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October 11, 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 writes in reply to the brief of amicus curiae Electronic Frontier Foundation ("EFF") in opposition to our motion to reconsider the 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 our application for an order authorizing use of a pen register to obtain information regarding the location of cell-sites used to process calls to and from a specified telephone number ("cell-site information"). As detailed below, EFF's arguments are unavailing.

A. **Overview**

1. Statutory Interpretation

The government's reading of the Communications Assistance for Law Enforcement Act ("CALEA"), P.L. 103-313 (1994), to authorize the use of a pen register to collect cell-site information under joint authority of 18 U.S.C. §§ 3121 et seq. (the pen register/trap and trace statute, or "Pen/Trap

Statute") and 18 U.S.C. § 2703(d) of the Stored Communications Act ("SCA"), as amended by CALEA, is mandated by controlling principles of interpretation.

CALEA established two overlapping regimes regulating disclosure of cell-site information. Under well-established rules of statutory interpretation, the two regimes must be read in a manner that gives effect to both. The government's interpretation gives effect both to the Pen/Trap Statute and SCA as amended by CALEA by construing its prohibition on a cell-site disclosure order issuing "solely pursuant" to the Pen/Trap Statute to be satisfied when such an order issues pursuant to that statute, complemented by the requisite and, by comparison, more demanding factual showing mandated by the SCA: namely, "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).

By contrast, EFF's argument that the "solely pursuant" clause of the Pen/Trap Statute implies legislative intent to preclude any use of that statute in combination with any other authority to obtain cell-site information fails to give effect to the SCA as amended by CALEA. And indeed, the Court of Appeals for the District of Columbia and the Federal Communications Commission ("FCC") have specifically so ruled in decisions on which EFF purports to rely, but omits fully to discuss. See United States Telecom Ass'n v. FCC, 227 F.3d 450 (D.C. Cir. 2000), upholding in relevant part In the Matter of Communications Assistance for Law Enforcement Act ("In the Matter of CALEA"), 14 F.C.C.R. 16794 (1999).

2. Orders For Prospective Disclosure Of Data

EFF is likewise unconvincing when it insists that the Court lacks authority under the SCA to order disclosure of cell-site information on a prospective basis. As a threshold matter, whether the SCA authorizes prospective disclosure is immaterial because the government's application is not made pursuant to the SCA alone, but rather pursuant to the SCA in tandem with the Pen/Trap Statute. By definition, the Pen/Trap Statute authorizes the collection of transmission-related call data prospectively via pen register or trap and trace device. In addition, nothing in the SCA prohibits a court from directing a telephone service provider to furnish the government with "records or other information," such as cell-site data, see 18 U.S.C. § 2703(c)(1)(B), as soon as the provider's information systems have recorded that data. Moreover, were any additional authority

needed for the Court to direct prospective disclosure of cell-site information, the Court already possesses it under the All Writs Act, 28 U.S.C. § 1651, which authorizes the issuance of orders in aid of the Court's jurisdiction.

3. Narrow Privacy Right Under CALEA

Nor is EFF persuasive when it argues that a person's privacy interest in cell-site information is so acute as to condition the government's access to that information on a showing of probable cause equivalent to what the Fourth Amendment and Title III require in order to authorize interception of the contents of communications. A person who uses the network of a telephone service provider to make a call does not assume the risk that others may be listening to what is said during that call. But he does assume the risk that information essential to process that call may pass from the provider to law enforcement. Smith v. Maryland, 442 U.S. 735, 744 (1979).

In the wireless/digital world, cell-site information is one of those types of data, as the D.C. Circuit likewise found in United States Telecom Ass'n v. FCC, 227 F.3d at 459. In enacting CALEA, Congress struck a balance in which although an individual may well prefer to keep his whereabouts confidential when he uses a cellular telephone, he has no right to privacy with respect to that information because he voluntarily discloses it to his service provider in the course of placing or receiving cellular calls. Thus, he assumes the risk that his cell-site usage may be disclosed to law enforcement. CALEA authorizes "expeditiou[s]" disclosures to the government of a person's cell-site usage under the Pen/Trap Statute, provided that the government also meets the essential requirement of the SCA: namely: an offer of specific and articulable facts demonstrating reasonable grounds to believe that cell-site information would be relevant and material to an ongoing criminal investigation. See 18 U.S.C. § 2703(d).

