UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-8461-BER

IN RE: APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INSTALLATION AND USE OF PEN REGISTERS AND TRAP AND TRACE DEVICES

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ORDER DENYING APPLICATION

This matter came before the Court on a sealed Application by the Department of Justice, pursuant to 18 U.S.C. §§ 3122 and 3123, for an order directing a cellular telephone company to install a pen register and a trap and trace device (collectively "pen-trap devices") on the cellular phone of a person suspected of being involved in violations of the federal money laundering laws ("the Application"). The undersigned rejected the Application because it requested "that the Court order the service provider identified above and any other person or entity whose assistance may facilitate execution of this Order to notify the applicant and the law enforcement agency identified above of any changes relating to the cell phone number, including changes to subscriber information, and to provide prior notice to the applicant and the law enforcement agencies identified above before terminating or changing service to the cell phone number." I write to explain the basis for my finding that the relevant statutes do not authorize the Court to impose this duty on the cellular telephone company.

Pen Register/Trap And Trace Devices

Most simply stated, a pen register is a device that captures the information that a person inputs when making an outgoing call from the target phone. *See* 18 U.S.C. § 3127(3)(definition of "pen register"). A trap and trace device is the inverse technology. It captures the information dialed by a person who is calling into the target device. *See* 18 U.S.C. § 3127(4)(definition of "trap and trace device").[1] Neither a pen register nor a trap and trace device captures the content of the communication occurring over the phone.

As background, it is helpful to go back in time to understand telephone technology before cellular phones and the Internet. Back then, an individual phone connected to the telephone network through a pair of wires. These wires could be accessed at various nodes in the communications network, including terminal boxes where the wires emerged from sealed telephone cables, s*ee United States v. New York Tel. Co.*, 434 U.S. 159, 162–63 (1977), or at a centralized location of the phone company. *See Smith v. Maryland,* 442 U.S. 735, 737 (1979) (pen register installed at "central offices" of phone company). The pen register device would be physically attached to the wires, would record whatever numbers were dialed on the particular phone, and would print those numbers on a paper tape. *See New York Telephone,* 434 U.S. at 162-63*; Smith*, 442 U.S. at 736 n.1 (1979)("A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed. A pen register is 'usually installed at a central telephone facility

[1]"Pen registers are devices that record the telephone numbers to which calls have been placed from a particular telephone. These capture no part of an actual telephone conversation, but merely the electronic switching signals that connect two telephones. The same holds true for trap and trace devices, which record the numbers of telephones from which calls have been placed to a particular telephone." S. Rep 99-541 at 10.

[and] records on a paper tape all numbers dialed from [the] line' to which it is attached.")(citations omitted)(brackets in original).

The telephone company owned the wires and terminal boxes to which law enforcement needed access. Depending on the location of the terminal box, it might be infeasible to attach the pen register there, especially given the need for investigators to access the paper tape containing the intercepted information. Rather, it might be necessary for the phone company to provide a separate line from the terminal box to a remote location where the pen register device could be unobtrusively installed and accessed. *See New York Telephone*, 434 U.S. at 162.

As succinctly explained by the Ninth Circuit in a 1980 decision:

> The [pen register] device is installed by connecting it with the line at a point where the line makes an "appearance" in the terminal near the telephone number under investigation. An appearance is the point at which the specific pair of wires serving the monitored telephone emerge from the sealed cable. If an appearance is not made at a terminal convenient for surveillance by law enforcement officers, the officers can request and obtain, pursuant to tariff, a leased line, that is to say, an unused telephone line which makes an "appearance" in the same terminal as the monitored line. The leased line is cross-connected to the subject line, and monitored at a more remote site, where the pen register is connected. As a general rule, the actual connection, installation and operation of the pen register can be and are performed by law enforcement officers. The telephone company simply identifies the pair of wires providing service to the subject telephone line and then provides a leased line.

