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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 1, 1998

Investigator T.K. Davis
Spartanberg Public Safety Department
Narcotics and Organized Crime Unit
145 Broad Street
Spartanberg, South Carolina 29306

Re: Informal Opinion

Dear Investigator Davis:

You have requested an opinion from this office concerning two issues:

1) Are there any laws that regulate the procurement, possession, and/or use of tracking devices by law enforcement agencies in this State?

2) May a law enforcement agency produce original search warrants through the use of computer software rather than use the standard forms usually provided?

In response to your first question, there is no statute or regulation currently in force in this State which directly relates to the procurement, possession, or use of tracking devices. Such devices are used by numerous law enforcement agencies around the United States, and it seems that the decision to utilize such devices would lie within the discretion of the particular agency. There has been, however, discussion among the federal courts concerning the constitutional boundaries which restrict the use of such tracking devices.

The United States Supreme Court has promulgated two opinions which provide extensive analysis concerning the constitutional issues surrounding the use of tracking devices. In United States v. Knotts, 460 U.S. 276, 103 S.Ct. 1081 (1983), the Court held that the placing of a "beeper" tracking device on the vehicle of a suspect does not constitute a "search" or "seizure" under the

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Fourth Amendment. There is less of an expectation of privacy in an automobile, and the movements of the vehicle are within plain view of the public:

> A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [the suspect] travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property. 460 U.S. at 281-282.

Therefore, the Court held, a warrant was not required to place a tracking device on the vehicle of a suspect.

In United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296 (1984), the Supreme Court revisited the issue of tracking devices. In Karo, the law enforcement officers had placed a tracking device on a can of ether which was used in the production of illegal drugs. The critical question presented to the Court concerned the monitoring of the tracking device once it entered a private residence. The Court held that once the tracking device enters an area which is not open to visual surveillance, any further monitoring of the device must be accompanied by a warrant. The essential justification for the Court's ruling is that the government can not obtain information, through the use of electronic tracking devices, which it could not otherwise obtain without a warrant. Once the tracking device allows access to information which could not be obtained through lawful surveillance (i.e. seen from "outside the curtilage of the house"), the constitutional requirement for a lawful search warrant is in force. Of course, the suspect must have a legitimate and reasonable expectation of privacy to enjoy the protection of the Fourth Amendment. See United States v. Jones, 31 F.3d 1304 (4th Cir. 1994) (holding that the defendant had no privacy interest in stolen governmental property to which a tracking device was attached).

The rules established in Knotts and Karo have not been accepted uniformly throughout the United States. At least two state supreme courts have issued opinions rejecting the Knotts/Karo rule on state constitutional grounds. See People v. Oates, 698 P.2d 811 (Colo. 1985); State v. Kelly, 708 P.2d 820 (Haw. 1985). The issue has yet to arise in any South Carolina court, but there is little reason to expect our Supreme Court to reject the Knotts/Karo rule.

As to your second question, it is perfectly acceptable for a police department to create its own search warrants, provided that such warrants contain all of the information required on the standard forms approved by this office. So long as the independently created warrants follow the form and substance of the standard forms to the letter, there need not be any direct authorization by this office. If the form or substance of the independently created warrant deviates from the standard in any manner, such warrants are in violation of S.C. Code Section 17-13-160.

I trust this information will be of assistance to you. If you have any further inquiries, please do not hesitate to contact my office.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With warmest regards, I am

Sincerely,

Robert D. Cook
Asst. Deputy Attorney General
Opinions Division