B. **Detailed Analysis**

1. The Pen/Trap Statute And SCA Must Be Read Jointly To Authorize Prospective Disclosure Of Cell-Site Information

EFF derides the government's reading of CALEA's amendments to the Pen Trap Statute and SCA, as a "'clown car' theory of statutory interpretation." EFF Br. at 6. But there is nothing comic in our approach. Application of well-known canons of construction mandate 47 U.S.C. § 1002(a)(2)(B) to be

read to prohibit disclosure of cell-site information if authority for the disclosure is obtained "solely pursuant" to the Pen/Trap Statute, but to permit it if the authority is obtained jointly under the Pen/Trap Statute and 18 U.S.C. § 2703 of the SCA.

There is no dispute that the SCA as amended by CALEA governs "records or other information pertaining to a subscriber," 18 U.S.C. § 2703(c)(1)(B), including cell-site information. See EFF Br at 2-3; see also Order of the Court dated September 19, 2005 (recognizing same). EFF maintains, however, that 47 U.S.C. § 1002(a)(2)(B) imposes a blanket ban on collection of cell-site information prospectively because Congress "would have made the connection explicit" if in enacting CALEA, it had intended the "solely pursuant" clause of 47 U.S.C. § 1002(a)(2)(B) to be satisfied by government applications made under Pen/Trap Statute and the complementary authority of the SCA, as amended. EFF Br. at 6. The claimed prohibition, however, is illusory. The term "solely" is not wholly prohibitive, but rather, partially restrictive.

"The Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. 535, 551 (1974) (emphasis added); accord Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Ass'n, 491 U.S. 490 at 510 (1989). If anything, this rule applies with even greater force where, as here, the two statutes that created overlapping regulatory regimes were "not only . . . enacted on the same day, but [also] enacted as part of the same legislation." Auburn Housing Authority v. Martinez, 277 F.3d 138, 145, 150 (2d Cir. 2002).

Congress did not express a clear intention in CALEA to preclude the SCA from regulating access to cell-site information. Rather, Congress said that the government could not obtain cell-site information based "solely" on the Pen/Trap Statute. 47 U.S.C. § 1002(a)(2)(B). The plain and ordinary meaning of "solely" is "alone" or "singly." American Heritage Dictionary of the English Language (4th ed. 2000). Accordingly, Congress not only can, but must be understood to have intended the government to obtain cell-site information on a prospective basis so long as it did not rely only on the Pen/Trap Statute, but rather, on that statute in conjunction with other authority. Not surprisingly, this is exactly what the FCC and, ultimately, the D.C. Circuit held when they each rejected the claims of EFF (among other intervenors) that 47 U.S.C. § 1002(a)(2)(B) prevented the FCC from requiring service providers to assure that their equipment

would allow law enforcement in possession of a valid court order expeditiously to obtain cell-site information. See United States Telecom Ass'n v. FCC, 227 F.3d at 464 (in recognizing that 47 U.S.C. § 1002(a)(2)(B) contemplated disclosure of cell-site information not obtained "solely pursuant" to Pen/Trap Statute, FCC "simply follow[ed] the well-accepted principle of statutory construction that requires every provision of a statute to be given effect"), affirming 14 F.C.C.R. 16,794 at ¶ 44.[1]

Moreover, the cited rules of interpretation not only require that 47 U.S.C. § 1002(a)(2)(B) be construed to provide for disclosure of cell-site information on a prospective basis if other, complementary authority exists to permit it, but also mandate that SCA as amended by CALEA be interpreted to constitute such other, requisite authority. Auburn Housing Authority v. Martinez, 277 F.3d at 150. CALEA created two statutory regimes that overlap with respect to regulation of cell-site information. The first is the Pen/Trap Statute, which subject to satisfying 47 U.S.C. § 1002(a)(2)(B)'s "solely pursuant" clause, authorizes the government to acquire the information based on the government's certification of relevance to a criminal investigation. See 18 U.S.C. § 3123(b). The second is the SCA, which as amended by CALEA, authorizes the disclosure to the government of categories of data, inclusive of cell-site information, upon an offer of specific and articulable facts demonstrating there are reasonable grounds to believe that the data is relevant and material. See 18 U.S.C. § 2703(d).

