

Table 5 Hypotheticals – Inns of Court February 2023

Ryan Jonah is a prominent local politician running for statewide office in New Hampshire. During the course of the race it is publicly reported that he may suffer from a rare heart condition, and Jonah's opponent has made his health an issue in the race. A month before the election, Jonah collapses after a meeting with his campaign staffers. He recovers, but it is clear he needs to be evaluated. His staffers arrange for him to be seen at the heart center of a local hospital with a national reputation for cardiac care. They set the appointment after hours in order to avoid members of the public seeing Jonah at the heart center.

The evening of his appointment, Jonah arrives at the heart center shortly before 7:00pm. A few minutes later, Vinny Victim, who lives near the heart center, passes the front of the building while out for an evening walk. At the same time, Danny Driver is driving his white SUV towards the heart center entrance. He receives a text on his phone and goes to check it. While Danny is distracted, his car drifts and hits Vinny. Danny panics and drives away. A nurse arriving at the heart center for his evening shift discovers Vinny badly hurt in the road and goes to get help.

Detectives investigating the hit and run interview Vinny, who tells them that he suspects the driver of the SUV was distracted. Vinny also tells the investigators he thinks the incident occurred about 7:00pm based on his habit of going for walks near his house around that time.

Investigators apply for a geofencing warrant to identify cell phones located within 50 yards of the entrance to the heart center between 6:45pm and 7:15pm on the night of the incident. The warrant asserts that the search is tailored to investigative needs because it is limited to the time and place they have reason to believe a crime occurred.

A local crime reporter hears about the warrant and mentions it to his friend, Jonah's chief of staff. The chief of staff hires you as campaign counsel to file an emergency motion to quash the subpoena.

What do you do?

SEARCH OF INFORMATION STORED BY GOOGLE

The government submits an application for a geofence warrant to Google. The warrant seeks to obtain cellular phone data generated in a designated geographic area for three forty-five minute periods of time on three different dates. The warrant pertains to the government's investigation into the theft and resale of certain pharmaceuticals.

The first geofence request has a 100-meter radius in a densely populated city. The area contains restaurants, various commercial establishments, and at least one large residential complex, complete with a swimming pool, workout facilities, and other amenities. The government believes that the suspect received stolen pharmaceuticals from a commercial enterprise located within the area during the designated forty-five minute interval.

The second and third geofence requests focus on the same commercial enterprise where the government believes that the suspect shipped some of the stolen pharmaceuticals to a buyer. Again, the requested geofence is a 100-meter radius area extending from the commercial establishment and covers two separate dates for forty-five minute intervals in the early afternoon hours. This geofence includes medical offices and other single and multi-floor commercial establishments that are likely to have multiple patrons during the early afternoon hours.

The warrant application contemplates that the information will be obtained in three stages: (1) Google will be required to disclose to the government an anonymized list of devices that specifies information including the corresponding unique device ID, timestamp, coordinates, and data source, if available, of the devices that reported their location within the geofence during the forty-five minute periods; (2) the government will then review the list to prioritize the devices about which it wishes to obtain associated information; and (3) Google will then be required to disclose to the government the information identifying the Google account(s) for those devices about which the government further inquires.

You are the judge who must determine whether to issue the search warrant.

What do you do?

What Fourth Amendment implications does the requested geofence raise?

TOWER DUMP SEARCH WARRANTS

One method available to track a potential suspect who is using a cell phone is via a tower dump. A “tower” is a cell phone tower. Each tower covers a roughly circular area. The coverage area is divided into separate arcs that is monitored by a separate antenna. Each tower has about 3 to 6 antenna.

When a cell phone user places a call, the cell phone attempts to find a cell tower to connect with. When the connection is made, the cell site will generate a time stamped record known as CSLI. The CSLI will note the cell number that made contact with the site, the time contact was made and which of the cell tower’s antenna registered the contact. Thus, the person accessing the CSLI will not only know who made contact and when, but approximately where the person was when contact was made.

In 2018, a string of armed robberies occurred in the greater Boston area. Police believed that one person was responsible for these crimes and may have been using a cell phone to coordinate with a get away driver. The police filed applications for two warrants for cell tower dumps. One application was made by the FBI to a federal magistrate judge. This warrant generally alleged that the police believed the suspect may be using a cell phone and that the crimes were conducted in a similar manner.

The second warrant was made by Boston Police to a magistrate judge. This application also alleged that the crimes were conducted in a similar manner and generally alleged that the perpetrator may be using a cell phone, but went on to allege further details (such as a description of the suspect, the manner in which the crime was committed, and a description of the get away vehicle and the presence or absence of public transportation) to show the crime was conducted in a highly organized/coordinated manner. This, the application stated, suggested the perpetrator and accomplice were in communication with one another both prior to and after the robbery.

Both warrants were issued and the police were able to identify the defendant through the cell phone numbers that appeared in the CSLI. The defendant moved to suppress both warrants, arguing that a search was conducted by accessing the CSLI, and neither warrant contained sufficient to establish probable cause. The superior court denied the motion and an interlocutory appeal was taken to the Supreme Judicial Court.

1. Is a cell tower dump a search within the meaning of the 4th amendment.
2. Should warrant 1 be suppressed?
3. Should warrant 2 be suppressed?