AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Search and Seizure

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United States v. Wallace, No. 16-40701 (5th Cir., 2017)

William Chance Wallace is a member of a Texas gang with a variety of felony convictions. In 2015, he violated his probation and became a fugitive. A confidential informant gave his cell phone number to the Texas Department of Public Safety, which obtained a "ping order" that allowed them to track Wallace's movements and collect "prospective cell site data" from cell towers in proximity to his cell phone. Using evidence collected from that surveillance, Wallace was arrested and charged with violating the terms of his probation, possessing a firearm, and witness intimidation. Wallace moved to suppress that evidence, arguing that the ping order was an unconstitutional search. The trial court dismissed the motion, and Wallace appealed to the circuit court. A three-judge panel on the circuit court affirmed the ruling of the trial judge.

JUDGE CLEMENT.

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. . . Wallace argues that the district court should have granted his motion to suppress because the government violated his Fourth Amendment rights when it accessed his phone's E911 location information—or prospective cell site data—pursuant to a court order supported by "specific and articulable facts" rather than a warrant supported by probable cause. Ordinarily, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search or seizure. This prohibition applies as well to the fruits of the illegally seized evidence." . . . Whether obtaining prospective cell site data constitutes a search within the meaning of the Fourth Amendment is still an open question in this Circuit.

The Sixth Circuit—the only appellate court to address the subject so far—held that obtaining prospective cell site data is not a search. *United States v. Skinner* (6th Cir., 2012). The Sixth Circuit reasoned that when an individual "voluntarily use[s]" a cellular device, he has no "reasonable expectation of privacy in the GPS data and location of his cell phone." "When criminals use modern technological devices to carry out criminal acts and to reduce the possibility of detection, they can hardly complain when the police take advantage of the inherent characteristics of those very devices to catch them." . . .

We have already grappled with the constitutionality of judicial orders based on less than probable cause authorizing government access to *historical* cell site data. *In re U.S. for Historical Cell Site Data* (5th Cir., 2013). . . .

. . . We concluded that:

> cell site information is clearly a business record. The cell service provider collects and stores historical cell site data for its own business purposes, perhaps to monitor or optimize service on its network or to accurately bill its customers for the segments of its network that they use. The Government does not require service providers to record this information or store it. The providers control what they record and how long these records are retained. . . . [T]he

Government merely comes in after the fact and asks a provider to turn over records the provider has already created.

There is little distinction between historical and prospective cell site data. As in *Historical Cell Site Data*, here the government sought "the disclosure of the locations of cell site towers being accessed by [Wallace's] cell phone" as recorded in future records "captured, stored, recorded and maintained by the phone companies in the ordinary course of business." "While this information is 'prospective' in the sense that the records had not yet been created at the time the order was authorized, it is no different in substance from the historical cell site information . . . at the time it is transmitted to the government." . . . We therefore conclude that like historical cell site information, prospective cell site data falls outside the purview of the Fourth Amendment. As such, "the Stored Communications Act authorization of § 2703(d) orders for [prospective] cell site information if an application meets the lesser 'specific and articulable facts' standard, rather than the Fourth Amendment probable cause standard, is not per se unconstitutional."

That said, even if accessing prospective cell site data did constitute a Fourth Amendment search, DPS's actions are covered by the good-faith exception to the exclusionary rule. . . .

The plain language of [the statute] states that the government may obtain "a court order" requiring a cellular telephone company to turn over "record[s] or other information" related to its "customer[s]." Nothing in the text of the statute suggests that "other information" does not encompass prospective cell site data. Given the "strong presumption of constitutionality due to an Act of Congress," *United States v. Watson* (1976), and the absence of a "clear, controlling case explicitly stating that the government may not obtain real-time cell site location data under the SCA," it was reasonable for the officers to rely on the text of the statute. . . .

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