

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<hr/>	:	CRIMINAL ACTION
	:	
v.	:	
	:	
KHALIL SMITH, <u>ET AL.</u>	:	No. 15-180
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Goldberg, J.

January 26, 2017

Memorandum Opinion

The superseding indictment in this case describes an ongoing, multi-year conspiracy, whereby drug dealers and other victims were targeted for armed home invasion robberies.¹ It is alleged that these crimes involved the use of GPS tracking devices, police scanners, firearms, and in some instances torture. The Government intends to prove Defendants' involvement in these crimes, in part, through the introduction of historical cell site location information (CSLI) obtained through court orders issued pursuant to the Stored Communications Act, 18 U.S.C. § 2703(d). According to the Government, this evidence, presented in part through an expert witness, will generally establish the various sector locations of calls made from Defendants' cell phones.

¹ On May 26, 2016, Defendants were charged in a superseding indictment with conspiracy to interfere with interstate commerce by robbery in violation of 18 U.S.C. § 1951(a) (one count); interference with interstate commerce by robbery in violation of 18 U.S.C. § 1951(a) and 18 U.S.C. § 2 (five counts); attempted interference with interstate commerce by robbery in violation of 18 U.S.C. § 1951(a) (five counts); carjacking in violation of 18 U.S.C. § 2119 (three counts); kidnapping in violation of 28 U.S.C. § 1201(a)(1) (two counts); attempted possession with intent to distribute cocaine in violation of 21 U.S.C. § 846 (one count); and using or carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2 (thirteen counts).

Defendants suggest that production of the CSLI was improperly authorized and that precedent instructs that a search warrant based on probable cause may have been required.² Defendants insist that the Government's expert, who analyzed the cell tower information, be compelled to testify at a pretrial hearing detailing the scope and duration of the cell tower information he reviewed and analyzed. Defendants also assert that the expert be required to explain the precision with which the CSLI can show a person's location.

For reasons set forth below, I conclude that the CSLI orders were properly issued pursuant to the Stored Communications Act. I also conclude that the Government's proffered scope of its expert's opinions obviates any need to test these opinions through a pretrial hearing.

I. Background

From January 2014 to January 2015, the Government obtained historical CSLI through multiple court orders for cell phones belonging to Defendants Smith, Ballard, Doggett, Jackson, Woods, Anthony, Munden, and Segers.³ (Mot., Attach. A.) The CSLI covered different periods of time for each Defendant, ranging from May 2009 through January 2015. To obtain this information, the Government submitted applications to Federal Magistrate Judges under the Stored Communications Act, permitting it to acquire the records from third-party cell phone providers. In those applications, the Government detailed its investigation, its belief that cell phones were being used for communication between co-conspirators before, during, and after the

² Defendant Braheim Ballard filed this motion on behalf of all Defendants. (Doc. No. 336.) Given the large number of Defendants charged, this case will be tried in phases. I previously denied Defendant Ballard's motion without prejudice because his trial has been bifurcated and will proceed in a later phase. Because resolution of this motion will affect the first phase pending trial, which includes Defendants Khalil Smith, Mark Woods, Terrance Munden, Robert Hartley, and Levern Jackson, I will resolve this motion now.

³ CSLI is historical cell phone tower data that shows the location of the antenna tower and which of the tower's "faces" carried a given call at its beginning and end, as well as the time and date of the call. See In re Application of U.S. for an Order Directing a Provider of Elec. Comm'n Serv. to Disclose Records to Gov't, 620 F.3d 304, 308 (3d Cir. 2010).

commission of crimes, and represented that CSLI would help it identify potential co-conspirators and other locations that the conspirators were visiting to commit crimes. After reviewing the applications, several Federal Magistrate Judges in this district signed the § 2703(d) orders, finding that the Government had “offer[ed] specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.” See id.

Defendants argue that the Government’s 24-hour surveillance of their cell phones over more than 24 months could implicate their privacy interests, requiring a search warrant. (Mot. at 1.) In support, Defendants point to the concurrence in the U.S. Supreme Court case United States v. Jones, where the Supreme Court addressed whether the installation of a GPS device on a suspect’s vehicle constituted a search. 132 S. Ct. 945, 948-54 (2012). The Jones majority found that the Government attachment of a GPS tracking device to the defendant’s car was a physical intrusion on the defendant’s “effect,” thus implicating the defendant’s Fourth Amendment rights and amounting to a search. Id. at 952-53. The Jones concurrence focused on the long-term nature of the monitoring of the suspect’s vehicle in concluding that use of the GPS device amounted to a search. Id. at 964.

