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September 9, 2005

BY HAND

The Honorable James Orenstein
United States Magistrate Judge
Eastern District of New York
Long Island Federal Courthouse
924 Federal Plaza
Central Islip, New York 11722-4454

Re: In re Application For Pen Register
and Trap and Trace Device With
Cell Site Location Authority,
Magistrate's Docket No. 05-1093(JO)

Dear Magistrate Judge Orenstein:

The government respectfully moves the Court to reconsider its Memorandum and Order entered August 25, 2005, __ F. Supp.2d __, 2005 WL 2043543 (E.D.N.Y. Aug. 25, 2005) (the "August 25 Order"), denying the government's application for an order to disclose cell-site records relating to a specified cellular telephone number. For the reasons stated below, the government's application dated August 23, 2005 should be granted consistent with § 103 of the Communications Assistance for Law Enforcement Act ("CALEA"), P.L. 103-313, 108 Stat. 4279 (1994), codified at 47 U.S.C. § 1002(a)(2)(B), under authority of 18 U.S.C. § 2703(d) of the Stored Communications Act ("SCA") and 18 U.S.C. §§ 3121 et seq. (the pen register/trap and trace statute, or "Pen/Trap statute").[1]

[1] A motion for reconsideration of a court order determining a motion in a civil matter may be made within ten days of the entry of the order, excluding holidays and weekends. Fed. R. Civ. Proc. 59(e) and Loc. Civ. R. 6.3. Loc. Civ. R. 6.3. Reconsideration under these rules is applicable to decisions of magistrate judges, and tolls the time for appeal to the district court. See Norex Petroleum, Ltd. v. Access Indus., Inc., 2003 WL 21872389, *1 (S.D.N.Y. 2003); Equal Employment Opportunity Commission v. Venator Group, 2001 WL 246376, *4 (S.D.N.Y. 2001); Yurman Design v. Chaindom Enterprises, 2000 WL 1871715, *1

A. Overview

The August 25 Order holds that disclosure of cell site information can only be compelled by a search warrant issued on a showing of probable cause. The Court has apparently concluded that because cell-site information is transmitted as "electronic communication," 18 U.S.C, § 2510(12), it is also the "contents of an electronic communication," 18 U.S.C. § 2510(8), unless it is the product of a "tracking device," 18 U.S.C. § 3117. August 25 Order at *1. We respectfully submit that these holdings are legally erroneous, for Congress has legislated to the contrary.

As we demonstrate below, an "electronic communication" may provide either "contents," see 18 U.S.C. §§ 2703(a) and 2703(b), or "information pertaining to a subscriber," see 18 U.S.C. § 2703(c). Cell-site information constitutes "information pertaining to a subscriber" under U.S.C. § 2703(c), not "contents" under U.S.C. § 2703(a) or (b), and is not the product of a "tracking device" or communications from it. Moreover, upon a showing under 18 U.S.C. § 2703(d) of specific and articulable facts demonstrating reasonable grounds to believe the information sought is relevant and material to an ongoing investigation, 18 U.S.C. § 2703(d) authorizes the Court to order cellular telephone providers to disclose existing cell-site usage records.

In addition, the Court is authorized to order disclosure of cell-site information on a prospective basis where, as here, the government's application is made not only under authority of SCA, but also under the Pen/Trap statute in a manner that demonstrates the prospective data to be relevant and material as the SCA requires, see 18 U.S.C. § 2703(d). CALEA prohibits the government from acquiring cell-site information prospectively if it is obtained "solely pursuant" to the Pen/Trap

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(S.D.N.Y. 2000); Brown v. Mineta, E.D.N.Y., order issued March 22, 2005, at p. 5 n.5. Reconsideration is also authorized in criminal matters, either by extension of these rules or under common law principles. See United States v. Ibarra, 502 U.S. 1, 4 (1991); United States v. Dieter, 429 U.S. 6, 8 (1976); United States v. Healy, 376 U.S. 75, 78-80 (1964). While there is some question whether reconsideration of a district court decision in a criminal matter must be sought within 10 days or 30 days, see Canale v. United States, 969 F.2d 13 (2d Cir. 1992); United States v. Gross, 2002 WL 32096592, *1-*3 (E.D.N.Y. 2002), this motion is made within 10 days, excluding holidays and weekends, and is therefore timely on either view.

statute. 47 U.S.C. § 1002(a)(2)(B) (emphasis added). In contrast, however, an order that directs disclosure of cell-site information prospectively under authority of the SCA as well as the Pen/Trap statute complies with CALEA.

