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ISSUES TO DEVELOP AT TRIAL

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This month's issue brings to the forefront a pressing question the U.S. Supreme Court will be considering next term: Whether law enforcement must obtain a warrant before acquiring cell phone records revealing an individual's location and movements over extended periods of time. Practitioners in New York should make motions to suppress, under the federal ***and state constitutions****, arguing that an individual has a constitutional privacy right under U.S. Const., amends. IV, XIV and N.Y. Const., art. I, § 12 in this information.*

Background: As many of you probably know from first-hand experience, the prosecution may present incriminating evidence against your client at trial in the form of cell site location information ("CSLI"). This information takes the form of records the prosecution obtains from the defendant's cellular service provider by court order under 18 USC § 2703(d) of the Federal Stored Communication Act, which does not require that the prosecution establish probable cause or obtain a warrant. The records generally establish the location of the phone (and, by inference, your client) at a given point in time, by reference to which cell tower sent and received signals from the defendant's phone. Through such network-based location techniques, a cellular service provider can approximate the location of any active cell phone within its network based on the phone's communication with a particular cell site. While arguments can be made that the cell data doesn't establish who was using the phone — just that someone was using your client's phone — or the location with exact precision, it is still very damning information.

The Law: The current state of the law with respect to whether the prosecution's acquisition of CSLI requires a warrant (and thus, whether 18 USC § 2703(d), by requiring only "reasonable grounds" is unconstitutional) is unsettled. There is a split in the federal circuits, as well as among some state high courts.

In the case to be heard by the Supreme Court next term, *U.S. v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), the Sixth Circuit, in rejecting the defendant's Fourth Amendment claim (1) distinguished between constitutionally protected "content" and non-protected "routing information," finding that the CSLI was "routing information, which the wireless providers gathered in the ordinary course of business;" (2) stated that, based on prior United States Supreme Court law from the 1970's (*United States v. Miller* and *Smith v. Maryland*), that the defendants lacked any privacy interest in business records created and maintained by third-party wireless carriers (the "third-party doctrine"); (3) held that users can have no expectation of privacy in the locational information because users know, or should know, that placing or receiving a call exposes the phones location to the nearest cell tower and thus to the company that operates the tower.

The only Appellate Division authority in New York is *People v. Hall*, 86 A.D.3d 450 (1st Dep't 2011), which held that, under the Fourth Amendment, the defendant had no reasonable expectation of privacy while traveling in public, and that any argument for suppression under the New York State Constitution was unpreserved. In dicta, the Court rejected a state constitutional argument on the merits, distinguishing CSLI from the installation of a GPS device on the defendant's car (which requires a warrant, *see People v. Weaver*, 12 N.Y.3d 433 (2009)). The Court also found that even if prolonged surveillance might require a warrant under federal law, the CSLI records sought in the case were for just three days. However, as noted, the state constitutional arguments were not preserved in *Hall*, and the Court of Appeals has not opined on this matter.

Practice tips:

If you anticipate that the prosecution will want to introduce historical CSLI records against your client, include in your omnibus motion a motion to suppress this evidence under the federal **and state constitutions** on the ground that your client had a reasonable expectation of privacy in his cell site location information. Note that the argument will be stronger if the prosecution is seeking prolonged location information. Here are some arguments you can include:

- Your client has a Fourth Amendment claim even though the records sought were from the cell phone provider, not directly from him, because third-party access to records is just one factor in the reasonable-expectation-of privacy analysis. For example, a patient enjoys a reasonable expectation of privacy in diagnostic tests performed by a hospital; those results cannot be shared with nonmedical personnel without her consent. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001). Older Supreme Court cases, such as *Smith* and *Miller*, are outdated and not controlling in this new age of digital surveillance. Nor has the New York Court of Appeals specifically opined on this matter.

- Your client has an expectation of privacy in records created and possessed by the cell service provider because he/she did not voluntarily share his location with the provider in any meaningful way. The only information your client voluntarily and knowingly conveyed to the phone company is the number that was dialed. When your client did so, there was no indication to him that making that call would also locate the caller. When your client received a call, he didn't voluntarily expose anything at all.

- The New York Court of Appeals has not addressed the third-party issue under either the federal or state constitutions with respect to the issue of CSLI, and its 1982 decision in *People v. DiRaffaele*, 55 N.Y.2d 234 (1982), holding that a defendant doesn't have an expectation of privacy under the Fourth Amendment in records maintained by the telephone company, and further declining to find that the state constitution was more restrictive on this question, is not controlling as it did not deal with CSLI. Its 1982 analog-age precedent, should not apply to digital surveillance techniques.

- Other state courts have already held the third-party doctrine is inapposite in this context under their state constitution. *See Com. v. Augustine*, 4 N.E.3d 846, 859 (Mass. 2014)

("[T]he nature of cellular telephone technology and CSLI and the character of cellular telephone use in our current society renders the third-party doctrine of *Miller* and *Smith* inapposite; the digital age has altered dramatically the societal landscape from the 1970s, when *Miller* and *Smith* were written.") Likewise, the New York Constitution provides greater protections than the Fourth Amendment when circumstances warrant. *See People v. Weaver*, 12 N.Y.3d 433, 445-46 (2009).

- A warrant should be required because important privacy interests are at stake. Cell phones are now ubiquitous and almost permanent attachments to people's bodies. There is no question that CSLI tracks the location of telephone users, and that tracking a person's movements implicates privacy concerns. *Weaver*; *United States v. Jones*, 132 S.Ct. 945 (2012)(five Justices agreed that GPS tracking of a vehicle, at least for more than a short period of time, intruded on an individual's reasonable expectation of privacy). Prolonged electronic surveillance of the location of a person's cell phone is at least as invasive as prolonged electronic surveillance of the location of his or her car, which is protected. Such monitoring can reveal intimate and private information about a person's political, professional, religious, and sexual associations, including their movements in private as well as public spaces.

- CSLI is especially problematic, because cell phones give off signals from both public and private spaces, and when the prosecution seeks to obtain CSLI from a cell service provider, it has no way of knowing in advance whether the CSLI will have originated from a private or public location. Given that the constitution, state and federal, certainly protects against warrantless intrusions into private places, the court should not ignore the probability that your client may have been tracked into a constitutionally protected area.

- Argue that even if the time period the prosecution seeks for CSLI is relatively short (say, less than two weeks), your client still has a constitutionally protected privacy right because of the unique concerns raised by cell-phone tracking. *People v. Hall* was wrong to put the stress on the length of time of the surveillance by likening it to GPS tracking in that regard. While short-term GPS tracking by the government is similar to visual surveillance, a traditional law enforcement tool that doesn't implicate constitutionally protected privacy interests, historical CSLI records allow the prosecution to track and reconstruct a person's past movements, a category of information that would never be available through the use of traditional law enforcement tools of investigation. Also, cell phone tracking can be more intrusive, as noted above, than GPS vehicle tracking.

General Reminders:

- When you move to dismiss at the close of the People's case, **specifically cite the element or elements that the People have failed to establish by sufficient proof.** A general motion to dismiss for failure to make out a prima facie case does not preserve a sufficiency issue for appeal.

- Never rely on an objection, motion, or request made only by a co-defendant's attorney. It will not preserve an issue for your client, unless you specifically join in it, on the record.

See past issues at http://appellate-litigation.org/issues-to-develop-at-trial/