Defendants in the case before me request an evidentiary hearing to establish a more detailed record regarding the precision with which CSLI can track a person’s movement. Defendants assert that if it is established that the CSLI could track their movement with exactness, their Fourth Amendment rights may have been violated, necessitating suppression of the CSLI. (Mot. at 2-7.)

The Government responds that it obtained the CSLI from third-party cell phone carriers, as authorized by multiple Magistrate Judges, in accordance with § 2703(d) of the SCA. The Government urges that not only did it obtain this information through a proper avenue, but also that Defendants' privacy interests were not implicated because: (1) there was no physical intrusion or trespass to obtain the historical CSLI, and (2) under the third-party doctrine, Defendants did not have a reasonable expectation of privacy in the historical CSLI.

The Government stresses that the CSLI expert will not testify about any Defendants' specific property location. In fact, the Government has clearly proffered that only general cell phone tower sector locations will be offered. The Assistant United States Attorney stated that "the expert will be able to provide information or testimony concerning where within a cell site sector, a phone or device was at the time of the initiation of the call and at the time of the termination of the call." (N.T.12/29/16, p. 167) (emphasis added.) For all of these reasons, the Government asserts that an evidentiary hearing is not required. (Gov't Resp. at 120-26.)

II. The Stored Communications Act, 18 U.S.C. § 2703

18 U.S.C. § 2703 of the SCA pertains to the disclosure of communication information by providers of electronic communication. Subsection 2703(a) addresses contents of wire or electronic communications in electronic storage; subsection 2703(b) addresses contents of wire or electronic communications in a remote computing service; subsection 2703(c) addresses records concerning electronic communication service or remote computing service; and subsection 2703(d) addresses the requirements for a court order to obtain such records. Id. §§ 2703(a)-(d).

Under § 2703(c), the Government may "require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a

subscriber to or customer of such service” in only five circumstances: (1) after obtaining a warrant; (2) after obtaining a court order under § 2703(d); (3) after obtaining consent of the subscriber or customer; (4) after submitting a formal written request to a law enforcement investigation concerning telemarketing fraud; and (5) if seeking information under paragraph two of subsection (c). Id. § 2703(c). A court issuing an order under § 2703(d) for a disclosure under §§ 2703(b) and (c) “shall issue [the order] only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.” Id. § 2703(d).

III. Analysis

The United States Court of Appeals for the Third Circuit addressed § 2703(d) orders in In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't (In re Application), 620 F.3d 304, 305 (3d Cir. 2010). In that case, the Magistrate Judge denied the Government’s application under § 2703(d), reasoning that she could not authorize a cell phone provider to disclose CSLI absent a showing of probable cause for a warrant. Id. at 308. The Government filed objections and a notice of appeal, which the District Court denied. The Government then appealed to the Third Circuit, which disagreed with the Magistrate Judge, ruling that 2703(c)(1) allows the Government to obtain CSLI pursuant to a court order under 2703(d), and that the standard to obtain a court order under 2703(d) is a less stringent one than is required for a warrant. Id. at 313.

In so holding, the Third Circuit observed that a court reviewing a 2703(d) application to obtain CSLI could, in certain instances, determine that a cell phone user’s Fourth Amendment rights were implicated and require a warrant. Id. at 319. The court cautioned, however, that the

warrant requirement under § 2703 was to be used “sparingly.” Id. Although the court did not provide clear guidance as to what set of facts would implicate the Fourth Amendment and thus require a warrant, it did indicate, by way of example, that disclosure of information about the interior of a home may rise to that level. Id. at 317.

In In re Application, the Government also argued that cell phone subscribers’ Fourth Amendment rights could not be implicated because they voluntarily conveyed CSLI to third parties (e.g., the cell phone providers). Id. The Government urged that because subscribers voluntarily provide historical CSLI to providers, they had no legitimate reasonable expectation of privacy in the information. Id. (citing Smith v. Maryland, 442 U.S. 735 (1979)). The Third Circuit disagreed, finding that subscribers do not “voluntarily share their location formation with a cell provider in any meaningful way” because “[i]t is unlikely that cell phone customers are aware that their cell phone providers *collect* and store historical location information.” Id. (emphasis in original). As will be discussed infra, this reasoning is contrary to other circuit courts’ analysis of the privacy issue.

