts to issue ex parte orders permitting telephone service providers or law enforcement officials to install and use pen registers and trap and trace devices. The statute defines a "pen register" as "a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication." 18 U.S.C. § 3127(3)(emphasis added). The statute defines a "trap and trace device" as "a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, or signaling information reasonably likely to
identify the source of a wire or electronic communication,  
provided, however, that such information shall not include the  
contents of any communication." 18 U.S.C. § 3127(4) (emphasis  
added).

The definitions of a "pen register" and a "trap and trace  
device" in the Pen Register Statute include the cell site  
information the government seeks here. As explained in the Hodor  
declaration, a cellular telephone transmits signals to the  
nearest cell tower or towers when the user makes a call and also  
transmits information to such towers when the cell phone is on,  
even if a call is not in progress, in order for the cellular  
telephone to register its presence in the network. (Hodor Decl.  
¶ 9-11). These transmissions constitute "signaling information"  
under the definitions in the Pen Register Statute, which are set  
forth above, and thus the statute permits an order for cell site  
information upon an appropriate application by the government.  

See In Re: Application of the United States for an Order for  
Prospective Cell Site Location Information on a Certain Cellular  

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

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

Prospective Cell site [and GPS] Investigation / July 28, 2006
provisions of the Stored Communication Act, which also governs cell site information.

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

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

47 U.S.C. § 1002(a)(2) (emphasis added). The government recognizes that cell site information "may disclose the physical location of the subscriber" and that the "solely pursuant" clause of CALEA set forth above prevents the government from obtaining such cell site information pursuant to the Pen Register Statute alone. Section 1002 does not, however, preclude entirely the disclosure of cell site information under the Pen Register Statute, but, rather, permits such disclosure pursuant to a combination of the Pen Register Statute and some additional authority. That additional authority is the Stored Communications Act.
Section 2703(c)(1)(B) of the Stored Communications Act provides that "[a] government entity may require a provider of electronic communication service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications). . . . when the governmental entity" obtains a court order for such disclosure pursuant to Section 2703(d). 18 U.S.C. § 2703(c)(1)(B).

The definition of terms in the Stored Communications Act makes clear that the "record or other information" that a court may order a provider to disclose to the government under Section 2703(d) includes cell site information. First, the Stored Communications Act expressly adopts the definition of statutory terms set forth in 18 U.S.C. § 2510. See 18 U.S.C. § 2711 ("As used in this chapter . . . (l) the terms defined in section 2510 of this title have, respectively, the definitions given such terms in that section"). Thus, the term "provider of electronic communication service" used in Section 2703(c) covers cellular telephone service providers, because 18 U.S.C. § 2510(15) defines "electronic communications service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). Further, cell site information is "a record or other information pertaining to a subscriber to or customer of" an electronic communications service -- another term used in Section 2703(c) -- because, as indicated by the Hodor declaration, cellular telephone service providers receive and store the information, if
sometimes only momentarily, before forwarding it to law
enforcement officials. (Hodor Decl. ¶¶ 14, 17-25). See In Re:
Application of the United States for an Order for Prospective
Cell Site Location Information on a Certain Cellular Telephone,

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

4 As discussed in the attached declaration of Mr. Hodor,
this application does not seek latitude and longitude data (often
colloquially referred to as “GPS information”) either via the
“handset based” or “network based” systems. (Hodor Decl. ¶¶ 30-
37). Accordingly, this application is not made pursuant to
Federal Rule of Criminal Procedure 41.
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. 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.
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) 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 warrant may be delayed if, inter
alia, the court finds reasonable cause to believe that providing
immediate notification of the execution of the warrant may have
an adverse result. An adverse result is defined in 18 U.S.C. §
2705(a)(2) as including endangering the life or physical safety
of a person, flight from prosecution, destruction of or tampering
with evidence, intimidation of potential witnesses, and serious
jeopardy of an investigation. Moreover, the Advisory Committee
delay of notice may be appropriate where “the officer establishes
that the investigation is ongoing and that disclosure of the
warrant will compromise that investigation.” The attached
declaration of [AGENT] provides reasonable cause to believe that
immediate notification of the execution of the warrant may have
an adverse result, and the proposed warrant both provides for the
giving of such notice within 30 days after the date that the
disclosure ends and prohibits, as part of the receipt of the
requested information, the seizure of any tangible property or
any other prohibited wire or electronic information as stated in 18 U.S.C. § 3103a(b)(2).}  

III  

CONCLUSION  

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

IV  

CERTIFICATION  

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

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

DATE  

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

Prospective Cell site (and GPS)/ investigation / July 28, 2008
***Note: this declaration goby is designed to ensure that the
same language that is in the application makes it into the
declaration - it is not a strict structural requirement, nor are
the headings required***

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

DEPARTMENT OF [AGENT]

