



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

CRM-200800549-F

Ms. Catherine Crump
American Civil Liberties Union
125 Broad Street, 17th Floor
New York, NY 10004

AUG 22 2008

Dear Ms. Crump:

While processing your Freedom of Information Act request dated November 29, 2007, the Executive Office for United States Attorneys located eight records (items 1-8) which originated with the Criminal Division of the Department of Justice and referred these records to us for our review and direct response to you. These records were received in this Office on August 19, 2008.

We have processed your request under the Freedom of Information Act and will make all records available to you whose release is either required by that statute or considered appropriate as a matter of discretion. In light of our review, we have determined to release items 1-6 in part, and to withhold items 7-8 (as described on the enclosed schedule) in full. We are withholding the records and portions of records indicated pursuant to the following FOIA exemptions set forth in 5 U.S.C. 552(b):

- (2) which permits the withholding of information relating solely to the internal personnel rules and practices of an agency;

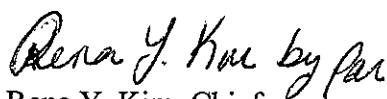
- (5) which permits the withholding of inter-agency or intra-agency memorandums or letters which reflect the predecisional, deliberative processes of the Department, and/or which consist of attorney work product prepared in anticipation of litigation.

Copies of items 1-6 are enclosed.

You have a right to an administrative appeal of this partial denial of your request. Your appeal should be addressed to: The Office of Information and Privacy, United States Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, DC 20530-0001. Both the envelope and the letter should be clearly marked with the legend "FOIA Appeal." Department regulations provide that such appeals must be received by the Office of Information and Privacy within sixty days of the date of this letter. 28 C.F.R. 16.9. If you exercise this right and your

appeal is denied, you also have the right to seek judicial review of this action in the federal judicial district (1) in which you reside, (2) in which you have your principal place of business, (3) in which the records denied are located, or (4) for the District of Columbia. If you elect to file an appeal, please include, in your letter to the Office of Information and Privacy, the Criminal Division file number that appears above your name in this letter.

Sincerely,

A handwritten signature in cursive script that reads "Rena Y. Kim by fax".

Rena Y. Kim, Chief
Freedom of Information/Privacy Act Unit
Office of Enforcement Operations
Criminal Division

SCHEDULE OF DOCUMENTS WITHHELD IN FULL
(Refer to Body of Letter for Full Description of Exemption)

7. Analysis 1-18-02 prepared by Richard Downing, Computer Crime and Intellectual Property Section (CCIPS); 9 pages.
Withheld in full pursuant to 5 U.S.C. 552(b)(5).
8. Response 8-1-05 by Nathan Judish, CCIPS to Smith Memorandum; 21 pages.
Withheld in full pursuant to 5 U.S.C. 552(b)(5).

Jones, Patricia (USALAM)

(b)(2)

From: [redacted] behalf of Judish, Nathan
Sent: Wednesday, November 23, 2005 12:56 PM
To: [redacted]
Subject: [chip] latest briefing on cell-site issue
Attachments: SDNY 2d Cell Site Brief - final 112205.wpd; SDNY Cell site brief 9 29 05 - final2.wpd
Importance: Low

As you know, many magistrates around the country have begun rejecting the use of the pen/trap statute and 2703 for prospective applications for cell-site information. Their rejections are based on two recent opinions by magistrates in S.D. Tex. and EDNY. See In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority, 2005 WL 2656621 (S.D. Tex. Oct. 14, 2005); In re Application of the United States for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device and (2) Authorizing Release of Subscriber Information and/or Cell Site Information, 2005 WL 2739208 (EDNY Oct. 24, 2005).

Attached is a letter, submitted yesterday to magistrates in SDNY, which addresses the many errors in the Texas and EDNY opinions. Tom Brown worked on this letter with the assistance of CCIPS. Because this letter references an October 5 letter on cell-site information submitted in SDNY, I am attaching that previous letter as well.

Finally, an unrelated correction: in my email of 11/16, the Westlaw citation to the Massachusetts opinion regarding magistrate-imposed restrictions on the collection of content by pen/trap devices should have been 2005 WL 2746649.

