

THE FEDERAL LAW ENFORCEMENT —INFORMER—

MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT
OFFICERS

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We value and sincerely solicit your comments and suggestions. E-mail them to [**robert.caughen@dhs.gov**](mailto:robert.caughen@dhs.gov)

IN THIS ISSUE

NEW Federal Rules of Criminal Procedure effective December 1, 2006.

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*Compiled and presented by
Senior Instructor Keith Hodges
Legal Division*

For a clean version of the new rules, go to
http://www.uscourts.gov/rules/supct1105/CR_Clean.pdf

Circuit Courts of Appeals Case Summaries

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NEW
Federal Rules of Criminal Procedure
effective December 1, 2006.

Section I

Rule Changes of Major Importance to Law Enforcement

Rule	Old	New
41 Search and Seizure <u>Tracking devices</u>	1. No definition of “tracking devices” (as the old rule did not address them.) 2. No mention that a magistrate may issue a warrant to install and use a tracking device. 3. No mention of contents of tracking warrant. 4. No mention of returns on tracking warrants.	1. “Tracking devices” definition in 18 U.S.C. § 3117(b) adopted. 2. A magistrate may issue a warrant to install tracking devices within his district, and the warrant may permit monitoring in or outside the district. <i>NOTE:</i> Committee note makes clear that the Rule change says nothing about <i>when</i> warrants are required; the Rule applies only <i>if</i> a warrant is required. In other words, this change does not affect current law of when a warrant might be required. 3. Specific guidance what a warrant must contain: who/what to be tracked; how long device may be used (45 days, with authority for 1 or more extensions of 45 days each); install the device within ten days, and unless good cause shown, in the day time; and requirement for a return. 4. Officer executing warrant must make return to magistrate and target within ten days after tracking ended. Magistrate can authorize delay.

Rule	Old	New
41 Search and Seizure <u>Telephonic Warrants</u>	1. Could issue warrant by other “appropriate means” including facsimile. 2. Contemplated that in many cases, requesting officer would read the warrant to the magistrate, and the magistrate “must enter the contents of the proposed duplicate warrant into an original warrant” and record the call. 3. If magistrate decides to issue warrant, she signs the original and directs requestor to sign the magistrate’s name on the duplicate original.	1. “Facsimile” deleted, and substituted therefore is “or other reliable electronic means.” Committee notes say that includes fax, provided the fax is “reliable”. (This is probably code for “email attachments”.) 2. Same provision as before, but adds that if the requester transmits the contents “by reliable electronic means,” that transmission will serve as the original warrant. Magistrate can modify what is sent (duplicate original warrant) and issue her own “original warrant.” 3. Now, magistrate can transmit the signed warrant and dispense with having the agent sign the duplicate original.

Rule	Old	New
41 Search and Seizure <u>Authorizing delays in returns</u>	No mention in Rules that a magistrate could issue a delay to a requirement to make a return, though there are provisions in statutes that would allow such a delay.	Rules explicitly allow magistrate to approve government requested delays in making a return if such a delay is authorized by statute. Examples of such statutes: 1. Modified Rule 41 to delay return on tracking warrant. (The Rules are themselves eventually codified as statutes.) 2. See 18 USCS § 3103a for the broad authority to grant delays on returns and notice provisions. Includes sneak and peek.

Section II

Rule Changes of Some Interest to Law Enforcement

Rule	Old	New
58(b)(2)(G) Petty Offenses and Other Misdemeanors <u>Advising of right to preliminary hearing</u> and 5(c)(3)(C) Initial Appearance <u>Initial appearance Out of district arrests</u>	1. Rule 58(b)(2)(G) could be interpreted to indicate that only those held in custody had to be told at the initial appearance they had a right to a preliminary hearing under Rule 5.1. 2. Rule 5(c)(3)(C) referred to Rule 58(b)(2)(G). (See above)	1. Rule amended to say that anyone entitled to a preliminary hearing under Rule 5.1 must be advised of that fact during an initial appearance, and not just those held in custody. 2. Rule deleted reference to Rule 58(b)(2)(G), leaving Rule 5.1 as the authority for who is entitled to a preliminary hearing.
5(c)(3)(D) Initial Appearance <u>Initial appearance Out of district arrests</u>	Rule required government to produce the arrest warrant, certified copy, a facsimile or “other appropriate form of either.”	Amendment deletes “facsimile” and substitutes “reliable electronic form”. That would include facsimile, email attachments, or those documents filed electronically.
6(e) <u>Disclosing GJ proceedings</u>	Technical wording changes only. No change in substance.	
32.1 Supervised Release	Permits copies of judgment, warrant, and warrant application to be presented to the magistrate by “reliable electronic means.”	