The overlapping statutes are each given effect, as Morton and Auburn Housing Authority require, by conditioning authorization of the government to obtain cell-site information via pen register or trap and trace device on an offer of specific and articulable facts as 18 U.S.C. § 2703(d) requires. The "solely pursuant" clause of 47 U.S.C. § 1002(a)(2)(B) is given effect because the Pen/Trap Statute is not the sole authority used to obtain the information. The SCA as amended is given

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[1] "We agree with DoJ/FBI that [47 U.S.C. § 1002(a)(2)(B)] does not exclude location information from the category of 'call-identifying information' [to be made accessible to law enforcement], but simply imposes upon law enforcement an authorization requirement different from that minimally necessary for use of pen registers and trap and trace devices." Id. The counter-arguments of EFF and others rejected by D.C. Circuit and the FCC are in the intervenors' brief, published at www.eff.org/legal/cases/USTA_v_FCC/29999129_eff_epic_aclu_calea_brief_html.

effect because the government's access depends on its making the showing required by 18 U.S.C. § 2703(d).

2. The Court Has The Power To Order Providers To Disclose Cell-Site Information Prospectively

Cell-site information is used, inter alia, to route calls from their point of origin to their intended destination. A pen register or trap and trace device obtains cell-site information from the data stream that a service provider uses for "dialing, routing, addressing and signaling" of a subscriber's call.[2] The pen register or trap and trace device acquires this information and transmits it to law enforcement contemporaneously with, if not always immediately during, a cellular telephone call.[3]

EFF asserts that the SCA is not to be used as authority to order the disclosure to law enforcement of cell-site information on a rolling basis, i.e., prospectively, because the

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[2] As amended by the USA PATRIOT Act of 2001 § 216, Pub. L. No. 107-56, 115 Stat. 272 (2001) ("Patriot Act"), "Pen register" is now defined to mean:

> a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication . . . .

18 U.S.C. § 3127(3). Similarly, "trap and trace device" is now defined to mean

> a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication.

[3] Federal agents with whom we have conferred report a lag of several minutes or more between the cell-site information entering a service provider's information system and that data being relayed to law enforcement via pen register or trap and trace device.

SCA governs disclosure of "records or other information," see 18 U.S.C. § 2703(c)(1)(B), which by definition are "retrospective" (EFF Br. at 3) or "historical" (Id. at 4). EFF's semantics are unpersuasive.

As a threshold matter, in an era of electronic communications, every datum communicated electronically is "retrospective" or "historical" once it is captured. Thus, a court order to a provider to disclose cell-site information at or close to the time that it enters the provider's datastream is prospective in one sense but is otherwise retrospective. It is prospective with respect to the continuing obligation that the order imposes on the provider to turn over data as it is captured. That obligation, however, only accrues with respect to cell-site information for a particular time, after the provider's network has captured it in the course of processing a call. Thus, the same datum that is prospectively covered by a disclosure order is a "record" by the time that it must be turned over to law enforcement.

EFF therefore demonstrates nothing of moment by arguing that the SCA only applies to "recorded" information. For EFF elides the critical, albeit easily-answered issue: whether SCA carves out a distinction between records of current vintage and earlier ones, governing disclosure of the latter but not the former. Neither the text nor the history of the SCA as amended by CALEA contains any such temporal limitation.

Accordingly, under any one of several in pari materia readings of CALEA (see canon of interpretation authorities cited above), SCA contains no impediment to its use in conjunction with the Pen/Trap statute to authorize the disclosure of cell-site information. Nothing within the SCA prevents disclosure of cell-site information on a prospective basis. The Court may therefore reasonably base its authority to order disclosure on a prospective basis entirely on the Pen/Trap Statute. For as is undisputed, the sole function of equipment or processes installed pursuant to the Pen/Trap Statute is to acquire information that is only transmitted over a service provider's network after issuance of an order authorizing their use.

It would also be more than reasonable, however, for the Court to order the requested prospective disclosure on the basis of the SCA as well as the Pen/Trap Statute. Reliance on 18 U.S.C. § 2703(d) to authorize disclosure of cell-site information prospectively advances Congress' intent, as expressed in 47 U.S.C. § 1002(a)(2)(B), to require the government to make a greater showing than is required for other information obtained

prospectively via pen register or trap and trace device. See note 1 above. As previously explained, an order issued under joint authority of the Pen/Trap statute and the SCA assures greater accountability and privacy protection than an order issued under the Pen/Trap Statute alone because the SCA adds the requirement that the court conduct an independent review of "articulable facts" that the government must specify. 18 U.S.C. § 2703(d). Because the SCA defines the additional showing that 47 U.S.C. § 1002(a)(2)(B) requires for the government to obtain disclosure of cell-site information on a prospective basis, it is reasonable for the Court to treat the SCA as complementary authority to the Pen/Trap Statute with respect to those prospective disclosures.