Nathan Judish

Computer Crime and Intellectual Property Section

Bourgeois, Richard

From: Judish, Nathan
Sent: Thursday, June 10, 2004 1:48 PM
To: Bourgeois, Richard
Subject: 2703(d) orders for cell site

Rich,

Please see the attached House Report of the Electronic Communications Privacy Act of 2000. [

[
]]
H.R. 5018 WOULD REQUIRE THE GOVERNMENT TO MEET A PROBABLE CAUSE STANDARD TO OBTAIN INFORMATION DISCLOSING THE PHYSICAL LOCATION OF MOBILE PHONE USERS, WITH CERTAIN EXCEPTIONS (b)(5)

Location tracking of users of wireless communications services is an emerging concern. Wireless telephones, which are increasingly used, generate information that can be used to physically track the movement of users. Initially limited to cell site antenna location, this tracking data is becoming more sophisticated with the introduction of new technologies. Still, persons in emergency situations want to be found when they call emergency services such as "911," and the government should have the ability to locate suspected criminals in those circumstances. Currently, there are no clear legal standards governing when the government can collect location information from cell phone companies. Law enforcement now uses its authority under 18 U.S.C. S 2703(d) (requirements for government access to business "records") to obtain location information from mobile phone service providers. However, 18 U.S.C. S 2703(d) does not contain any emergency exceptions to its requirements.

H.R. 5018 provides that the government must show probable cause before it may obtain information disclosing the location of a customer or user of a mobile phone from a mobile phone service provider. Certain exceptions to this provision are provided in the bill for disclosing such information to emergency service providers such as hospitals, or to the legal guardian or members of the user's immediate family in situations involving the risk of death or serious physical harm, or with the express consent of the user of the mobile phone equipment. These exceptions are based on 47 U.S.C. S 222, which already prohibits cell phone companies from disclosing customer location information to marketers and other commercial entities without express customer consent or under other exceptions. See 47 U.S.C. S 222(d).

Thanks,
Nathan Judish



ECPA 2000.wpd

Jones, Patricia (USALAM)

(b)(2)

From: [redacted] in behalf of Judish, Nathan
 Sent: Tuesday, September 06, 2005 4:15 PM
 To: [redacted] (b)(2)
 Subject: [chip] Prospective orders for cell-site information
 Attachments: cellsite response to Magistrate Judge Smith 080205.wpd; Memo from Magistrate Judge Smith.pdf
 Importance: Low

Recently, magistrates in several districts around the country have begun to object to the use of 2703(d) orders for prospective collection of cell-site information. The matter was apparently brought to their attention by a memorandum issued June 10 by Magistrate Judge Smith of the Southern District of Texas. In addition, on August 25, Magistrate Judge Orenstein of the Eastern District of New York issued an opinion (available at 2005 WL 2043543) rejecting an application for prospective cell-site information pursuant to 2703 and the pen/trap statute. This issue has arisen in several other districts as well.

Magistrate Judge Smith raised two primary objections to use of 2703(d) orders for prospective collection of cell-site information. First, Judge Smith argued that a cell phone is a "tracking device" as defined in 18 U.S.C. § 3117(b), and that records related to tracking devices fall outside the scope ECPA. Second, Judge Smith argued that the ECPA's organizational structure demonstrates that 2703(d) orders are inherently retrospective: for example, ECPA includes no duration period for 2703(d) orders.

If you would like our assistance with this issue, please let me know.

Nathan Judish
 Computer Crime and Intellectual Property Section

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(b)(5)

(b)(5)

Jones, Patricia (USALAM)

(b)(2)

From: [redacted] on behalf of Judish, Nathan
Sent: Wednesday, November 02, 2005 2:32 PM
To: [redacted] (b)(2)
Subject: [chip] prospective orders for cell-site information
Importance: Low

As many of you are aware, two magistrate judges have recently issued opinions rejecting use of the pen/trap statute and 2703 for prospective applications for cell-site information. See In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority, 2005 WL 2656621 (S.D. Tex. Oct. 14, 2005); In re Application of the United States for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device and (2) Authorizing Release of Subscriber Information and/or Cell Site Information, 2005 WL 2739208 (EDNY Oct. 24, 2005).