40 <u>Arrest for failing to</u> <u>Appear in Another</u> <u>District</u>	Did not explicitly authorize arrest in District A for violating conditions of release imposed in District B (except for failure to appear).	Violating any conditions of release (and not just failure to appear) imposed in one district grounds for arrest in another district.
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CIRCUIT COURTS OF APPEALS CASE SUMMARIES

1st CIRCUIT

U.S. v. Allen, 2006 U.S. App. LEXIS 28513, November 17, 2006

Where the vehicle contains no trunk, the entire inside of the vehicle constitutes the passenger compartment and may be lawfully searched incident to the arrest of an occupant. This bright-line rule extends to SUVs.

Click [HERE](#) for the full opinion.

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U.S. v. Pelletier, 2006 U.S. App. LEXIS 29214, November 28, 2006

The Supreme Court's decision in *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) [Hudson at QR-7-3](#) that a violation of the "knock and announce" rule in the course of executing a search warrant does not automatically trigger the Exclusionary Rule applies as well in the context of an arrest warrant.

Click [HERE](#) for the full opinion.

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2nd CIRCUIT

U.S. v. Skinner, 2006 U.S. App. LEXIS 29607, November 30, 2006

Violations of 18 U.S.C. §§ 242 and 241 are crimes of violence for purposes of 18 U.S.C. § 924(c).

Click [HERE](#) for the full opinion.

See also *Leocal v. Ashcroft*, 543 U.S. 1 (2004) [Leocal at QR-6-2](#)

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Cassidy v. Chertoff, 2006 U.S. App. LEXIS 29388, November 29, 2006

It is a “governmental search” for purposes of the Fourth Amendment when employees of a private transportation company search the carry-on baggage of randomly selected passengers and inspect randomly selected vehicles, including their trunks, pursuant to the company’s security policy implemented in order to satisfy the requirements imposed by the Maritime Transportation Security Act of 2002 and its implementing regulations.

Click [HERE](#) for the full opinion.

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7th CIRCUIT

U.S. v. Elder, 466 F.3d 1090, November 1, 2006

Many 911 calls are brief, and anonymous, precisely because the speaker is at risk and must conceal the call. These persons are more rather than less in need of assistance. The fact that drug dealers often use guns and knives to protect their operations creates a possibility that violence has been done, or that someone is still there and lying in wait. Therefore, following an anonymous call about methamphetamine, entry into the outbuilding was reasonable, and a warrant was not necessary. The officers acted sensibly in attempting to assure the caller’s safety.

Click [HERE](#) for the full opinion.

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U.S. v. DiModica, 2006 U.S. App. LEXIS 28349, November 16, 2006

U.S. v. Parker, 2006 U.S. App. LEXIS 29471, December 1, 2006

Police are not required to ask for consent to search from all tenants who are present. Search pursuant to the valid consent of one tenant is reasonable when a co-tenant is present, but is not asked, and does not object. Police may not remove a co-tenant from the house for the sake of avoiding a possible objection to the subsequent search.

Click [HERE](#) for the full *DiModica* opinion.

Click [HERE](#) for the full *Parker* opinion.

U.S. v. De La Cruz, 2006 U.S. App. LEXIS 29290, November 29, 2006

When criminal intent is otherwise proven, after-the-fact ratification from those with authority is not a complete defense to prosecution for misapplication of public funds under 18 U.S.C. § 666(a)(1)(A).

Click [HERE](#) for the full opinion.

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10th CIRCUIT

U.S. v. Cruz-Mendez, 467 F.3d 1260, November 6, 2006

It is important to distinguish “plain view” to justify the seizure of an object, from an officer’s mere observation of an item left in plain view (sometimes called “open view”) which generally involves no Fourth Amendment search. For a mere observation to be valid, the only requirement is that the officer be lawfully in a position from which he can view the object. (Parenthesis added).

Click [HERE](#) for the full opinion.

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DC CIRCUIT

U.S. v. Lawrence, 2006 U.S. App. LEXIS 29495, December 1, 2006

Constructive possession requires the ability to exercise knowing dominion and control over the items. It is reasonable to infer that a person exercises constructive possession over items found in his home. The defendant’s possession of a key to a residence he does not own or rent supports a reasonable inference that he was not just a casual visitor.

Click [HERE](#) for the full opinion.