B. Cell-Site Data Constitutes "Records Or Other Information" Accessible To The Government Pursuant to the SCA

The holding of the August 25 Order is based on two erroneous conclusions: (1) that 18 U.S.C. § 2703 provides no authority for the Court to order disclosure of data relating to cell-site usage by a cellular telephone ("cell-site information"), August 25 Order at *1-2; and (2) that CALEA prohibits any use of the Pen/Trap statute to acquire cell-site information; August 25 Order at *3-4.

In reaching the first of these conclusions, the Court stated that "the only one" of 18 U.S.C. § 2703's provisions "that appears arguably to permit the disclosure of cell site location information is the language permitting the disclosure of 'the contents of a wire or electronic communication.'" August 25 Order at *1-2. The Court rejected that hypothesis, however, on the grounds that cell-site information constitutes a "communication from a tracking device," which is specifically exempted from the class of "electronic communications" discoverable under 18 U.S.C. §§ 2703(a) and 2703(b). August 25 Order at *1-2, relying on 18 U.S.C. § 2711(1) (incorporating by reference exceptions to definitions of "electronic communication," codified at U.S.C. § 2510(12), including communications from "tracking devices" under 18 U.S.C. § 3117).

While other aspects of the above rationale are also open to question,[2] we respectfully submit that the decisive error occurs at the outset: the August 25 Order ignores the controlling authority of 18 U.S.C. § 2703(c)(1)(B). In tandem with 18 U.S.C. § 2703(d), 18 U.S.C. §§ 2703(c)(1)(B) authorizes the government to apply for an order and for the court to compel disclosure of "record[s] or other information pertaining to a subscriber or customer of such service (not including the contents of

[2] As further discussed below, we respectfully submit that a cellular telephones cannot properly be characterized as a "tracking device" since the cell-site information that results from its use is far less precise than the information obtained by bona fide tracking devices under 18 U.S.C. § 3117, such as GPS transponders and "bumper beepers."

communications)." 18 U.S.C. § 2703(c)(1). The government's original application as well as its renewed application in this case (at ¶¶ 3, 10 and 11 of both applications) specifically relied on 18 U.S.C. § 2703(c)(1).

The "record[s] or other information" available to the government pursuant to 18 U.S.C. §§ 2703(c) include cell-site information. As a threshold matter, cell-site information is not the "contents of a communication" within the meaning of 18 U.S.C. §§ 2703(a) and 2703(b). In general, such "contents" includes only the "substance, purport, or meaning" of an electronic communication. 18 U.S.C. § 2510(12), incorporated by reference in the SCA at 18 U.S.C. § 2711(1). By contrast, cell-site information conveys what neighborhood or locale a person is in or is passing through when he operates a cellular telephone rather than what he said. Thus, cell-site information constitutes "information pertaining to a subscriber," rather than the "contents of a communication."

Secondly, the structure of the SCA, as first enacted and as later amended by CALEA, demonstrates an intention to authorize courts to order disclosure of a broad array of non-content information, including cell-site information. When it was first enacted, the SCA permitted the disclosure pursuant to court order (or subpoena) of the category of the catch-all category of "record[s] or other information pertaining to a subscriber or customer of such service (not including the contents of communications)," now codified at 18 U.S.C. § 2703(c)(1). See P.L. 99-508, 100 Stat. 1848, 1862 (1986). The accompanying 1986 Senate report emphasized the breadth of the "record or other information" language: "[t]he information involved is information about the customer's use of the service not the content of the customer's communications." S. Rep. No. 541, 99th Cong., 2d Sess., at 38 (1986).

Moreover, while Congress increased privacy protections with respect to detailed, non-content telephone transactional records when it enacted CALEA in 1994, CALEA's amendments to the SCA preserved the government's right of access to such data, including cell-site information. CALEA created a distinction between basic subscriber records (e.g., subscriber name and address, duration of call) and more detailed transactional data. Basic subscriber information could still be subpoenaed without notice, see 18 U.S.C. § 2703(c)(2). The government's access to "record[s] or other information pertaining to a subscriber to or customer of such service (not including the contents of communications)" and outside the scope of basic subscriber records was conditioned, however, on its obtaining a search

warrant or alternatively, a 2703(d) order, as newly defined by CALEA. See P.L. 103-322, Title XXXIII, 330003(b) (1994); P.L. 103-414, Title II, § 207(a) (1994).