[redacted] (b)(5)
[redacted] (b)(5)
[redacted] (b)(5)

Nathan Judish
Computer Crime and Intellectual Property Section

[redacted] (b)(2)

Jones, Patricia (USALAM)

From: [(b)(2)] on behalf of Eckenwiler, Mark
Sent: Friday, November 16, 2007 2:19 PM
To: [(b)(2)]
Subject: [chip] Obtaining prospective, precise location data on wireless phones
Attachments: Generic lat-long order v 1.2 10-07.wpd

CHIPs, I'm writing to repeat the advice given at the CHIP conference in June concerning acquisition of GPS or similarly precise location data (sometimes called "E-911 data") on target phones. We continue to believe that the most appropriate legal mechanism is a Rule 41 warrant, and I'm attaching a sample form for that purpose. (Note: for mere tower/sector data – a/k/a the less accurate "cell-site" records – we remain of the view that 2703(d) & pen/trap combined are sufficient authority.)

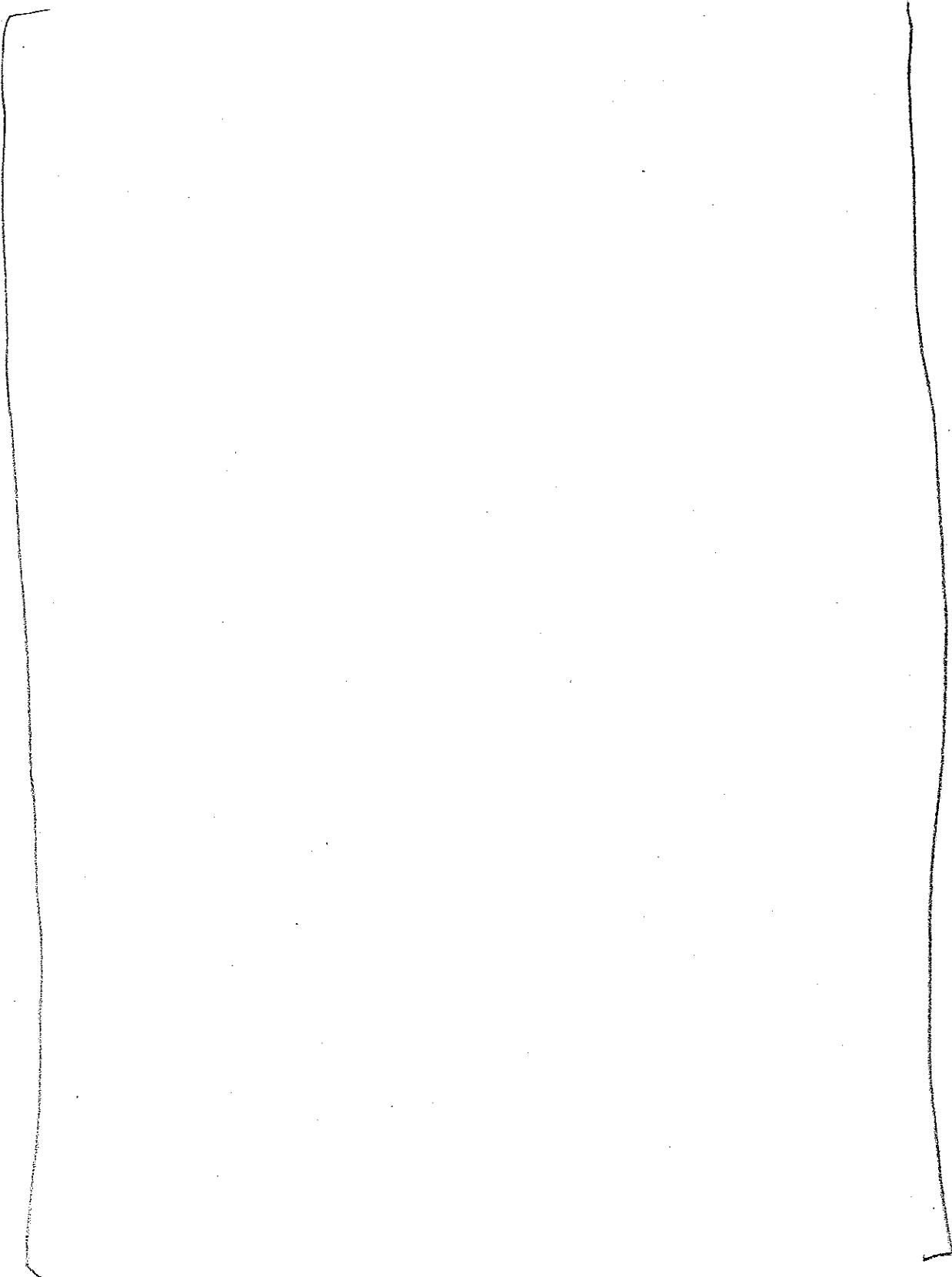
As always, I welcome your questions, comments, and critiques.