Application for an Order Authorizing an In-Progress Trace of Wire Communications over Tel. Facilities, 616 F.2d 1122, 1127 (9th Cir. 1980). In contrast, a trap and trace device required the phone company to modify its own equipment to capture the requested information. *See Id.* (phone company had to reprogram 12 computers to implement trap and trace order).

New York Telephone is instructive of the kind of technological assistance originally used for pen registers. There, the trial court issued an order authorizing the FBI to install pen registers on two telephones associated with a gambling operation. The court order required the phone

company to "furnish the FBI 'all information, facilities and technical assistance' necessary to employ the pen registers unobtrusively." 434 U.S. at 161. The phone company refused to give the FBI access to phone lines that would allow it to install the pen register at a remote and unobtrusive location. *Id.*at 162-63.[2] The trial court denied the phone company's motion to vacate the portion of the order that required it to provide facilities and technical assistance to the FBI. The trial court "concluded that it had jurisdiction to authorize the installation of the pen registers upon a showing of probable cause and that both the All Writs Act and its inherent power provided authority for the order directing the Company to assist in the installation of the pen registers." *Id.* at 163.

On appeal, the Second Circuit "assumed, *arguendo,* that 'a district court has inherent discretionary authority or discretionary power under the All Writs Act to compel technical assistance by the Telephone Company,' but concluded that 'in the absence of specific and properly limited Congressional action, it was an abuse of discretion for the District Court to order the Telephone Company to furnish technical assistance.' The majority expressed concern that 'such an order could establish a most undesirable, if not dangerous and unwise, precedent for the authority of federal courts to impress unwilling aid on private third parties" and that "there is no assurance that the court will always be able to protect [third parties] from excessive or overzealous Government activity or compulsion.'" *New York Tel. Co.,* 434 U.S. at 164 (footnotes and citations omitted).

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[2] "The [telephone] Company, instead of providing the leased lines, which it conceded that the court's order required it to do, advised the FBI to string cables from the 'subject apartment' to another location where pen registers could be installed. The FBI determined after canvassing the neighborhood of the apartment for four days that there was no location where it could string its own wires and attach the pen registers without alerting the suspects, in which event, of course, the gambling operation would cease to function." *New York Tel. Co.*, 434 U.S. at 162–63 (footnote and record citation omitted).

The Supreme Court reversed. It held that the order was "clearly authorized by the All Writs Act and was consistent with the intent of Congress." *Id.* at 171.[3] It noted that "without the Company's assistance there is no conceivable way in which the surveillance authorized by the District Court could have been successfully accomplished. The FBI, after an exhaustive search, was unable to find a location where it could install its own pen registers without tipping off the targets of the investigation. The provision of a leased line by the Company was essential to the fulfillment of the purpose—to learn the identities of those connected with the gambling operation—for which the pen register order had been issued." *Id.* at 175 (footnote omitted).

Two years after *New York Telephone,* the Supreme Court held in *Smith* that the installation and use of a pen register was not a fourth amendment "search" because a phone customer lacked a reasonable expectation of privacy in the numbers dialed. *Id.*, 442 U.S. at 745. As a House Judiciary Committee Report summarized in 1986, the state of the law after *Smith* was:

> The current practice of federal law enforcement agencies is to obtain a court order, under Rule 57 of the Federal Rules of Criminal Procedures, before using a pen register. This practice conforms with the Foreign Intelligence Surveillance Act, which created a requirement for a court order even in a domestic criminal case. Outside the limited context of foreign intelligence, Congress has specified no standard for obtaining a pen register court order. Thus, current case law and statutes leave federal law enforcement officials with virtually unchecked discretion to obtain information through the use of pen registers. All the government needs to do is make an application to a federal court; no independent judicial review of the facts is required.

H.R. Rep. No. 99-647 at 25.