As the August 25 Order acknowledges (at *1), under the SCA as amended by CALEA, courts are empowered to issue a 2703(d) order if the government offers "specific and articulable facts showing that there are reasonable grounds to believe that the . . . records or other information sought are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Congress intended this new "intermediate standard," midway between the standard required for issuance of a subpoena and for a search warrant, H.R. Rep. No. 827(I), 103rd Cong., 2d Sess., ("House CALEA Report") at 31 (1994), to apply to detailed transactional data, including cell-site information. In discussing the newly-added provisions of 18 U.S.C. §§ 2703(c)(1), the House Report emphasized that the drafters understood that "transactional records from on-line communication services reveal more than telephone records or mail records." House CALEA Report at 31. Accordingly, the government henceforth would be permitted to obtain the addresses used in email messages if (at minimum) it satisfied the "reasonable grounds" requirements of 18 U.S.C. § 2703(d). House CALEA Report at 31.

If anything, an individual's privacy interest in the identity of his email correspondents exceeds his privacy interest in the identity of the neighborhood or locale in which he operates a cellular telephone. That Congress expressly stated that the SCA as amended by CALEA was intended to authorize disclosure of email address information upon a proper showing under 18 U.S.C. § 2703(d), demonstrates that Congress likewise intended 18 U.S.C. § 2703(d) to govern arguably less intrusive categories of detailed, non-content telephone transactional records -- including cell-site information.

C. CALEA's Ban On Cell-Site Data Acquired "Solely Pursuant" To The Pen/Trap Statute Is Satisfied By An Order Issued Under Dual Authority Of § 3123 and § 2703(d)

The August 25 Order, at *3, states that "[t]he government . . . does not rely on the pen register statute" and, in any event, "Congress appears to have prohibited it from doing so" to obtain cell-site information. As to the first point, we respectfully submit that the government did in fact invoke the authority of the Pen/Trap statute in its original and renewed applications for, inter alia, a cell-site location order. To the extent that there was previously a lack of clarity on that score,

we seek to dispel it now. The government seeks by this application to obtain authority under authority of both the SCA and the Pen/Trap statute.

As further explained below, cell-site information that the government seeks to obtain on a prospective basis is both "records or other information," see 18 U.S.C. §§ 2703(c), access to which is conditioned on a court issuing an order that complies with 18 U.S.C. § 2703(d) of the SCA, and information that requires installation of a pen register, access to which is conditioned on a court issuing an order under 18 U.S.C. §§ 3122 and 3123 of the Pen/Trap statute. Accordingly, each time in the government's applications (see ¶¶ 1,6, 7 thereto) that we invoked 18 U.S.C. §§ 3122 and 3123 to seek pen register data in applications (see ¶¶ 3, 10 and 11 thereto) that also sought disclosure of cell-site information under the SCA, the citations to the Pen/Trap statute were likewise for the purpose of obtaining cell-site information.

As to the assertion that Congress has banned any use of pen registers to obtain cell-site information, we respectfully submit that the conclusion is at odds with CALEA's careful phrasing. CALEA authorizes the use of a pen register in circumstances such as these, in which the SCA's requisites of articulate facts demonstrating reasonable grounds are also satisfied. See 18 U.S.C. § 2703(d). The provision of CALEA that the August 25 Order cited to deny the government's application provides as follows:

> (a) ... a telecommunications carrier shall ensure that its equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications are capable of –
> . . .
>
> > (2) expeditiously isolating and enabling the government, pursuant to a court order or other lawful authorization, to access call-identifying information that is reasonably available to the carrier– . . .
>
> except that, with regard to information acquired solely pursuant to the authority for pen registers and trap and trace devices (as defined in section 3127 of title 18, United States Code), such call-identifying information shall not include any information that may disclose the physical location of the subscriber (except to the extent that the location may be determined from the telephone number). . . .

CALEA § 103(a), codified at 47 U.S.C. § 1002 (emphasis added).