Mark Eckenwiler
Associate Director, OEO
Criminal Division

[(b)(2)]

(b)(5)

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UNITED STATES DISTRICT COURT
DISTRICT OF

IN THE MATTER OF THE APPLICATION
OF THE UNITED STATES OF AMERICA
FOR AUTHORIZATION TO OBTAIN LOCATION
DATA CONCERNING A CELLULAR TELEPHONE
ASSIGNED CALL NUMBER (xxx) xxx-xxxx,
WITH [INTERNATIONAL MOBILE SUBSCRIBER
IDENTITY / ELECTRONIC SERIAL NUMBER]
XXXXXXXXXXXXXXXXXXXX

UNDER SEAL

AFFIRMATION IN
SUPPORT OF
APPLICATION

STATE OF _____)
COUNTY OF _____ : ss.:
_____ DISTRICT OF _____)

_____, a Special Agent with the _____, being duly
sworn, deposes and states:

INTRODUCTION

1. I am a "federal law enforcement officer" within
the meaning of Federal Rule of Criminal Procedure 41(a)(2)(C),
that is, a government agent engaged in enforcing the criminal
laws and duly authorized by the Attorney General to request a
search warrant. I have been a _____ agent since _____. I have
participated in investigations of _____ and, among other
things, have conducted or participated in surveillances, the
execution of search warrants, debriefings of informants and
reviews of taped conversations. Through my training, education
and experience, I have become familiar with the manner in which

2. I submit this affidavit in support of an
application for an order pursuant to Federal Rule of Criminal

Procedure 41 [OPTIONAL: and 18 U.S.C. 2703(c) (1) (A)] [see cover instructions], directing [carrier] to assist agents of the _____ by providing all information, facilities and technical assistance needed to ascertain the physical location of the cellular telephone assigned call number (xxx) xxx-xxxx, with [International Mobile Subscriber Identity /Electronic Serial Number] xxxxxxxxxxxxxxxx, subscribed to in the name _____ at _____[address]____, with service provided by [carrier] (the "TARGET CELLPHONE"), including but not limited to data indicating the specific latitude and longitude of (or other precise location information concerning) the TARGET CELLPHONE (the "Requested Information"),¹ for a period of thirty (30) days.

3. I have personally participated in the investigation set forth below. I am familiar with the facts and circumstances of the investigation through my personal participation; from discussions with other agents of the _____ and other law enforcement; from my discussions with witnesses involved in the investigation; and from my review of records and

¹Such information may, where other information is unavailable, include records reflecting the tower and antenna face ("cell site") used by the TARGET CELLPHONE at the start and end of any call. In requesting cell site information, the Government does not concede that such cell site records - routinely retained by wireless carriers as business records - may only be obtained via a warrant issued on probable cause. See In re Application, 460 F. Supp. 2d 448 (S.D.N.Y. 2006) (authorizing prospective acquisition of cell-site records under combined authority of 18 U.S.C. 2703(d) & 3121 et seq.).

reports relating to the investigation. Unless otherwise noted, wherever in this affidavit I assert that a statement was made, the information was provided by another ___ agent, law enforcement officer or witness who may have had either direct or hearsay knowledge of that statement and to whom I or others have spoken or whose reports I have read and reviewed. Such statements are among many statements made by others and are stated in substance and in part unless otherwise indicated. Since this affidavit is being submitted for the limited purpose of securing an order authorizing the acquisition of the Requested Information, I have not included details of every aspect of the investigation. Facts not set forth herein, or in the attached exhibits, are not being relied on in reaching my conclusion that the requested order should be issued. Nor do I request that this Court rely on any facts not set forth herein in reviewing this application.

4. Probable cause exists to believe that the Requested Information will lead to evidence of offenses involving _____, in violation of _____ (the "TARGET OFFENSES"), as well as the identification of individuals who are engaged in the commission of these offenses.

5. For the reasons set out in this affidavit, there is probable cause to believe that the TARGET OFFENSES have been committed, are being committed, and will continue to be committed

by _____ and others unknown. [Further, there is probable cause to believe that _____ is using the TARGET CELLPHONE to commit the TARGET OFFENSES.]

