

June 2018

Emerging Technology and Privacy Protections: Supreme Court Requires a Search Warrant for Cellular Telephone Historical Geographic Tracking Data

By J. David Marsey
dmarsey@rumberger.com

In a sharply divided opinion, the United States Supreme Court¹ has changed the landscape for law enforcement investigators seeking to obtain historical geographic location information from cellular telephone providers. As is often the case with emerging technologies, the seizure of this data does not fit neatly within existing precedent, but instead, lies at the intersection of two lines of cases: (1) those finding a fundamental privacy right in one's physical location and movements, and (2) those finding no reasonable expectation of privacy in information voluntarily turned over to third parties. Until now, it has been commonplace to obtain mobile phone data transmitted to cellular towers using an investigative subpoena. Using this process, the investigator must establish reasonable grounds to believe the records sought are material and relevant to an ongoing investigation. However, with the Court's clarification, it is now clear that mobile phone geographic location data transmitted to cell phone towers may only be obtained via search warrant and the requisite showing of probable cause.

The *Carpenter* Court evaluated the very narrow question of whether the government conducts a search under the Fourth Amendment when it accesses historical cell phone location records that provide a comprehensive chronicle of the user's past movements. After finding that geographic tracking is subject to Fourth Amendment protections, the Court was careful to narrowly tailor its opinion to these limited facts. This opinion is not intended to address: (1) real time data gathering; (2) "tower dumps" that provide all data from a particular tower at a particular time; (3) the use of security cameras; (4) conventional surveillance techniques; (5) business records that may *incidentally* reveal geographic location; or (6) collection techniques involving foreign

¹ *Carpenter v. United States*, 585 U.S. ____, (2018).

affairs or national security. Equally apparent is the Court's lack of any restrictions on existing exceptions to the warrant requirement, such as exigent circumstances. Indeed the Court noted that the pursuit of a fleeing suspect, the need to protect individuals who are threatened with imminent harm or to prevent against the imminent destruction of evidence all remain valid exceptions to the warrant requirement. Succinctly stated, the rule the Court established in *Carpenter* "does not limit the ability to respond to an ongoing emergency."

In 2011 police officers arrested four men suspected of committing a series of robberies in two states. Their investigation revealed a series of mobile telephone numbers used by accomplices, including the alleged leader, Mr. Carpenter. Prosecutors applied for and obtained court orders to obtain Carpenter's mobile phone records. Federal law permitted the release of the records where the Government offered specific and articulable facts showing that there are reasonable grounds to believe that the records sought were relevant and material to an ongoing criminal investigation. The records revealed geographic evidence placing Carpenter near the scenes of several robberies. The defendant moved to suppress the location tracking data, arguing that it had been obtained without a warrant and without a showing of probable cause. The Government argued that there was no reasonable expectation of privacy because the defendant's phone continuously shared its geographic location with the cellular provider's network which allowed the triangulation of the phone's location. The trial court agreed, and denied the motion to suppress the evidence on the basis that the geographic location data was voluntarily shared with the provider's network. The appellate court affirmed the denial of the motion to suppress.

In recent history, the Court has decided several noteworthy cases weighing privacy rights against emerging technologies. In *Kyllo v. United States*, 533 U.S. 27 (2001), the Court found a reasonable expectation of privacy to be free from the government's use of thermal imaging cameras to invade the sanctity of one's home. In *Riley v. California*, 573 U.S. 783 (2014), the Court distinguished physical objects from mobile phones when applying the search incident to arrest exception to the warrant requirement. In *United States v. Jones*, 565 U.S. 400 (2012), perhaps the most analogous case, the Court held that the use of a GPS tracker on a suspect's vehicle triggered privacy concerns. Although not then before the Court, five Justices agreed that privacy concerns would be raised by surreptitiously activating a stolen vehicle detection system "or conducting GPS tracking of his cell phone." The Court has also addressed the lack of an expectation of privacy in records maintained by third-parties. In *United States v.*

Miller, 425 U.S. 435 (1976), the Court held there was no reasonable expectation of privacy in canceled checks, deposit slips and monthly statements, because these records were created in the ordinary course of business. In *Smith v. Maryland*, 442 U.S. 735 (1979), the Court held that the use of a pen register to record outgoing phone numbers dialed on a landline telephone was not a search due to its limited capabilities and because when the number were dialed, the caller voluntarily conveyed the numbers to the telephone company. It was against this backdrop that the Court evaluated the seizure of historical GPS cellular phone tracking data.

The Court found the challenged seizure was most analogous to *Jones* and the already-established right to privacy in one's location and movements, because, much like GPS data, the geographic cellular phone data is "detailed, encyclopedic, and effortlessly compiled." The Court declined to equate the transmission of location data to cellular phone providers' equipment as the voluntary disclosure of bank records or dialed phone numbers, because the information gathered here was a qualitatively different category of information. More specifically, the Court recognized that people are rarely without their telephones, but instead carry them with them at all times, thus becoming "almost a feature of human anatomy." The Court reasoned that the intrusiveness of the search here exceeded that of the GPS tracker in *Jones*, because it would permit the government to track people "beyond the public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." "Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." The Court also noted that the data is not truly "voluntarily provided," because the phone's automatic communications to the provider's network take place without any affirmative action by the user. Therefore, the argument that one "voluntarily" provided his or her physical location to the provider network was not persuasive.

Decisions interpreting the Fourth Amendment are generally retroactive and will apply to all cases not yet final as of June 22, 2018., however, some exceptions may apply. By way of example only, the Supreme Court has extended the good-faith exception to the warrant requirement where investigators acted in reasonable reliance on a subsequently invalidated statute. See *Illinois v. Krull*, 400 U.S. 340 (1987). "Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 350. Therefore, the net effect on existing cases will likely have to be resolved on a case-by-case basis.

June 26, 2018

Page 4

Make no mistake, however, that effective June 22, 2018, law enforcement investigators must immediately cease and desist from obtaining historical geographic tracking data in the absence of a search warrant. Law enforcement executives should immediately circulate this directive and initiate a review of investigative policies and procedures to include the new search warrant requirement. Because the Supreme Court has spoken on the issue, it is now well-settled law, and therefore the good faith exception will not apply to future investigations.

J. David Marsey is a former police officer, investigator and prosecutor and is a partner at the law firm of Rumberger, Kirk & Caldwell in Tallahassee, Florida. He defends and advises corporations, government entities and their employees on casualty, employment and constitutional issues throughout the state. For more information, please visit www.rumberger.com.