

Dress for Success at the MDC: A Visit from Warden Herman Quay

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**Criminal Practice in the Information Age: Electronic Surveillance,
Digital Forensics and New Bases of Criminal Liability**

**A Panel Discussion Sponsored By:
CJA Committee, U.S. District Court, Eastern District of New York
Monday, June 6, 2016, 5:30pm to 7:15pm**

Moderator:

Hon. Cheryl M. Pollak – U.S. Magistrate Judge, EDNY

Panelists:*

Hon. James O. Orenstein – U.S. Magistrate Judge, EDNY

Jed Davis – Solo Practitioner; Former EDNY AUSA and Cybercrimes Prosecutor

Justine Harris – Partner, Scher Tremonte LLP; former EDNY Assistant Federal Defender

Ahmed Ghappour – Visiting Professor, UC Hastings College of Law

- I. Welcome and Introductions of Speakers by Magistrate Judge Pollak (5:30pm-5:35pm)
- II. Remarks By Warden Quay of MDC-Brooklyn (attorney attire rules at MDC) (5:35-5:50pm)
- III. Discussion, Criminal Practice in the Information Age (5:50pm-7:15pm)
 - A. Overview (Jed Davis) (5:50pm-5:55pm)
 - B. The Pressure Of New Technology On 4th Amendment Doctrine, Warrant Rules and Statutes (Led by Magistrate Judge Orenstein) (5:55pm-6:10pm)
 - C. Continuing Quandaries of Location Tracking (Led by Justine Harris) (6:10pm-6:25pm)
 - D. Electronic Surveillance Under Warrant - But By Hack: Emergent Issues Of Government Disclosure And Jurisdictional Reach (Led by Prof. Ghappour) (6:25pm-6:40pm)
 - E. Just A “Container” – Or Your Whole Life? Seizure And Forensic Search Of Smartphones And Other Mass Storage Devices (Led by Jed Davis) (6:40pm-6:55pm)
 - F. The More Things Change: “Cybercrimes” As Traditional Fraud and Theft Charges, In New Contexts (Led by Jed Davis) (6:55pm-7:05pm)
 - G. Q&A Session with Audience (7:05pm-7:15pm)

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LIST OF WRITTEN MATERIALS

NOTE TO READERS: The electronic version of this document contains hyperlinks to publicly-accessible (and trusted) copies of the authorities cited. To retrieve a particular case or other reference source using the electronic file and an Internet connection, hover the cursor over the citation you want to view and click on it. The electronic version of this document can be found at <http://federaldefendersny.org/cja-resources.html>.

I. Foundational Cases

A. Third-Party Doctrine

1. Smith v. Maryland, 442 U.S. 735 (1979)
2. United States v. Miller, 425 U.S. 435 (1976)
3. United States v. Warshak, 631 F.3d 266 (6th Cir. 2010) (en banc)

B. Tracking Intrusiveness

1. United States v. Jones, 132 S. Ct. 945, 957 (2012)
2. Kyllo v. United States, 533 US 27 (2001)
3. United States v. Knotts, 460 U.S. 276 (1983)
4. United States v. Karo, 468 U.S. 705 (1984)

C. Seizure and Search Of Mass Storage Devices & Media

Riley v. California, 134 S. Ct. 2473 (2014)

D. All Writs Act and Filling Statutory Gaps

United States v. New York Telephone Co ., 434 U.S.159 (1977)

II. Cases and Materials Specific To:

A. Location Tracking

1. GPS Tracking Without A Warrant

- a. In general: United States v. Jones, 132 S. Ct. 945 (2012)
- b. See Cell-site Tracking, Cell-Site Emulator and Ping Cases Below