Background of the Investigation

6. This application is submitted in connection with a _____ investigation of _____.

7. Based on information obtained from _____, _____ regularly carries the TARGET CELLPHONE [and uses it to conduct illegal activities].

8. The investigation, through, among other things, the use of confidential sources and _____, has revealed, among other things, that _____ and others are engaged in _____.

[Set forth facts tying target cellphone to illegal activities.]

AUTHORIZATION REQUEST

9. Based on the foregoing, there is probable cause to believe that the Requested Information will lead to evidence regarding the activities described above. [OPTIONAL: IF 2703(c) (1) (A) NOT RELIED UPON - SEE COVER INSTRUCTIONS & ¶¶ 2 & 10 - THEN SET FORTH BASIS FOR BELIEVING THAT TARGET CELLPHONE IS WITHIN THE DISTRICT OF THE ISSUING COURT.] The Requested Information is necessary to determine the approximate location of _____ so that [e.g., law enforcement agents can conduct physical

surveillance of _____ in connection with this expected transaction].

10. WHEREFORE, pursuant to Federal Rule of Criminal Procedure 41 [OPTIONAL: and 18 U.S.C. 2703(c) (1) (A)] [see cover instructions], it is requested that the Court issue a warrant and Order authorizing the acquisition of the Requested Information and directing [carrier], the service provider for the TARGET CELLPHONE, to furnish the technical assistance necessary to accomplish the acquisition unobtrusively, and with a minimum of interference with such services as that provider accords the user(s) of the TARGET CELLPHONE, for a period of thirty (30) days. Reasonable expenses incurred pursuant to this activity will be processed for payment by the _____.

11. IT IS FURTHER REQUESTED that the Court authorize execution of the warrant at any time of day or night, owing to the potential need to locate the TARGET CELLPHONE outside of daytime hours.

12. IT IS FURTHER REQUESTED that the warrant and this affirmation, as it reveals an ongoing investigation, be sealed until further order of the Court in order to avoid premature disclosure of the investigation, guard against fugitives, and better ensure the safety of agents and others, except that working copies should be made available to the United States

Attorney's Office, the ____, and any other law enforcement agency designated by the United States Attorney's Office.

13. IT IS FURTHER REQUESTED that, pursuant to 18 U.S.C. 3103a(b) and Federal Rule of Criminal Procedure 41(f)(3), the Court authorize notice to be delayed for a period of [INSERT NUMBER NO GREATER THAN 30; SEE ALSO COVER SHEET] days after the termination of the execution of the warrant.

Special Agent

Sworn to before me this
__ day of ____ 2007

UNITED STATES MAGISTRATE JUDGE

DISTRICT OF _____

UNITED STATES DISTRICT COURT
DISTRICT OF

IN THE MATTER OF THE APPLICATION
OF THE UNITED STATES OF AMERICA
FOR AUTHORIZATION TO OBTAIN LOCATION
DATA CONCERNING A CELLULAR TELEPHONE
ASSIGNED CALL NUMBER (xxx) xxx-xxxx,
WITH [INTERNATIONAL MOBILE SUBSCRIBER
IDENTITY / ELECTRONIC SERIAL NUMBER]
XXXXXXXXXXXXXXXXXXXX

SEALED ORDER

Application having been made by the United States for an Order pursuant to Federal Rule of Criminal Procedure 41 [OPTIONAL: and 18 U.S.C. 2703(c)(1)(A)] [see cover instructions], directing [carrier] to assist agents of the _____ by providing all information, facilities and technical assistance needed to ascertain the physical location of the cellular telephone assigned call number (xxx) xxx-xxxx, with [International Mobile Subscriber Identity / Electronic Serial Number] XXXXXXXXXXXXXXXXXXXX, subscribed to in the name _____ at _____ [address] _____, with service provided by [carrier] (the "TARGET CELLPHONE"), including but not limited to data indicating the specific latitude and longitude of (or other precise location information concerning) the TARGET CELLPHONE (the "Requested Information"), for a period of thirty (30) days;

The Court finds that there is probable cause to believe that the Requested Information will lead to evidence of violations of Title __, United States Code, Sections ___ and ___, among other

offenses, as well as to the identification of individuals who are engaged in the commission of these offenses.