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

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

PURPOSE OF DECLARATION

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

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

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

[Signature]

RIF
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  [IF SEEKING GPS INFO:
23  GROUNDS FOR DELAYING NOTICE
24  6. Based on my training and experience and my
25  investigation of this matter, I believe that reasonable cause
26  exists to delay the service of the warrant as normally required
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for a period of 30 days beyond the end of the disclosure period
because [INSERT FACTS RELATING TO WHY GOOD CAUSE EXISTS; INCLUDE
REFERENCE TO A PARTICULAR ADVERSE RESULT. FOR EXAMPLE:]

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]
THOMAS P. O’BRIEN
United States Attorney
CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division
[YOU] (CA Bar No. _____)
Assistant United States Attorney
XXX0 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-XXXX
Facsimile: (213) 894-XXXX
Email: XXXX@usdoj.gov

Attorneys for Applicant
United States of America

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

IN RE CELLULAR
TELEPHONE[S]  No. ________________
) [proposed] [WARRANT] [ORDER]
)  ) (UNDER SEAL)
)  )
)  )

Upon application by the United States of America, supported by the declarations of Henry Hodor, [IF REQUESTING GPS INFO: Eric A. Kischer], and [AGENT], for [a warrant and] orders relating to the following cellular telephone[s] [IF MORE THAN ONE, USE SUBPARAGRAPH STRUCTURE BELOW]:
(a) [TARGET NUMBER], a cellular telephone issued by [TELEPHONE COMPANY], subscribed to [SUBSCRIBER INFORMATION] and believed to be used by [USER] (“Subject Telephone #1”); and

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

RIF
(b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject
Telephone #2, and concurrently with Subject Telephone #1 referred
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 violations of
[STATUTES AND DESCRIPTIONS], being committed by [TARGET] [and
others [known and] unknown].

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

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

GOOD CAUSE HAVING BEEN SHOWN, THIS COURT HEREBY ISSUES THIS
WARRANT AND FURTHER 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]

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

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

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

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

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

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

8. []

[ ] ranged telephone number(s) assigned to an

Prospective Cell site (and GPS)/ investigation / July 28, 2009
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
agents and employees are ordered not to make any disclosure to
the lessees of the telephone or telephone subscribers.

HONORABLE [judge]
UNITED STATES MAGISTRATE JUDGE

DATE/ TIME OF ISSUE: ______________________

AFFIANT NAME/ AGENCY: ______________________
RETURN FOR GPS / CELL SITE WARRANT

This return is being submitted pursuant to Federal Rule of Criminal Procedure 41(f)(2) in relation to the court warrant in case [INSERT CASE NUMBER OF ORIGINAL WARRANT, e.g., "08-0441(A)M"] (the "Warrant"). The Warrant was signed on [DATE] by the Hon. [INSERT MAG. JUDGE WHO SIGNED Warrant], United States Magistrate Judge.

The Warrant authorized the disclosure of GPS and/or cell site information relating to the following Telephone(s) (the "Target Telephone(s)"): [IF PHONES DEFINED WITH SHORT NAMES IN ORIGINAL WARRANT, insert the following: Target Telephone [# X] [and Target Telephone # Y], as described in the Warrant.]
[FOR BOTH OPTIONS NO.1 AND NO. 2 - IF NO INFORMATION RECEIVED ON ONE OR MORE PHONES ADD: No information was obtained for [NAME OF PHONE. e.g. "Target Telephone 8"].

[IF ORIGINAL APP. AND Warrant FILED UNDER SEAL ADD: The Warrant was filed under seal. Therefore, I request that this
return be filed under seal as well, for the reasons set forth in
the Warrant, and to protect the integrity of the ongoing criminal
investigation.]

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

[Agency] [Special Agent] [Agent Name] Date

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

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

United States Magistrate Judge Date
**Note: if you want EITHER GPS data, or cell site info for whenever the phone is turned on, you must include the procedures 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.**

**Note: if you are requesting only cell site data, use this form, the Hodor declaration, and your agent's declaration. If 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.**

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

THOMAS P. O'BRIEN
United States Attorney
CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

[YOU] (CA Bar No.____)
Assistant United States Attorney
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Attorneys for Applicant
United States of America

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

IN RE CELLULAR TELEPHONE[S]

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Prospective Cell site (and GPS)/ investigation / August 27, 2008

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

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

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

[IF REQUESTING GPS INFO: This application also seeks authorization under 18 U.S.C. § 3103a(b), for reasonable cause shown, to delay notification of the above Warrant to the subscriber and users of the Subject Telephone for a period of 30 days from the date that the disclosure ends. [YOU MAY ASK FOR A LONGER PERIOD OF DELAY NOW TO A DATE CERTAIN IF YOU CAN STATE WHY THE FACTS OF THIS CASE JUSTIFY SUCH AN ORDER, OR YOU MAY ASK FOR CONTINUANCES OF THE DELAY AS NEEDED. IF YOU SEEK A CONTINUANCE, GO FIRST TO THE JUDGE WHO SIGNED THIS ORDER/ Warrant]
This application is based on the attached memorandum of points and authorities, including the certification by the attorney for the government, and declarations of 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].

