



Written by [Joe Wolverton, II, J.D.](#) on September 17, 2018

## Florida Appeals Court Opinion Upholds Fourth Amendment

In a rare victory for the Constitution, a Florida Court of Appeals upheld the order of a lower court suppressing evidence obtained by the use of a Stingray device, in violation of the defendant's right to be free from unwarranted search and seizure.

Here's a summary of the case, as reported in the Appeals Court's decision:



The State charged the Defendant and two co-defendants with first-degree murder with a firearm while wearing a mask and six counts of robbery with a firearm while wearing a mask, arising from the robbery of a Boca Raton restaurant.

As part of its investigation, the State sought an order requiring the Defendant's cell phone service provider to disclose real-time CSLI for what it believed was the Defendant's cell phone number. A judge signed the "CSLI Order," which required the service provider to disclose "all cell-site activations and sectors for all incoming and outgoing calls/communications ... call detail location records, 'angle from the tower' data, including contemporaneous (real-time) with these communications, and historical calls/communications detail records."

The judge also signed an order requiring the service provider to install a pen register and trap and trace device on the Defendant's phone and transmit the information collected to the Broward Sheriff's Office (the "Trap and Trace Order").

Later, the State applied for a search warrant of a Fort Lauderdale residence. The affidavit filed in support of the warrant stated that "[m]obile tracking was activated on [the Defendant's] cell phone pursuant to a lawful court order" and that the Defendant's phone was "placed specifically" at the residence and had been "stationary overnight within this residence for several concurrent nights." The search warrant was granted.

Detectives searched the residence and found a black backpack containing three firearms, a mask, ammunition, and a stun gun. The State tracked the location of the Defendant's cell phone and arrested him while he was driving into Palm Beach County.

The law-enforcement agency carrying out the investigation admitted to the court that the cellphone company could only give "tower information," that is to say, the cellphone company couldn't provide precise GPS location of the phone, it could only provide a triangulation of the location based on the distance from cellphone towers.

That wasn't enough for the police, so they deployed a Stingray device to give them the exact location of the phone. This step was taken without a warrant, an act which was an unmistakable violation of the



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Fourth Amendment.

In order to understand what a welcome decision the Florida Court of Appeals handed down, here is a little background on the history of the Fourth Amendment and the use of the Stingray.

The Constitution's primary protection of a person's papers and private information is the Fourth Amendment, which reads, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Potential problems with the use by law enforcement of a tool as powerful as the Stingray demand an extra measure of vigilance on the device's widespread purchase by police.

The function of the technology reveals its threat to the liberties of the law-abiding. The suitcase-sized Stingray masquerades as a cell tower to trick cellphones into connecting to it. It can give police tracking identifiers for phones more than a mile away, depending on terrain.

Given the mobility of the device, police who use it can triangulate a target's location with better accuracy than if they relied on data transferred by traditional cell towers.

This equipment isn't cheap. According to published reports, each Stingray device costs about \$350,000. Despite the cost, however, it has been reported that nearly 30 police departments admit to owning a Stingray, with about 50 other cities refusing to disclose whether or not they own one of these expensive surveillance devices.

Perhaps because of the cost, but more likely because of the devastating effect on the personal liberty of those caught in the Stingray's net, police and the feds are zealous about keeping the device's deployment a secret.

In America, our Founders considered their own experience with unwarranted searches and seizures at the hands of British soldiers and government agents as a cautionary tale that informed their own efforts to shield the citizens of their new union from similar deprivations of the fundamental right to be free from warrantless general writs.

The Framers abhorred this practice, believing that "papers are often the dearest property a man can have" and that permitting the government to "sweep away all papers whatsoever," without any legal justification, "would destroy all the comforts of society."

In 1776, George Mason, the principal author of the Virginia Declaration of Rights — a document of profound influence on the construction of the federal Bill of Rights — upheld the right to be free from such searches, as well: "That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence [sic] is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

The undeniable truth is that not a single one of our Founding Fathers, not even the most ardent advocate of a powerful central government, would have accepted that government at any level could support its investigation of crimes only by violating the fundamental rights of those suspected of criminal activity.

The Appeals Court's opinion thankfully reinforces the barriers our forefathers built around our liberty:



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Without a warrant, the government cannot: use technology to view information not visible to the naked eye, attach a device to property to monitor your location, search a cell phone in your possession without a warrant, or obtain real-time location information from the cell carrier.

With a cell-site simulator, the government does more than obtain data held by a third party. The government surreptitiously intercepts a signal that the user intended to send to a carrier's cell-site tower or independently pings a cell phone to determine its location. Not only that, a cell-site simulator also intercepts the data of other cell phones in the area, including the phones of people not being investigated.

If a warrant is required for the government to obtain historical cell-site information voluntarily maintained and in the possession of a third party, see *Carpenter*, 138 S. Ct. at 2221, we can discern no reason why a warrant would not be required for the more invasive use of a cell-site simulator.

There are those who believe that although the police's use of the Stingray was technically unconstitutional, the evidence they collected using it should not be suppressed as it resulted in the identification of a "criminal."

This is not the American way, however. When we begin to act according to the rules we think best for the situation, we begin a rapid descent down a road that leads to the abandonment of the rule of law and the adoption of the rule of men.

In the words of one of our fiercest and most faithful Founding Fathers, Sam Adams, "There shall be one rule of justice for the rich and the poor; for the favorite in court, and the countryman at the plough."



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