

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

FILED

ORLANDO, FL

5/23/06

U.S. MAGISTRATE JUDGE

IN THE MATTER OF THE APPLICATION  
OF THE UNITED STATES OF AMERICA  
FOR AN ORDER AUTHORIZING THE  
INSTALLATION AND USE OF AN  
ELECTRONIC COMPUTERIZED DATA  
COLLECTION DEVICE EQUIVALENT  
TO A PEN REGISTER AND TRAP  
AND TRACE DEVICE

Case No. 6:06-mj-1130

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ORDER

This matter came before the Court for consideration without oral argument on the Third Application filed by the United States seeking an extension of an order authorizing installation of a pen register and trap and trace device that was issued by the Honorable David A. Baker, United States Magistrate Judge. The United States requests that I add a provision not included in Judge Baker's order that would permit the communication service provider that installed the pen register and trap and trace device authorized by Judge Baker to capture post-cut-through digits.

The United States defines post-cut-through digits as "any digits dialed by the subject after connecting to another carrier's service." Third Application at 3 n.4 (quoting Federal Communications Commission Third Report, In the Matter Of: Communications Assistance For Law Enforcement Act, 14 F.C.C.R. 16794, 1999 WL 674884, at ¶ 112 (F.C.C. 1999)). For example, after calling an 800 number to access a long-distance carrier, post-cut-through digits would be created when the caller "then dials the telephone number that represents the ultimate destination of the call." *Id.* It also acknowledges that the post-cut-through digits may

include content, such as credit card numbers, bank account numbers, and passwords dialed from the telephone after the telephone call is connected. It represents that the current technology does not permit the communication service provider to separate post-cut-through digits that disclose content from those that do not.

The United States concedes that the pen register/trap and trace statute expressly precludes use of pen register/trap and trace devices to capture the content of the communications. 18 U.S.C. § 3127(3), (4). The United States argues that it should not be precluded from obtaining the post-cut-through digits that do not disclose the content of communications simply because some of the post-cut-through digits captured may disclose content. It suggests that the resolution to this problem is to rely on a Department of Justice policy that precludes use of content of the communications “for any affirmative investigative purpose, except in a rare case in order to prevent an immediate danger of death, serious physical injury, or harm to the national security.” Memorandum of Law, ex. 2. at 4.

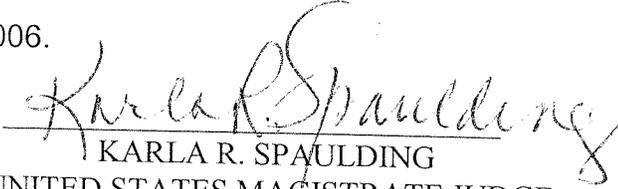
Congress was clear that content of communications cannot be captured by use of pen register and trap and trace devices. The Department of Justice’s unenforceable policy<sup>1</sup> not to use content captured by pen register and trap and trace devices, except when it really needs to do so, cannot override the clear requirements of the statute. Accordingly, the request to include authorization to capture post-cut-through digits in the extension of the

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<sup>1</sup> The policy provides as follows: “This Memorandum is limited to improving the internal management of the Department and is not intended to, nor does it, create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity, by any party against the United States, the Department of Justice, their officers or employees or any other person or entity. Nor should this Memorandum be construed to create any right to judicial review involving the compliance or noncompliance of the United States, the Department, their officers or employees, or any other person or entity, with this Memorandum.” Memorandum of Law, ex. 2 at 5.

existing pen register/trap and trace order is DENIED. The proposed order will be issued with the post-cut-through digit authorization excised from it.

**DONE** and **ORDERED** this 23rd day of May, 2006.

  
KARLA R. SPAULDING  
UNITED STATES MAGISTRATE JUDGE