[3] The All Writs Act, 28 U.S.C. §1651(a), states, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Electronic Communications Privacy Act

In 1986, recognizing the emergence of new communications technologies, such as email and cellular telephones, Congress passed the Electronic Communications Privacy Act of 1986 (ECPA). *See* S. Rep. 99-541 at 2-3. ECPA enacted 18 U.S.C. §§ 3121-3127, which imposed statutory restrictions on pen registers and trap and trace devices.

As relevant here, Section 3121(a) prohibits law enforcement from installing or using a pen register or trap and trace device without first obtaining a court order under Section 3123. Section 3122 authorizes an Attorney for the Government to apply for a pen-trap order, 18 U.S.C. § 3122(a). The application must include the identity of the attorney and a certification that the information likely to be obtained is relevant to an ongoing criminal investigation. 18 U.S.C. § 3122(b). So long as the proper certification is made, the Court "shall enter an ex parte order authorizing the installation and use" of a pen-trap device. 18 U.S.C. § 3123(a). The order must specify (1) the identity of the phone subscriber, (2) the identity, if known, of the subject of the criminal investigation, (3) "the attributes of the communications to which the order applies, including the number or other identifier and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied," and (4) the offense(s) under investigation. 18 U.S.C. § 3123(b). The order also "shall direct, upon the request of the applicant, the furnishing of information, facilities, and technical assistance necessary to accomplish the installation of the pen register or trap and trace device under section 3124 of this title." 18 U.S.C. § 3123(b)(2).[4]

[4] The order also must include time limits that are not relevant to the issue presently before the Court.

Section 3124 establishes the obligations imposed on a telephone company who is served by a law enforcement officer with an order issued under Section 3123(b)(2).[5] For a pen register, the service provider "shall furnish such investigative or law enforcement officer forthwith all information, facilities, and technical assistance necessary to accomplish the *installation* of the pen register unobtrusively and with a minimum of interference with the services that [the service provider provides to the subscriber named in the order]." 18 U.S.C. § 3124(a)(emphasis added). For a trap and trace device, the service provider "shall install such device forthwith on the appropriate line or other facility and shall furnish such investigative or law enforcement officer all additional information, facilities, and technical assistance *including installation and operation of the device* unobtrusively and with a minimum of interference with the services [that the service provider provides to the subscriber named in the order]." 18 U.S.C. § 3124(b).[6]

The Application

On the afternoon of Friday, October 26, 2018, an Assistant United States Attorney emailed the Application and a proposed Order to the undersigned for initial review. Consistent with my standard procedure, the Application was not signed. Paragraph 12 of the Application stated, "The United States further requests that the Court order the service provider identified above and any other person or entity whose assistance may facilitate execution of this Order to notify the applicant and the law enforcement agency identified above of any changes relating to the cell phone number, including changes to subscriber information, and to provide prior notice

[5] Section 3124 applies to "a provider of wire or electronic communication service, landlord, custodian, or other person." Cellular telephone companies fall under the definition of a "provider of wire communication service." For ease of discussion, and to be consistent with the pre-ECPA cases, this Order will use the term "telephone company."

[6] Section 3124 has been amended several times since its enactment in 1986. None of those amendments modified the assistance provisions of Sections 3124(a) and (b).

to the applicant and the law enforcement agencies identified above before terminating or changing service to the cell phone number." A proposed Order was also submitted, which contained language mirroring that in Paragraph 12. On Sunday, October 28, 2018, at approximately 9:20 a.m., after reviewing the Application, the undersigned emailed the Assistant United States Attorney that the Court was unsure if it had statutory authority to grant the request in Paragraph 12. The Court invited the Assistant United States Attorney to submit legal authority supporting Paragraph 12.

