

Pen Registers: Pen Register Statute May Not Be Used To Authorize Government's Use of a Device to Gather Numerous Cell Phone Numbers at Various Locations

In *In re Application of United States for An Order Authorizing the Installation and Use of a Pen Register and Trap and Trace Device*, 2012 WL 2120492 (S.D. Tex. June 2, 2012), a magistrate judge ruled that the government could not use the Pen Register statute, 18 U.S.C. § 3121 *et seq.*, as a basis for using an electronic device known as a "stingray" to capture all cellular telephone numbers being used at particular locations as a method of determining the specific cellular telephone number a particular suspect is using.

The government applied for an order under 18 U.S.C. §§ 3122(a) and 3127(5), and 18 U.S.C. § 2703(c)(1), the Stored Communications Act, for permission to use a device known as a "stingray" for a period of 60 days "to detect radio signals emitted from wireless cellular telephones in the vicinity of [a particular suspect] that identify the telephones (e.g. by transmitting the telephones's serial number and phone number) to the network for authentication." The purpose for using the device was to identify cell phone numbers being used at different locations as a way of determining the particular cell phone number being used by a suspect in a drug investigation. After conducting an *ex parte* hearing, the assigned magistrate judge identified numerous problems with the government's application, including a failure to adequately explain the technology being used to gather the cell phone numbers, and a failure to "address what the government would do with the cell phone numbers and other information concerning seemingly innocent cell phone users whose information was recorded by the equipment." After analyzing the original history and purpose of the pen register statute, the magistrate judge declined to issue the requested order, concluding that the plain language of the statute "mandates that this Court have a telephone number or some similar identifier before issuing an order authorizing a pen register." The magistrate judge, citing the analysis in *United States v. Rigmaiden, F. Supp. 2d*, 2012 WL 27600 (D. Ariz. January 5, 2012) (summarized earlier in this memorandum), further noted that the government's use of a cell site simulator in that case (technology similar to the "stingray" equipment) was deemed a mobile tracking device that was authorized pursuant to a search warrant. The magistrate judge concluded: Here, the application seeks an order authorizing the use of this equipment as a pen register as opposed to seeking a warrant. The government has not provided any support that the pen register statute applies to stingray equipment. Based on the statutory language and the limited case law analyzing this issue, a pen register does not apply to this type of electronic surveillance. The magistrate judge thus denied without prejudice the government's application for an order authorizing a pen register.

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