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CLIENT ALERT

Supreme Court Holds Acquisition of Cell-Site Location Information Requires Warrant

JUNE 25, 2018

On Friday, a narrow majority of the Supreme Court held that the Government's acquisition of historical cell-site location information ("CSLI") from a wireless service provider constituted a search under the Fourth Amendment and required a warrant supported by probable cause. The Court reversed and remanded a decision of the Sixth Circuit that had analogized historical CSLI to "business records" voluntarily disclosed to a third party, which are not afforded Fourth Amendment protection. The opinion, delivered by Chief Justice Roberts, follows a line of recent Supreme Court cases recognizing "the seismic shifts in digital technology" and the implications those shifts have for individual privacy.

The case arose when petitioner Timothy Carpenter and other individuals were convicted in federal court of nine armed robberies in violation of the Hobbs Act—a federal statute that prohibits interference with commerce by threats or violence. Investigating these robberies, police had arrested a man who subsequently confessed and provided the FBI with his cellphone and the cellphone numbers of the other participants. Based on this information, the FBI applied for, and received, court orders under the Stored Communications Act to obtain the historical CSLI of Carpenter and other alleged accomplices. The Stored Communications Act permits the Government to compel telecommunications records upon a showing of "reasonable grounds to believe" that the records "are relevant and material to an ongoing investigation," a standard far less stringent than the Fourth Amendment's probable cause requirement. Based in part on the CSLI, which contained location records over 127 days, the FBI arrested Carpenter and charged him with several counts stemming from the robberies.

Before trial, Carpenter moved to suppress the CSLI on Fourth Amendment grounds. The district court denied the motion and the Sixth Circuit affirmed, concluding that Carpenter lacked a reasonable expectation of privacy in the CSLI because he had voluntarily shared that information with his wireless carriers. Because these records had been shared with a third party, according to the Sixth Circuit, Carpenter did not have an expectation of privacy in the records and therefore the Government's collection of these records was not a Fourth Amendment search. The Supreme Court granted certiorari.

In a split 5–4 decision, the Court held that the acquisition of historical CSLI does constitute a search under the Fourth Amendment and this requires a warrant supported by probable cause. In reaching this conclusion, the Court recognized that CSLI requests "lie at the intersection of two lines of cases, both of which inform [the Court's] understanding of the privacy interests at stake." The first line of cases, characterized by *United States v. Knotts* and

United States v. Jones, addresses a "person's expectation of privacy in his physical location and movements." In *Knotts*, the Court had found that the use of a "beeper" to augment the Government's tracking of a vehicle through traffic did not constitute a search because "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." More recently, however, five Justices in *Jones* found that the 28-day monitoring of a vehicle with GPS technology "impinge[d] an expectation of privacy" and therefore constituted a search under the Fourth Amendment.

The second line of cases holds that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." In *United States v. Miller*, the Court determined that the Fourth Amendment did not protect a private citizen's business records that were held at a bank, and in *United States v. Smith* the Court held that the same principle applied to a device used by law enforcement to record the phone numbers dialed in a telephone (reasoning that by dialing the number, a person voluntarily disclosed the number to the telephone company). In each of these cases, the Court found that individuals who convey this information to a third party take the risk that it could be conveyed to the Government. While the Court in *Carpenter* found that CLSI "implicates the third-party principles" of this line of cases, it ultimately declined "to extend *Smith* and *Miller*" to cover historical CSLI. According to the *Carpenter* majority, although the historical CLSI information is delivered to a third party, "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." The Court ultimately concluded that the privacy implications in CSLI more closely resembled those in *Jones* and in fact "present[ed] even greater privacy concerns" than the GPS monitoring of Jones' vehicle, as a cell phone "tracks nearly exactly the movements of its owner." The Court even equated this cell phone tracking to putting an ankle monitor on the defendant's phone. Furthermore, CSLI provides the Government the ability to track an individual's movement retrospectively.

Having concluded that the Government's acquisition of the CSLI constituted a search, the Court then found that "the Government must generally obtain a warrant supported by probable cause before acquiring such records." Based on the significant privacy implications, the Court determined that "an order issued under [the Stored Communications Act] is not a permissible mechanism for accessing [CSLI]."

Four Justices dissented from the Court's opinion, writing four separate opinions—one by Justice Kennedy, joined by Justices Thomas and Alito; one by Justice Thomas alone; one by Justice Alito, joined by Justice Thomas; and one by Justice Gorsuch. Each of the dissenters concluded principally that the case is governed by the third-party doctrine and that, under *Miller* and *Smith*, individuals had no reasonable expectation of privacy in the CSLI given to their wireless carriers. Both Justice Thomas and Justice Gorsuch further criticized the majority for extending its Fourth Amendment jurisprudence and expanding what constitutes a "reasonable expectation of privacy."

The Court described its holding in *Carpenter* as "a narrow one." The Court declined to express any opinion about other uses of CSLI, such as real-time CSLI, and noted that its decision did not "disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools." The Court's opinion similarly does not address other types of information collection, such as business records that could reveal location information, or collection techniques "involving foreign affairs or national security," or law enforcement's use of facial recognition, biometric data, IP address tracking, or license plate readers. The *Carpenter* decision will almost certainly be tested in each of these instances to determine how far the courts will expand this newly recognized expectation of privacy. It will also be interesting to monitor how the courts use *Carpenter* in the civil context. For instance, most state and federal privacy or data protection laws in the United States currently apply only to certain limited types of data. The Court's holding does, however, continue the recent trend of expanding the reach of the Fourth Amendment to protect an individual's expectation of privacy given the increasing prevalence of digital technology in modern life.

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