On October 29, 2018, at approximately 1:50 p.m., the Assistant United States Attorney emailed to the Court excerpts from the Government's brief in *United States of America v. Under Seal 1 and 2,* case no. 13-4625, 13-4626 (4th Cir.) (Docket Entry 51, 11/12/13), *decision reported at* 749 F.3d 276 (4th Cir. 2014).[7] The cover email asserted that Paragraph 12 was authorized by Section 3124(b) because it related to the "installation and operation" of the pen-trap devices.[8] That is, the Government argued that requiring the cellular telephone company (1) to notify the Government of "changes related to the cell phone number, including changes to subscriber information" and (2) requiring prior notice to the Government "before terminating or changing service to the cell phone number" falls under the umbrella of furnishing law enforcement "all

[7] *Under Seal* involved an email provider who refused to give the Government the keys necessary for the Government to decrypt the information being captured by the pen-trap device. Unlike Paragraph 12, the relevant order in *Under Seal* was limited to requiring the email provider to "furnish . . . all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap unobtrusively and with minimum interference." 749 F.3d at 281.

[8] For the completeness of the record, copies of the emails between the Court and the Assistant United States Attorney are being filed separately under seal. On October 31, 2018, the Court had a 12 minute telephone conference with the Assistant United States Attorney and supervisory personnel from that Office. This telephone conference was not recorded or transcribed. The Government essentially restated the arguments it had made in its October 29, 2018 email.

additional information, facilities and technical assistance including installation and operation of the device unobtrusively and with a minimum of interference." 18 U.S.C. §3124(b). The Government did not contend that Section 3124(a) provides a legal basis for Paragraph 12.

Different obligations are imposed for pen registers and trap and trace devices because, historically, pen registers were operated, and maintained by law enforcement agencies. At most, they needed third party assistance only to install the pen register. Congress recognized this fact when it enacted ECPA. The Senate Committee report on Section 3124(a) noted, "The Committee assumes that the current practice of law enforcement officials installing and maintaining pen registers will continue." *See* S. Rep. 99-541 at 48.

Trap and trace devices required ongoing involvement by the telephone company. As the Government acknowledged in its *Under Seal* brief:

> The distinction between the assistance requirements for pen registers and trap and trace devices has historical roots. When the Pen/Trap statute was enacted in 1986, pen/traps were implemented only on telephones. *See* Electronic Communications Privacy Act of 1986 § 301, Pub. L. No 99-508, 100 Stat 1848 (creating the Pen/Trap statute and defining "pen register" using telephone-specific language); S. Rep. No. 99-541, at 10 (1986). At that time, providers had to do more work to implement a trap and trace device than a pen register. *See In re Application*, 616 F.2d 1122, 1127 (9th Cir. 1980) ("In the case of the pen register, the device may be physically operated by law enforcement officers after limited assistance from the telephone company .... Tracing through ESS facilities, on the other hand, because it is entirely automated, must be activated by the programing of a computer by a technician of the telephone company."). When the definitions of "pen register" and "trap and trace device" were broadened to reach Internet communications in 2001, the assistance provisions of § 3124 remained unchanged. USA Patriot Act § 216, Pub. L. No. 107-56, 115 Stat 272 (2001). Regardless, given the broad statutory definitions of "pen register" and "trap and trace device," both assistance provisions require providers to assist with the implementation of pen /trap orders on the Internet.

Under Seal at 22, n.7. This factor is also reflected in Section 3124(b), which requires the telephone company to provide the results of the trap and trace device "at reasonable intervals

during regular business hours for the duration of the order." There is no analog in Section 3124(a) because law enforcement would have real-time access to pen register data.

Even though Section 3124(b) is broader than Section 3124(a), Paragraph 12 of the Application is overbroad and therefore incompatible with the plain text of Section 3124(b). Section 3124(b) requires the cellular telephone company to provide information, facilities, and technical assistance relating to the "installation and operation *of the device*." (emphasis added). Paragraph 12 seeks to compel disclosure of "*any changes* relating to the cell phone number, *including changes to subscriber information*." (emphasis added). Changes to the phone number and the subscriber information could include information such as identifying information about a new subscriber, billing information, identities of authorized users on this phone, and other phones that are linked to the same account. This information has nothing to do with the operation of the device.