In the case before me, the Government applied for 2703(d) orders to obtain historical CSLI from third-party cell phone providers. The reviewing Magistrate Judges considered the applications and found that the agents had presented “specific and articulable facts” showing that there were reasonable grounds to believe that the contents of the historical CSLI were relevant and material to the Government’s ongoing criminal investigation.

In light of the language of the SCA and the Third Circuit’s ruling in In re Application, I find that the Government properly obtained 2703(d) orders to acquire historical CSLI. The SCA plainly permits the Government to obtain records of electronic communication service through a court order if the Government meets the requirements outlined in 2703(d). 18 U.S.C.

§ 2703(c)(2). That subsection of the statute requires the Government to demonstrate through “specific and articulable facts” that there are reasonable grounds to believe that the contents of the CSLI are relevant and material to the Government’s ongoing criminal investigation. Id. § 2703(d). In In re Application, the Third Circuit confirmed that the Government may obtain CSLI through a 2703(d) order if its application meets the “specific and articulable” standard. 620 F.3d at 313. Here, the Government applied for an order under 2703(d) and the Magistrate Judges found that the Government had met its burden. I thus conclude that the CSLI was properly obtained.⁴

Defendants also argue that the scope of information obtained by the Government could place this case within the exception described above and carved out by the Third Circuit in In re Application, where the court noted that in certain circumstances a warrant could be required. Defendants analogize the CSLI to a GPS device and contend that the Supreme Court’s decision in Jones demonstrates that because the CSLI showed call records for 24-hours a day, for over twenty-four months, their Fourth Amendment rights could have been implicated and thus a warrant was required. Defendants also argue that the precision with which the CSLI could track their movements could have implicated their privacy rights, and posit that a hearing where they can question the Government’s expert will support this theory. (Mot. at 4-6; N.T. 12/29/16, pp. 150-51.)

I find that Defendants have failed to demonstrate that the facts before me could fall within the exception set out in In re Application. As to Defendants’ duration argument, their reliance on Jones is misplaced. In Jones, the majority found that the defendant’s privacy rights had been implicated because the Government had physically intruded onto his property to install

⁴ Defendants’ question only whether a search warrant was required and do not question whether the § 2703(d) orders were based upon “specific and articulable” facts. Thus, I need not review the facts the Magistrate Judges relied upon.

a GPS device. 132 S. Ct. at 945. The majority did not find that the duration of the GPS monitoring implicated privacy rights. Id. at 953; see also United States v. Skinner, 690 F.3d 772, 779-80 (6th Cir. 2012) (finding that the CSLI case before it was “different from the recent Supreme Court decision in United States v. Jones. . . [because] [n]o such physical intrusion occurred in this case.”); In re Application of U.S. for an Order Pursuant to Title 18, U.S. Code, Section 2703(d) to Disclose Subscriber Info. & Cell Site Info., 849 F. Supp. 2d 177, 178 (D. Mass. 2012) (finding that the Jones holding did not bear on the issue of obtaining historical CSLI because “the Court Order allowing the government to obtain the records [did] not involve any attachment of any device on any of an individual's real or personal property.”).

Here, the Government did not physically intrude on Defendants’ property to obtain the historical CSLI. Further, historical CSLI is entirely different from the GPS used in Jones. Unlike the GPS tracking device installed by the Government in Jones and then monitored in real-time as the person being tracked moves, the historical CSLI obtained in this case shows a person’s *past* location in relationship to a cell phone tower. And further, even though the Government obtained historical CSLI for over twenty-four months for some of the Defendants, the Government was not monitoring or surveilling those Defendants for that period of time. Instead, Defendants’ cell phones sent signals to cell phone towers when they made phone calls, their cell providers logged that information, and the Government later acquired the information.

As to Defendants’ precision argument, although the Third Circuit provided little guidance as to what facts could implicate the Fourth Amendment, it indicated that CSLI disclosing “location information about the interior of a home could.” See In re Application, 620 F.3d at 317. Here, the Government is not introducing evidence of any Defendants’ presence in a protected space such as their home. In fact, the Government has represented that it did not

obtain any such information because the CSLI did not track location with that kind of precision. (See N.T.12/29/16, pp. 144-47, 167.) Rather, the Government’s CSLI expert will testify only to “where within a cell site sector, a phone or device was at the time of the initiation of the call and at the time of the termination of the call.” (See *id.* at 167.) The Government’s proffer confirms that the facts before me do not implicate the Fourth Amendment.

Moreover, the Assistant United States Attorney definitively stated that his expert could not pinpoint a Defendant’s whereabouts with such precision so that a warrant was needed:

THE COURT: [C]an your expert pinpoint within a block
[and] did your expert do this?