DATED: ____________

Respectfully submitted,

THOMAS P. O'BRIEN
United States Attorney

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

[YOU]
Assistant United States Attorney

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

I

INTRODUCTION

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

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

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

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

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\(^1\) In order for a cellular telephone to make or receive a 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;

Prospective Cell site [and GPS] investigation / August 27, 2008

RIF
(for outbound calling), call termination (for incoming calls),\(^2\) and, if reasonably available, during the progress of a call. This information, which is acquired in the first instance by the cellular telephone service provider, includes any information, apart from the content of any communication, that is reasonably available to the service provider and that is requested by the [AGENCY], concerning the cell sites/sectors receiving and transmitting signals to and from the Subject Telephone[s](\textsuperscript{[1]} \textsuperscript{[2]})\(^{1,2}\). This information is sought based on the combined authority of 18 U.S.C. § 3121 \textit{et seq.} (the "Pen Register Statute") and 18 U.S.C. §§ 2701-11 (the "Stored Communications

\(^2\) 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).
The attorney for the government has made the required certification at the end of this application.

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

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

3 In light of the government's showing of probable cause herein, this application does not rely on, and this Court need not consider the validity of, the government's continuing position that courts may issue orders authorizing the government to obtain cell site and GPS information based on the combined effect of the Pen Register Statute and the Stored Communications 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.
disclosure ends. [YOU MAY ASK FOR A LONGER PERIOD OF DELAY NOW TO A DATE CERTAIN IF YOU CAN STATE WHY THE FACTS OF THIS CASE JUSTIFY SUCH AN ORDER, OR YOU MAY ASK FOR CONTINUANCES OF THE DELAY AS NEEDED. AGAIN, CONTINUANCES SHOULD GO TO THE SAME JUDGE]. As discussed in the attached declaration of [AGENT], immediate notification of this order to the user of the Subject Telephone[s] may have an adverse result.]

This application further seeks an order that: (1) authorizes the disclosure of the requested information whether the Subject Telephone[s] [is/are] located within this District, outside of the District, or both; (2) [ ] 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 an investigation of offenses committed by [TARGET], specifically violations of
[STATUTES AND DESCRIPTIONS], and is based upon the certification
by the attorney for the government as well as 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 Pen Register Statute and the Stored Communications Act

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

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

The Pen Register Statute, as amended by the USA PATRIOT Act,
permits courts to issue ex parte orders permitting telephone
service providers or law enforcement officials to install and use
pen registers and trap and trace devices. The statute defines a
"pen register" as "a device or process which records or decodes
dialing, routing, addressing, or signaling information
transmitted by an instrument or facility from which a wire or
electronic communication is transmitted, provided, however, that
such information shall not include the contents of any
communication." 18 U.S.C. § 3127(3) (emphasis added). The
statute defines a "trap and trace device" as "a device or process
which captures the incoming electronic or other impulses which
identify the originating number or other dialing, routing,
addressing, or signaling information reasonably likely to
identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication." 18 U.S.C. § 3127(4) (emphasis added).

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

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

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

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

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

47 U.S.C. § 1002(a)(2) (emphasis added). The government recognizes that cell site information "may disclose the physical location of the subscriber" and that the "solely pursuant" clause of CALEA set forth above prevents the government from obtaining such cell site information pursuant to the Pen Register Statute alone. Section 1002 does not, however, preclude entirely the disclosure of cell site information under the Pen Register Statute, but, rather, permits such disclosure pursuant to a combination of the Pen Register Statute and some additional authority. That additional authority is the Stored Communications Act.
Section 2703(c)(1)(B) of the Stored Communications Act
provides that "[a] government entity may require a provider of
electronic communication service to disclose a record or other
information pertaining to a subscriber to or customer of such
service (not including the contents of communications) . . . when
the governmental entity" obtains a court order for such
disclosure pursuant to Section 2703(d). 18 U.S.C.
§ 2703(c)(1)(B).