Lastly, were additional authority required -- although we respectfully submit that it is not -- the Court has authority under the All Writs Act to order prospective disclosure of cell-site information in accordance with the SCA as soon as it becomes available to the service provider. The All Writs Act provides in relevant part that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added). Under this statute, such a court has "the power to issue such commands" as "may be necessary or appropriate to effectuate . . . orders that it has previously issued in its exercise of jurisdiction otherwise obtained." United States v. New York Tel. Co., 434 U.S. 159, 173 (1977). This power to issue supplemental orders in aid of the court's jurisdiction "extends to persons who are not defendants and have not obstructed justice." United States v. Doe, 537 F. Supp. 838 (E.D.N.Y. 1982) (Nickerson, J.) (relying on United States v. New York Tel. Co., 434 U.S. at 174-75).

Thus, for example, between 1979 and 1986, when Congress enacted the original version of the Pen/Trap statute,[4] the government routinely applied for and received orders authorizing the installation of pen registers in aid of investigations already being conducted under judicial supervision. See, e.g., United States v. Mosko, 654 F. Supp. 402, 405 (D. Colo. 1987) (pen register issued in 1984) (Matsch, J.). Currently, the government routinely applies for and upon a showing of relevance

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[4] In 1979, the Supreme Court decided Smith v. Maryland, 442 U.S. at 741-45, which held that pen registers were not subject to the warrant requirements of the Fourth Amendment because persons have no expectation of privacy in the numbers they dial.

to an ongoing investigation receives "hotwatch" orders issued pursuant to the All Writs Act. Such orders direct a credit card issuer to disclose to law enforcement each subsequent credit card transaction effected by a subject of investigation immediately after the issuer records that transaction. Likewise, courts frequently issue orders pursuant to the All Writs Act that direct disclosure of evidence in furtherance of their jurisdiction over cases of unlawful flight to avoid prosecution or confinement. While the evidence sought by All Writs orders in such cases is often pre-existing, see, e.g., United States v. Doe, 537 F. Supp. at 839 (ordering disclosure of 6 prior months of telephone toll records), there is no legal impediment to issuing such an order for records yet to be created. See, e.g., In re Application of the U.S.A. For An Order Directing X To Provide Access to Videotapes, 2003 WL 22053105, No. 03-89 (Aug. 22, 2003 D. Md.) (directing that production of subsequently-created videotapes made by security camera installed in apartment hallway).

Accordingly, the Court may use the All Writs Act as a basis in addition to the Pen/Trap Statute or SCA to order prospective disclosure of cell-site information, just as courts prior to 1986 were free to use it authorize pen registers and courts now are free to use it to order the collection of other types of evidence in investigations under their jurisdiction.

3. Under Smith v. Maryland and CALEA, There Is No Right To Privacy With Respect To Cell-Site Information

EFF insists that the disclosure of cell-site information to the government converts a cellular telephone into a covertly-planted "tracking device" (Eff. Br at 6-7) and is therefore an invasion of privacy that is illegal absent a Title III eavesdropping order.

But EFF is not writing on a blank slate. Smith v. Maryland, 442 U.S. 735, 744 (1979) established that telephone subscribers voluntarily assume the risk that data associated with their calls will be conveyed to law enforcement. In Smith, the Supreme Court held that telephone users had no subjective expectation of privacy in dialed telephone numbers and that any such expectation is not one that society is prepared to recognize as reasonable. See Smith, 442 U.S. at 742-44.

Smith's reasoning is as applicable to cell-site information as it is to dialed telephone numbers. First, as the Supreme Court emphasized in Smith: "we doubt that people in general entertain any actual expectation of privacy in the

numbers they dial. All telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." Smith, 442 U.S. at 742. Users of cellular telephones understand that they are broadcasting a signal to the service provider so that it can locate them to complete their calls. Accordingly, users cannot reasonably expect that the location of the cellular antenna used to effect their calls will be kept secret from the service provider.

In addition, under Smith, whether a user has a subjective expectation of privacy is irrelevant. In Smith, the Supreme Court explicitly held that "even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not one that society is prepared to recognize as reasonable." Smith, 442 U.S. at 743 (internal quotations marks omitted). It noted that "[t]his Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith, 442 U.S. at 743-44. In Smith, the user "voluntarily conveyed numerical information to the telephone company" and thereby "assumed the risk that the company would reveal to the police the numbers he dialed." Smith, 442 U.S. at 744. Similarly, a cellular telephone user voluntarily transmits a signal to the cell phone provider, and thereby assumes the risk that the cell phone provider will reveal the cell-site information to law enforcement. A cellular telephone user therefore can have no expectation of privacy in cell-site information.