2. Cell-site Tracking With A Warrant Or 2703(d) Order (Prospective and Historical)

- a. Circuit-Level Cases (none yet in Second Circuit):
 - i. United States v. Graham, No. 12-4659 (4th Cir. May 31, 2016)
 - ii. United States v. Carpenter, Nos. 14-1572/1805 (6th Cir, April 13, 2013)
 - iii. United States v. Davis, 785 F.3d 498, 511-13 (11th Cir. 2015) (en banc)
 - iv. In re Application of U.S. for Historical Cell Site Data, 724 F.3d 600, 615 (5th Cir. 2013)
 - v. In re Application of U.S. for an Order Directing a Provider of Electronic Communication Services to Disclose Records to the Government, 620 F.3d 304 (3d Cir. 2010)
- b. Diverse EDNY and SDNY Decisions -plus recent N.D.Cal. case of interest
 - i. In Re: Application For Telephone Information Needed For A Criminal Investigation, 119 F.Supp.3d 1011 (N.D.Cal. 2015)
 - ii. In re Smartphone Geolocation Data Application, 977 F. Supp. 2d 129 (E.D.N.Y. 2013), (Brown, M.J.)
 - iii. In re Application of U.S. for an Order Authorizing Release of Historical Cell-Site Information, 809 F. Supp. 2d 113 (E.D.N.Y. 2011) (Garaufis, D J.); compare with United States v. Herron, 2 F. Supp. 3d 391 (E.D.N.Y. 2014) (same)

- iv. In the Matter of an Application of the United States for an Order Authorizing the Use of Two Pen Register and Trap and Trace Devices, 632 F.Supp.2d 202 (E.D.N.Y.2008) (Garaufis, D.J.)
 - v. In the Matter of an Application of United States for an Order Authorizing the Release of Historical Cell-Site Information, 736 F.Supp.2d 578 (E.D.N.Y. 2010) (J. Orenstein, M.J.); compare with In The Matter Of An Application Of The United States Of America For An Order Authorizing The Release Of Historical Cell-Site Information, No. 11-MC-0113 (JO) (E.D.N.Y. Feb. 26., 2011) (same),
 - vi. In Re: Application Of The United States For An Order For Prospective Cell Site Location Information On A Certain Cellular Telephone, 460 F.Supp.2d 448, 450 (S.D.N.Y.2006) (Kaplan, D.J.)
 - vii. In Re Application Of The United States Of America For An Order For Disclosure Of Telecommunications Records And Authorizing The Use Of A Pen Register And Trap And Trace, 405 F. Supp. 2d 435 (S.D.N.Y. 2005) (Gorenstein, M.J.)
 - viii. In re an Application of the United States of America for an Order (1) Authorizing the use of a Pen Register and a Trap and Trace Device and (2) Authorizing Release of Subscriber Information and/or Cell Site Information, 396 F.Supp.2d 294 (2005) (J. Orenstein, M.J.)
3. Cell Tower “Dumps”
- a. In The Matter Of The Application Of The United States Of America For An Order Pursuant To 18 U.S.C. §§ 2703(c) And 2703(c) Directing AT & T, et. al., to Disclose Cell Tower Log Information, 42 F.Supp.3 511 (S.D.N.Y. 2014) (Francis, M.J.)
 - b. In the Matter of Application for Cell Tower Records Under 18 U.S.C. § 2703(d), 90 F.Supp. 3d 673 (S.D. Tx. 2015)
4. GPS & Cell-Site “Pings” By Law Enforcement: How Does Jones Limit Knotts?
- a. In the Matter of the Application of the United States of America for an Order Relating to Telephones Used by Suppressed, No. 15 M 0021 (N.D. Ill. Nov. 9, 2015) (summarizing emulator technology),
 - b. USDOJ Policy Guidance: Use of Cell-Site Simulator Technology (Sept. 3, 2015)

- c. “New York Police Are Using Covert Cellphone Trackers, Civil Liberties Group Says,” New York Times, Feb. 11, 2016
- d. United States v. Rigmaiden, No. CR 08-814-PHX-DGC (D. Ariz. May 8, 2013)
- e. United States v. Skinner, 690 F. 3d 772 (6th Cir. 2012)
- f. United States v. Forest, 355 F. 3d 942 (6th Cir. 2004); see also United States v. Ayers, (S.D. Ohio Dec. 4, 2014)

