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LEARNING POINTS

July 2018

SEARCH WARRANT NECESSARY TO OBTAIN CELL-SITE RECORDS

Carpenter v. United States

Supreme Court of the United States, No. 16-402 - decided June 22, 2018

By Michael P. Stone, Esq., and Robert Rabe, Esq.

In a decision which Chief Justice Roberts joined the four remaining "liberals" on the Court, the Supreme Court held, in a 5 to 4 decision, that the acquisition of cell-site records was a "search" under the Fourth Amendment and, therefore, requires a warrant supported by probable cause to obtain.

After the FBI identified the cell phone numbers of several robbery suspects, prosecutors obtained court orders, (not search warrants), under the Stored Communications Act to obtain the suspect's cell phone records. Wireless carriers produced cell-site location information (CSLI) for Carpenter's phone, and the Government was able to obtain 12,898 location points cataloging Carpenter's movements over 127 days. Carpenter moved to suppress the data, arguing that the Government's seizure of the records without obtaining a warrant supported by probable cause violated the Fourth Amendment. The District Court denied the motion, and prosecutors used the records at trial to show that Carpenter's phone was near four of the robbery locations at the time those robberies occurred. Carpenter was convicted. The Sixth Circuit affirmed, holding that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers.

The Supreme Court noted that the digital data at issue - personal location information maintained by a third party - did not fit neatly under existing precedents, but lies at the intersection of two lines of cases. One set, which addresses a person's expectation of privacy in his physical location and movements, was discussed in *United States v. Jones*. In *Jones*, five Justices concluded that privacy concerns are raised by GPS tracking of a suspect's vehicle. The other, addresses a person's expectation of privacy in information voluntarily turned over to third parties. For example, the Court held in *Smith v. Maryland* that there was no expectation of privacy in records of dialed telephone numbers conveyed to a telephone company.

In this case, the Court reasoned that allowing the government access to cell-site records - which "hold for many Americans the 'privacies of life'" - contravenes that expectation. The Court remarked that historical cell-site records present even greater

privacy concerns than GPS monitoring because they give the government near-perfect surveillance, and allow it to travel back in time to retrace a person's whereabouts. Given the unique nature of cell-site records, the Court declined to extend the *Smith* case to cover them.

Except for Federal law enforcement agents, this case should not require any change to current investigative practices within California, because in 2015 the legislature passed a law which prohibits a government entity from compelling the production of or access to electronic communication information, such as cell-site location information, without a search warrant. (S.B. No. 178.)

Stay Safe!

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