Moreover, when it enacted CALEA, Congress deliberately left Smith's risk calculus intact. Accordingly, disclosure without notice of cell-site information to law enforcement cannot, as a matter of law, be deemed tantamount to the covert installation of a tracking device -- let alone one that requires a warrant. One who assumes the risk that location information that he wishes to keep confidential may be obtained to law enforcement has a choice. He can keep using a telephone, a pen register or trap and trace device that reveals his movements or whereabouts -- or he can turn that cellular telephone off.

CALEA was a direct response to new impediments to investigation by law enforcement created by rapidly-emerging wireless and digital technologies. See H.R. Rep. No. 103-287, Part OI at 14-15 (1994). Congress intended that it "provide law enforcement no more and no less access to information than it had in the past." Id at 22. To that end, CALEA enacted a definition of "call-identifying information," see 47 U.S.C. § 1002 that

recognized that while under "plain old telephone service" ("POTS"), a telephone was easily (and solely) identified by that telephone's number, in the wireless environment, a telephone is identified by a variety of other factors, including "signaling information." United States Telecom Ass'n v. FCC, 227 F.3d at 291.

Cellular telephone networks carry calls between parties by "'send[ing] signals to the nearest cell site at the start and end of the call." United States Telecom Ass'n v. FCC, 227 F.3d at 291. Accordingly, when the FCC set standards by which the telephone industry was to implement CALEA, it determined that "signaling information" included cell-site information. On this basis, the FCC directed the industry to build capabilities by which, when served with a proper order, a service provider could expeditiously make available to law enforcement information about the cell sites used to carry those signals. Id.

EFF and others filed suit to challenge this interpretation. They were squarely rebuffed by the D.C. Circuit, however. Lauding the FCC's approach as both "reasoned and reasonable," the D.C. Circuit endorsed the FCC's explanation that interpreting "call identifying information" to include cell-site information "comports with CALEA's goal of preserving the same surveillance capabilities that law enforcement agencies had in POTS" Id. As the FCC had explained:

> "'[I]n the wireline environment' . . . law enforcement agencies "have generally been able to obtain location information routinely from the telephone number because the telephone number usually corresponds with location' . . . . In the wireless environment, 'the equivalent location information' is 'the location of the cell sites to which the mobile terminal or handset is connected at the beginning and at the termination of the call.'"

United States Telecom Ass'n v. FCC, 227 F.3d at 291-92 (ellipses and emphases added).

Moreover, the D.C. Circuit so ruled only after earlier in its opinion affirming the continuing vitality of Smith v. Maryland after enactment of CALEA. In United States Telecom Ass'n v. FCC, (as here, see EFF Br. at 8), EFF claimed that under Smith, while callers have no reasonable expectation of privacy in their telephone numbers, they still had a right to expect privacy with respect to other types of call-identifying information. The D.C. Circuit likewise rejected this argument, holding that

"Smith's reason for finding no legitimate expectation of privacy in dialed telephone numbers -- that callers voluntarily convey this information to the phone company in order to complete calls -- applies as well to much of the information provided by the challenged capabilities." United States Telecom Ass'n v, FCC, 227 F.3d at 459.

The Court did not specify what "information provided by the challenged capabilities," falls outside Smith's ambit. The later portions of United States Telecom Ass'n, however, that emphasize that cell-site location is the functional equivalent of a location-identifying hardline telephone number, see 227 F.3d at 291-92 quoted above demonstrate beyond cavil that cell-site information is well within Smith's assumption-of-the-risk rubric.

Accordingly, EFF merely reprises arguments here that the D.C. Circuit properly rejected before. Smith v. Maryland is as applicable to cell-site information as it is to the hardline telephone number that was the subject of the pen register in Smith. One who does not wish to disclose his movements to the government need not use a cellular telephone. One who uses a cellular telephone runs the same risk as someone who subscribes to hardline telephone service that on a proper showing by the government, the government will discover his whereabouts. The only material difference between the two contexts is not of constitutional dimension, but rather, is merely statutory, namely that under CALEA, while law enforcement can obtain most species of call-identifying information pursuant to the Pen/Trap Statute upon mere certification of relevance, in order to obtain cell-site information, it must first satisfy the "articulable facts" standard of 18 U.S.C. § 2703(d).

E. **Conclusion**

For all of the above reasons, the Court should reconsider its August 25 Order and grant the government's request for orders authorizing disclosure to it of cell-site information with respect to use of the specified cellular telephone.

Respectfully submitted,

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