

Legal Issues When Using or Encountering 21st Century Technology In Criminal Investigations

Legal Issues
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Encountering 21st
Century Technology
In Criminal Investigations

- Task Force
- Terrorist Group that uses I.D. Theft To Raise \$
- Surveillance of known subject
 - Bluetooth device in ear
 - GPS in rental car
 - Using “Smart Phone”
 - Watches people pumping gas while using laptop
 - Drives in manner to avoid being followed

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- Traffic stop
- Confirmed warrant: Theft of Government Computers
- Arrested, secured.

1. Can you search...

- Passenger area
- Backpack
- Cell Phone
- iPad
- SIM or SD Cards in backpack
- GPS device
- Trunk

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Assume No Arrest Was Made...

- Parks in mall near residence
- Talking on cell phone, using Bluetooth
- Shows something on iPad to man
- Door to unattached structure closes upon arrival
- Roofless storage area in back yard
 - Propane tank seen carried toward area a week or so ago

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2. Intercept Bluetooth without court order?

- Does it matter if “on the street” or in the residence?

3. Install GPS tracking device on car in mall parking lot without court order?

- May the GPS be monitored without court order?

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4. Residence has large picture window in front...

- Can pole camera be installed to view home and the garage and workshop?
- Can we “zoom in” and view documents and what’s on the iPad?
- Can “low light enhancement” be used to view into residence at night when lights are off?

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- 4, continued...
- Can an overflight be done w/o warrant to photograph property from above?
- Can “Google Earth” images be utilized w/o warrant to view the property from above?

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Arrest at shopping center...

- Resistance
- Taser™ used with head injury from falling
- Attempt to incite crowd
- Many crowd members using cell phone to video or take photos
- “Ride along” trainee also videos the event

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- 5. Impound all the phones?
- 6. Require pictures and videos to be erased?
- 7. Trainee's video have any legal significance?

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- 8. Prior to installing GPS, subject returns to car in mall.
 - Drives off.
 - Lose sight of subject.
 - Agents want to present-time “ping” or triangulate cell phone to find the suspect again
- What legal process (if any) needed?

“Primer”

- “PING” = digital; “Triangulate” = analog
- By federal mandate all new generation phones must be, or become GPS capable for 911 related locating
- Newer (digital) phones: PING sent. Phone responds with Lat/Long via GPS function, sent to Pinger. Info sent via “SMS”. Accurate within several feet.
- Older (analog): Towers 6-12 miles apart (closer in cities). Typical phone activates 3 towers. Strength + time lag for carrier signal to reach each tower allows triangulation. Accurate within 100 or so feet.

Present Location Efforts

- November, 2007 USDOJ Memo says use warrant based on PC
- Others maintain that court order based on the “specific articulable facts” “relevant to a criminal investigation” is all needed.
- ACLU did random sample and found federal prosecutors in Florida and NJ were using “order” while USAs in California, Louisiana, Nevada and DC required PC based warrant.
- Statutorily defined access standard; likely not 4th Amendment when on public thoroughfares (?)

“Historical” Cell Location: Warrant, Order or Subpoena?

Some prosecutors obtain HSL info via subpoena. Others use warrant or order.

In re Applications of the United States of America for Orders Pursuant To Title 18, United States Code, Section 2703(d),

509 F.Supp.2d 76 (USDC Mass. 9/17/07)

- Historical cell site information obtainable pursuant to the Stored Communications Act
- Disclosure pursuant to the SCA of historical cell site information held by cell service provider did not violate the 4th Amendment.

Mitchell v. State, 25 So.3d 632 (Fla. 4th DCA, 2/8/10)

- Historical cell phone site information is not content-based
- User has no expectation of privacy in historical cell phone records
- Adopting the above “In re Applications...” case.

In the Matter of the Application Of the United States of America For An Order Directing A Provider Of Electronic Communication Service To Disclose Records To The Government, 2010 WL 3465170, (CA3, 9/7/10)

- Court has discretion to require a warrant., but option to obtain by an order (see: 18 USC § 2703(d)) exists also.

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Lessons from today's discussion:

- Technological advances provide numerous opportunities to investigators
- Just because you "can" doesn't mean you "can"
- Not much court opinion guidance on many issues. Draw analogy to similar situations and be aware that statutes may provide more privacy protection than traditional "4th Amendment" analysis and cases.

Supplemental Slides

- Power pole FBI Legal Bulletin article by Wes Clark (as discussed during presentation) may be accessed at:

<http://www2.fbi.gov/publications/leb/2009/november2009/>

- Carl Milazzo's Cell Phone Article may be accessed at:

<http://policechiefmagazine.org/magazine/index.cfm?fuseaction>

Supplemental Slides

The “Maynard” case referred to by Jayme as a “must-read”: U.S. v Maynard, No. 08-3034, 2010 U.S. App. LEXIS 16417, 2010 (D.C. Cir. 8/6/2010).

New York GPS “must have warrant” case: People v. Weaver, N.Y. Ct. Appeals.

May, 2009, found at: <http://caselaw.findlaw.com/ny-court-of-appeals/1140764.html>

Other mentioned:

“Google Earth” cases:

U.S. v. Garcia, 474 F.3d 994 (7th Cir. 2007).

U.S. v. Rios, 2010 WL 1529435 (E.D. Wis).

U.S. v. Garcia-Hernandez, 550 F.Supp.2d 1228 (S.D. Cal. 2008)

U.S. v. Fields, 2008 WL 5332249 (N.D. Ind).

State v. Sveum, 769 N.W.2d 53 (Wis. 2009).

State v. Reed, 2009 WL 2991548 (Tenn. Crim. App.)

People v. Jamison, 2009 WL 2568740 (N.Y. Supp.)

State v. Fernandez, 306 S.W.3d 354 (Tex. 2010)

Pole Camera cases:

U.S. v. Jackson, 213 F.3d 1269 (10th Cir. 2000)

U.S. v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987)

Hudspeth v. State, 78 S.W.3d 99 (Ark. 2002)

State v. Holden, 964 P.2d 318 (Utah 1998)

State v. Costin, 720 A.2d 866 (Vt. 1998)

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Thanks for your attention!

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