B. Electronic Surveillance Under Warrant - But By Hack

1. Public Examples of FBI Network Investigative Techniques, Including CIPAV

- a. Agent’s Search Warrant Affidavit in Operation Torpedo, No. 8:12-MJ-356 (D. Neb., filed Nov. 15, 2012)
- b. Agent’s Search Warrant Affidavit in “Timberlinebombinfo” case, No. 07-MJ-5114 (W.D.Wa., filed June 7, 2007)

2. Recent, Harder Cases For The Government

- a. United States v. Michaud, No. 3:15-cr-05351-RJB (W.D. Wa) (Plainsite interactive docket available [here](#))
 - i. January 28, 2016 Order Denying Suppression Motion
 - ii. May 18, 2016 Order Summarizing Status Of Defendant’s Motions For Access To NIT Source Code And Court’s Consideration Of Sanctions Against Government
 - iii. May 25, 2016 Order Excluding NIT Evidence (Item 212 on [this](#) interactive docket)
- b. United States v. Levin, No. 15-CR-10271-WGY (May 6, 2016)
- c. United States v. Arterbury, 4:15-CR-182-JHP (N.D. Okla. April 25, 2016) (MJ report), affirmed and adopted by referring District Judge (N.D. Okla. May 12, 2016)
- d. In re Warrant To Search A Target Computer At Premises Unknown, 958 F.Supp.2d 753 (S.D. Tex. 2013)

3. Proposed Amendment to Rule 41, Advisory Committee on Criminal Rules (Sept. 2016) (at 205)
 4. Implications re: Vulnerability Disclosure
 - a. Ahmed Ghappour, “Is the FBI Using Zero Days in Criminal Investigations?” Just Security, Nov. 17 2015
 - b. Mozilla’s May 11, 2016 Motion To Intervene In Michaud Case To Obtain Disclosure Of Firefox Vulnerability In Advance Of Defendant
 5. International / Jurisdictional Implications:
 - a. Ahmed Ghappour, "Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web" 69 Stanford L. Rev. [] (Forthcoming, 2017)
 - b. Ahmed Ghappour, “Justice Department Proposal Would Massively Expand FBI Extraterritorial Surveillance,” Just Security, Sept. 14, 2014
 - c. Richard Salgado, Esq., on behalf of Google Inc., Comment submitted to the Judicial Conference Advisory Committee on Criminal Rules (Feb. 12. 2015)
- C. Seizure And Search Of Smartphones And Other Mass Storage Devices
1. Particularization, Methods And Scope of Search
 - a. See Riley v. California, above
 - b. United States v. Ganius, __ F.3d __, No. 12-240-cr (2d Cir. May 27, 2016) (en banc)
 - c. United States v. Galpin, 720 F. 3d 436 (2d Cir. 2013); compare with United States v. Comprehensive Drug Testing, Inc., 621 F. 3d 1162 (9th Cir. 2010) (en banc) (per curiam), affirming in relevant part, 513 F. 3d 1085 (9th Cir, 2008); see also United States v. Pugh No. 15-CR-116 (NGG) (E.D.N.Y. Dec. 21, 2015)
 - d. iPhone encryption and the All Writs Act
 - i. The San Bernardino case (2016)
 - A. All Writs Order and Government’s Underlying Application

- B. Government’s Motion to Compel Apple to Comply
 - C. Apple’s Opposition to Government’s Motion to Compel And Motion to Vacate Order
 - D. Government’s Reply On Its Motion to Compel and Opposition to Motion to Vacate
 - E. Apple’s Reply On Its Motion To Vacate
- ii. The EDNY Case: In Re Order Requiring Apple, Inc. To Assist In The Execution Of A Search Warrant, No. 15-MC-1902 (JO) (E.D.N.Y. Feb. 29, 2016) (J. Orenstein, M.J.)