MR. ASTOLFI: No.

(*Id.* at 147.) The Assistant United States Attorney’s in-court representations are confirmed by statements made in the Government’s written submissions on this issue, which state: “[T]he cell site information obtained here only gave very general location information if, and only if, the subject used his or her cell phone. The data collected shows only what cell tower handled the call at its inception and its termination. It does not tell the government anything about any other moment in time.” (Gov’t Resp. at 126.)

I thus find that a hearing to explore the anticipated testimony of the Government’s CSLI expert is not needed because the facts of this case do not fall within the narrow exception carved out by the Third Circuit. Allowing Defendants’ counsel to engage in questioning of the Government’s expert, in the hopes of establishing that the CSLI evidence could possibly reflect an ability to pinpoint a Defendant’s whereabouts, seems like an unnecessary fishing expedition. More is needed, particularly where the Government has stated that the CSLI expert will testify only to the general location of a cell phone within a cell sector at the time of the initiation of a

call and at the time of the termination of the call. This expert testimony does not extend to the content of the call or to the exact location from where the call was made.

Lastly, I note that the Government also urges me to find that cell phone users in general do not have a reasonable expectation of privacy in CSLI because CSLI constitutes business records, which users voluntarily convey to third-party cell phone providers. In In re Application, the Third Circuit seemed to reject this argument, stating that cell phone customers do not voluntarily share their CSLI with a cell phone provider because it is “unlikely [they] are aware that their cell phone providers *collect* and store historical location information.” 620 F.3d at 317 (emphasis in original). The court found that the only information voluntarily shared by a cell phone user is the number dialed on the phone. Id. at 317-18.

The Fourth, Fifth, Sixth, and Eleventh Circuits have also addressed whether cell phone users have a reasonable expectation of privacy in CSLI. These circuit courts have found that the third-party doctrine does apply to CSLI, and therefore cell phone users do not have a legitimate expectation of privacy in CSLI. See United States v. Graham, 824 F. 3d 421, 427-28 (4th Cir. 2016) (en banc) (“Here, as in Smith, Defendants unquestionably ‘exposed’ the information at issue to the phone company's equipment in the ordinary course of business. . . . Having ‘exposed’ the CSLI to Sprint/Nextel, Defendants here, like the defendant in Smith, ‘assumed the risk’ that the phone company would disclose their information to the government.”); In re Application of U.S. for Historical Cell Site Data, 724 F.3d 600, 613-14 (5th Cir. 2013) (“Because a cell phone user makes a choice to get a phone, to select a particular service provider, and to make a call, and because he knows that the call conveys cell site information, the provider retains this information, and the provider will turn it over to the police if they have a court order, he voluntarily conveys his cell site data each time he makes a call.”); United States v. Carpenter,

819 F.3d 880, 887 (finding that because CSLI does not reveal the content of cell phone communications, CSLI is similar to the business records in Smith and thus defendants have no reasonable expectation of privacy in it); United States v. David, 785 F.3d 498, 511 (11th Cir. 2015) (en banc) (“[C]ell users know that they must transmit signals to cell towers within range, that the cell tower functions as the equipment that connects the calls, that users when making or receiving calls are necessarily conveying or exposing their service provider to their general location within that cell tower’s range, and that the cell phone companies make records of cell-tower usage.”).

Although other circuits have found that cell phone users do not have a reasonable expectation of privacy in CSLI, I am bound by Third Circuit precedent and therefore cannot conclude that cell phone users do not have a reasonable expectation of privacy in any circumstance. Rather, as explained above, the Third Circuit seemed to reject the third-party doctrine as applied to CSLI and left open the possibility that, under certain circumstances, a cell phone user’s Fourth Amendment rights could be implicated. However, as set forth above, Defendants have not demonstrated that this case falls under that exception.

An appropriate Order follows.

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ORDER

AND NOW, this 26th day of January, 2017, upon consideration of “Defendants’ Motion for a Hearing to Determine Whether a Warrant Was Necessary to Obtain Historical Cell Site Location Data” (doc. no. 336),¹ the Government’s response (doc. no. 525), and following oral argument, and for the reasons set forth in the Court’s Memorandum Opinion, it is hereby **ORDERED** that Defendants’ motion is **DENIED**.

BY THE COURT:

/s/ Mitchell S. Goldberg
Mitchell S. Goldberg, J.

¹ Defendant Braheim Ballard filed this motion on behalf of all Defendants.