IT IS HEREBY ORDERED pursuant to Federal Rule of Criminal Procedure 41 [OPTIONAL: and 18 U.S.C. 2703(c)(1)(A)] [see cover instructions] that [carrier], beginning at any time within ten (10) days of the date of this Order and for a period not to exceed 30 days from the date of this Order, provide to agents of the _____ the Requested Information concerning the TARGET CELLPHONE, with said authority to extend to any time of the day or night as required, including when the TARGET CELLPHONE leaves the _____ District of _____; all of said authority being expressly limited to ascertaining the physical location of the TARGET CELLPHONE and expressly excluding the contents of any communications conducted by the user(s) of the TARGET CELLPHONE.

It is further ORDERED that the _____ compensate [carrier] for reasonable expenses incurred in complying with any such request.

It is further ORDERED that agents of the _____ and other law enforcement officers and persons authorized to provide them with necessary and technical assistance are authorized to acquire the Requested Information concerning the location of the TARGET CELLPHONE for a period of thirty (30) days from the date of this Order or until the goals of the investigation have been achieved.

It is further ORDERED that the Court's Order and the accompanying Affirmation submitted in support thereof, as they

reveal an ongoing investigation, be sealed until further Order of the Court in order to avoid premature disclosure of the investigation, guard against fugitives, and better ensure the safety of agents and others, except that copies of the Court's Order in full or redacted form may be maintained by the United States Attorney's Office, and may be served on Special Agents and other investigative and law enforcement officers of the ____, federally deputized state and local law enforcement officers, and other government and contract personnel acting under the supervision of such investigative or law enforcement officers, and **[carrier]** as necessary to effectuate the Court's Order.

It is further ORDERED that this warrant be returned to the issuing judicial officer within 10 days after the termination of the execution of the warrant.

It is further ORDERED that, pursuant to 18 U.S.C. 3103a(b) and Federal Rule of Criminal Procedure 41(f)(3), service of notice may be delayed for a period of **[INSERT NUMBER NO GREATER THAN 30; SEE ALSO COVER SHEET]** days after the termination of the execution of the warrant.

It is further ORDERED that **[carrier]**, its affiliates, officers, employees, and agents not disclose the Court's Order or the underlying investigation, until notice is given as provided above.

Dated: _____, _____
_____ day of _____ 2007

Time: _____

UNITED STATES MAGISTRATE JUDGE
DISTRICT OF _____

AO
(Rev. 8/97)

WARRANT ON WRITTEN AFFIDAVIT FOR CELL PHONE LOCATION DATA

United States District Court	DISTRICT	
	_____ District of _____	
UNITED STATES OF AMERICA v. PREMISES KNOWN AND DESCRIBED AS A CELLULAR TELEPHONE ASSIGNED CALL NUMBER (xxx) xxx-xxxx, WITH [INTERNATIONAL MOBILE SUBSCRIBER IDENTITY / ELECTRONIC SERIAL NUMBER] XXXXXXXXXXXXXXXXXXXX	DOCKET NO.	MAGISTRATE'S CASE NO.
	To: ANY AUTHORIZED FEDERAL AGENT	

Affidavit having been made before me by the below-named affiant to obtain precise location information concerning the following cell phones (the "Premises"):

A CELLULAR TELEPHONE ASSIGNED CALL NUMBER (xxx) xxx-xxxx, WITH
[INTERNATIONAL MOBILE SUBSCRIBER IDENTITY / ELECTRONIC SERIAL NUMBER]
XXXXXXXXXXXXXXXXXXXX

and as I am satisfied that there is good cause for the acquisition of precise location information concerning the Premises,

YOU ARE HEREBY COMMANDED to acquire precise location data concerning the Premises named above for a period of thirty (30) days starting within ten (10) calendar days of the date of this order, during any time of day; to return this warrant to the U.S. Magistrate Judge designated in this warrant within ten (10) calendar days after the execution of the warrant has ended; and pursuant to 18 U.S.C. § 3103a(b)(3) authorizing delayed notification, to serve notice within [INSERT NUMBER NO GREATER THAN 30; SEE ALSO COVER SHEET] after the execution of the warrant has ended.

NAME OF AFFIANT Special Agent _____ _____	SIGNATURE OF JUDGE OR U.S. MAGISTRATE	DATE/TIME ISSUED
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RETURN

DATE AND TIME ACQUISITION OF LOCATION DATA FIRST INITIATED AND PERIOD DURING WHICH IT WAS ACQUIRED:

CERTIFICATION

I swear that this information contained on this return is true and accurate:

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

Federal Judge or U.S. Magistrate

Date