The definition of terms in the Stored Communications Act
makes clear that the "record or other information" that a court
may order a provider to disclose to the government under Section
2703(d) includes cell site information. First, the Stored
Communications Act expressly adopts the definition of statutory
used in this chapter . . . (1) the terms defined in section 2510
of this title have, respectively, the definitions given such
terms in that section"). Thus, the term "provider of electronic
communication service" used in Section 2703(c) covers cellular
telephone service providers, because 18 U.S.C. § 2510(15) defines
"electronic communications service" as "any service which
provides to users thereof the ability to send or receive wire or
electronic communications." 18 U.S.C. § 2510(15). Further,
cell site information is "a record or other information
pertaining to a subscriber to or customer of" an electronic
communications service -- another term used in Section 2703(c) --
because, as indicated by the Hodor declaration, cellular
telephone service providers receive and store the information, if
sometimes only momentarily, before forwarding it to law

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

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4 As discussed in the attached declaration of Mr. Hodor, this application does not seek latitude and longitude data (often colloquially referred to as "GPS information") either via the "handset based" or "network based" systems. (Hodor Decl. ¶¶ 30-37). Accordingly, this application is not made pursuant to 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. 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.]

\[\text{Again, the government does not concede that probable cause must be shown to obtain the GPS information sought, but nonetheless provides probable cause in this case. See fn. 3, supra.}\]
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) 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 warrant may be delayed if, inter alia, the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result. An adverse result is defined in 18 U.S.C. § 2705(a)(2) as including endangering the life or physical safety of a person, flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, and serious jeopardy of an investigation. Moreover, the Advisory Committee Notes for Fed. R. Crim. P. 41(f)(3) (2006 Amendments) state that delay of notice may be appropriate where “the officer establishes that the investigation is ongoing and that disclosure of the warrant will compromise that investigation.” The attached declaration of [AGENT] provides reasonable cause to believe that immediate notification of the execution of the warrant may have an adverse result, and the proposed warrant both provides for the giving of such notice within 30 days after the date that the disclosure ends and prohibits, as part of the receipt of the requested information, the seizure of any tangible property or
any other prohibited wire or electronic information as stated in

III

CONCLUSION

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

IV

CERTIFICATION

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

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

DATE

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

Prospective Cell site (and GPS) investigation / August 27, 2008
***Note: this declaration goby is designed to ensure that the
same language that is in the application makes it into the
declaration - it is not a strict structural requirement, nor are
the headings required****

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

DECLARATION OF [AGENT]

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

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

PURPOSE OF DECLARATION

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

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

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

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

PROBABLE CAUSE

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

[IF SEEKING GPS INFO:]

GROUNDS FOR DELAYING NOTICE

6. Based on my training and experience and my investigation of this matter, I believe that reasonable cause exists to delay the service of the warrant as normally required
for a period of 30 days beyond the end of the disclosure period
because [INSERT FACTS RELATING TO WHY GOOD CAUSE EXISTS; INCLUDE
REFERENCE TO A PARTICULAR ADVERSE RESULT. FOR EXAMPLE:]

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

Attorneys for Applicant
United States of America

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

IN RE CELLULAR TELEPHONE[S]

No. ________________

[proposed] [WARRANT] [ORDER]

(UNDER SEAL)

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

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

Prospective Cell site [and GPS] investigation / August 27, 2008

RIF
(b) [REPEAT FOR 2ND/SUBSEQUENT PHONE] ("Subject Telephone #2, and concurrently with Subject Telephone #1 referred 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 violations of [STATUTES AND DESCRIPTIONS], being committed by [TARGET] [and others [known and] unknown].

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

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

GOOD CAUSE HAVING BEEN SHOWN, THIS COURT HEREBY ISSUES THIS WARRANT AND FURTHER 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].

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

3. As part of the receipt of the requested GPS 
information, the [AGENCY] is prohibited from seizing any tangible 
property pursuant to this warrant, or any other prohibited wire 
or electronic information as stated in 18 U.S.C. § 3103a(b)(2). 
The [AGENCY] is not prohibited from doing so in relation to any 
other investigation authorized by law.
4. The [AGENCY] is permitted to delay service of this warrant for GPS information to the subscriber[s] of the Subject Telephone[s] [for a period of 30 days from the date that the disclosure ends] [until DATE] [USE LATTER ONLY IF YOU HAVE JUSTIFIED AS DISCUSSED ABOVE]. Any requests for a continuance of this delay should be filed with this Court, unless directed to the duty United States Magistrate Judge by this Court.

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

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

7. The disclosure of the requested information shall occur whether the Subject Telephone[s] [is/are] located within this District, outside of the District, or both.
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
agents and employees are ordered not to make any disclosure to
the lessees of the telephone or telephone subscribers.

HONORABLE [judge]
UNITED STATES MAGISTRATE JUDGE

DATE/ TIME OF ISSUE: _______________________

AFFIANT NAME/ AGENCY: _______________________

Prospective Cell site [and GPS] investigation / August 27, 2008
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:


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 32306592, *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, 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(g)(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

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2 As further discussed below, we respectfully submit that a cellular telephones 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, the terms

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"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). Accordingly, Congress'
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,

ROSILYNN R. MAUSKOPF
United States Attorney

By:

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Assistant U.S. Attorney
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cc: Clerk of the Court (JO)