There is no dispute that "[i]nformation that may disclose the physical location of the subscriber" includes cell-site information of the kind in issue here. Congress' prohibition on the use of pen registers to obtain cell-site information, however, is limited to circumstances in which that data is "acquired solely pursuant" to the authority of 18 U.S.C. § 3127 of the Pen/Trap statute. Moreover, CALEA contains not only the "solely pursuant" clause governing the Pen/Trap statute, but also the provisions discussed above (at 3-4) that amend the SCA to authorize the disclosure of cell-site information, provided the government articulates facts demonstrating "reasonable grounds to believe" that the information sought is "relevant and material". 18 U.S.C. § 2703(d). Accordingly, by amending the SCA, CALEA created authority distinct from the Pen/Trap statute -- i.e., not "solely pursuant" to that statute -- that authorizes the release to the government of "information that may disclose the physical location of" a cellular telephone subscriber."

In this case, as is our practice, the government has not sought to acquire cell-site information "solely pursuant" to the Pen/Trap statute, but as well under the more demanding requirements of the SCA. Under the Pen/Trap statute, a court is empowered to authorize the installation of a pen register or trap and trace device upon the mere finding that a law enforcement officer "has certified . . . that the information sought is likely to be obtained . . . is relevant to an ongoing investigation. 18 U.S.C. § 3123(b). We do not seek authorization to obtain cell-site information based on a mere finding that the government has certified the information's likely relevance. Rather, we have sought it based on the provisions of the SCA that require the government to articulate and for a neutral magistrate to find "reasonable grounds to believe" that the information sought is "relevant and material to" that investigation. 18 U.S.C. § 2703(d). See Point B above.

That is not to say that the order that we propose could or should issue based solely on authority of the SCA. We agree with those portions of the August 25 Order (at *3-4) that recognize the Pen/Trap statute plays a governing role in the issuance of orders requiring the prospective disclosure of cell-site obtained from the installation by a provide of a special device or process. As amended by the USA PATRIOT ACT,[3] the terms

[3] P.L. 107-56, 115 Stat. 272 (2001).

"Pen register" and "trap and trace device" now include "dialing, routing, addressing and signaling information." See 18 U.S.C. §§ 3127(3) (pen register) and 3127(4) (trap and trace device). Service providers use cell-site information for several of those functions and in particular, the routing of calls from their point of origin to their intended destination. Accordingly, orders directing the prospective collection of cell-site information must issue under the complementary authority of the Pen/Trap statute and -- to comply with CALEA -- of the SCA.

D. Cell-Site Information Does Not Convert A Cellular Telephone Into A "Tracking Device" Requiring A Warrant

The August 25 Order expresses concern that disclosure of cell-site information pursuant to 18 U.S.C. § 2703 "would effectively allow the installation of a tracking device without the showing of probable cause normally required for a warrant" August 25 Order at *2. Underlying this concern is the assertion that cell-site information is the functional equivalent of physical surveillance of the cellular telephone because "it reveals that person's location at a given time" Id. We respectfully submit that these concerns are unfounded.

First, it is not the general rule that a "tracking device" requires a search warrant. For example, there is no requirement that law enforcement obtain a warrant for a proximity beeper installed in a car tracked on the open road. See United States v. Knotts, 460 U.S. 276 (1983). Second, although future improvements in cell-site technology may permit the location of a cellular phone user to be pinpointed, that is not the present state of the technology. Cell-sites only reveal the general vicinity of the person using a cellular telephone and the general direction in which they are moving if they are in transit.

Thus, it is inaccurate to say a law enforcement officer's access to cell-site information gives him a virtual view of a target's location. Rather, it only gives him access to routing information of the kind that is ordinarily used by the telephone service provider and as to which a subscriber has at best a limited privacy interest. See Smith v. Maryland, 442 U.S. 735, 744 (1979) (no "seizure" within meaning of Fourth Amendment occurred when police obtained data obtained via pen register installed on hardline telephone).[4] Accordingly, Congress'

[4] In Smith, the defendant "assumed the risk" that telephone numbers he dialed would be disclosed by telephone

decision to authorize the disclosure of cell-site information upon the showings required by the SCA and the Pen/Trap statute is entirely appropriate.

Respectfully submitted,

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company, since "the switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber". Id.