

MEMORANDUM

TO: Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States

FROM: The State Bar of California's Committee on Federal Courts

DATE: February 13, 2003

SUBJECT: Federal Rule of Criminal Procedure 41
28 U.S.C. § 2254 and 28 U.S.C. § 2255 Rules and Forms
Federal Rule of Evidence 804(b)(3)

The State Bar of California's Committee on Federal Courts ("Committee") has reviewed and analyzed the proposed amendments to the Federal Rules of Bankruptcy Procedure, Criminal Procedure, and Evidence, the rules governing 28 U.S.C. §§ 2254 and 2255, and the forms accompanying the rules governing 28 U.S.C. §§ 2254 and 2255. The Committee appreciates the opportunity to submit its comments. By way of background, the Committee is comprised of attorneys throughout the State of California who specialize in federal court practice and volunteer their time and expertise to analyze and comment upon matters that have an impact on federal court practice in California. The Committee consists of a broad range of federal practitioners, including members with civil, criminal, and appellate experience. The Committee has reviewed and analyzed all the proposed amendments, but has limited its comments to the proposed amendments discussed below. If you have any questions or would like to discuss any of the comments, please contact Saul Bercovitch, Staff Attorney, at 415-538-2306 or saul.bercovitch@calbar.ca.gov.

I. FEDERAL RULE OF CRIMINAL PROCEDURE 41

The Committee believes the proposed amendments to Rule 41 concerning tracking devices would add clarity to an area previously left largely unaddressed by the law. In the absence of these proposed changes, federal prosecutors have been submitting applications for orders authorizing the installation, monitoring, and removal of tracking devices to magistrate judges with only 18 U.S.C. § 3117 and *United States v. Karo*, 468 U.S. 705 (1984) as authority. Prosecutors have been left wondering (1) whether an application is even needed, particularly when the tracking device is of the "slap-on" variety, and when the prosecutors do not expect the car to which it is attached to enter enclosed private property, (2) whether the standard of review is reasonable suspicion, probable cause, or something in-between, (3) whether the installation and/or removal of the device can be effected at night, as it invariably needs to be to avoid detection, (4) whether the local magistrate judges has the authority to order the monitoring and/or removal of the tracking device, should the vehicle travel outside of the federal judicial district, (5) how long a tracking device can be legally monitored and maintained, and whether