Paragraph 12 also conflicts with 18 U.S.C. § 2703, which was also enacted as part of ECPA. Section 2703(c) delineates when and how the Government can require a cellular phone provider to disclose subscriber information. That disclosure can occur only if the Government issues a subpoena, obtains a search warrant, obtains a court order under Section 2703(d), or gets the consent of the subscriber. 18 U.S.C. § 2703(c)(1), (2). An order under Section 2703(d) may issue only "if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the . . . records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

An order under Section 3124(b) is not one of the legally authorized means for the Government to obtain subscriber information. As such, to the extent Paragraph 12 seeks subscriber information, it is barred by Section 2703. Moreover, even if the Court were to

construe the Application to be seeking authorization for the disclosure of subscriber information under Section 2703(d), the Application does not contain sufficient specific and articulable facts.

Similarly, the request that the cellular phone provider give prior notice to the Government "before terminating or changing service to the cell phone number" is overbroad. To the extent Paragraph 12 can be read to require the phone company to identify how the cell phone service was changed (e.g., by providing the new phone number or the identity or a new subscriber), it is irreconcilable with the text of Section 3124(b); that information has nothing to do with whether the trap and trace device is operating properly. Nevertheless, as discussed below, if Paragraph 12 merely seeks notice of the *fact* that the cell phone service is to be terminated or changed, it is compatible with Section 3124(b).

A narrower reading is also consistent with the legislative history of ECPA. Congress was attempting to balance individual privacy, needs of law enforcement, and burdens on third-party telephone companies. It recognized that law enforcement agencies would have ongoing direct access to pen register devices, so it only required the telephone companies to assist in the installation of those devices. Presumably, issues relating to the operation of the installed device could be corrected by the law enforcement agency. In contrast, trap and trace devices were under the primary (possible exclusive) control of the telephone company. Law enforcement needed the ability to compel the telephone company to assist with issues relating to the operation of the trap and trace device. That was the purpose of Section 3124(b). It was not intended to allow the Government to conscript the telephone company as an investigative agent to help overcome obstacles that arise during an ongoing criminal investigation. *Accord New York Telephone,* 434 U.S. at 189 ("the inability of the Government to achieve the purposes for which

it obtained the pen register order" was not a basis for invoking the All Writs Act)(Stevens, J., dissenting in part)

The undersigned does not suggest that Section 3124(b) is limited solely to purely mechanical operational assistance. During the telephone conference with the Court, the Assistant United States Attorney explained that the Government needed to know about changes to the subscriber information, or terminations of service, in part, so that it could potentially discontinue collecting information using the pen-trap device. In other words, this information was relevant to whether to continue to operate the device, at all. Information about account changes or termination would allow the Government to minimize the collection of information wholly unrelated to the named subject of the investigation. The Court agrees, and finds that the *fact* of a change in the phone's subscriber or a termination of the phone account is properly compelled under Section 3124(b).[9] Nevertheless, Section 3124(b) does not authorize disclosure of details such as who the new subscriber may be (or other subscriber information) and/or other specific information about any new or changed phone account. That information must be obtained by other investigative means.

The Application of the United States for an Order Authorizing the Installation and Use of Pen Registers and Trap and Trace Devices is DENIED.

[9] The Government subsequently submitted a revised Application, *see* Case No. 18-8470-BER, which requested that the Court compel the phone company to notify the Government "if the subscriber listed above ceases to be a named subscriber on the account, and to provide prior notice to the applicant and the law enforcement agency identified above before terminating service to the account, either at the request of the subscriber or on its own initiative." The revised Application was granted.

DONE AND ORDERED in Chambers this 29th day of November, 2018, at West Palm Beach in the Southern District of Florida.

BRUCE REINHART
UNITED STATES MAGISTRATE JUDGE