FOURTH AMENDMENT — WARRANTLESS SEARCHES — NEW JERSEY SUPREME COURT HOLDS THAT STATE CONSTITUTION REQUIRES POLICE TO OBTAIN WARRANT BEFORE ACCESSING CELL-SITE LOCATION INFORMATION. — *State v. Earls*, 70 A.3d 630 (N.J. 2013).

Technological advances test the limits of search and seizure doctrine. They force courts to consider whether to leave in place the legal standards that governed individual privacy during an earlier time in American history or to alter them in the face of new methods of search or of seizure.[1] Lower federal courts and state courts, the early battlegrounds on which privacy disputes are waged, are often hesitant to distinguish Supreme Court precedent, even when changes in the technological landscape are dramatic. A conflict of this nature has been brewing in the courts over whether law enforcement must obtain a warrant before accessing individuals' cell-site location information[2] (CSLI) from cell phone service providers.[3]

Recently, in *State v. Earls*,[4] the New Jersey Supreme Court determined that, under New Jersey's constitution,[5] state and local police are required to obtain a warrant — unless their actions fit into an exception — before they can collect a criminal suspect's real-time CSLI from a wireless service provider.[6] In dicta, however, the court suggested that federal Fourth Amendment case law may potentially require the opposite holding mainly due to two major precedential ob-

---

[1] *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928) (holding that law enforcement wiretapping of telephone conversations without a warrant does not violate the Fourth Amendment); *cf.* Marc McAllister, *The Fourth Amendment and New Technologies: The Misapplication of Analogical Reasoning*, 36 S. ILL. U. L.J. 475, 522 (2012) (criticizing how "courts often fall back on the rules . . . from an earlier technological era" in applying the Fourth Amendment to surveillance technologies).

[2] A cell phone emits radio waves to a network of "cell sites," or radio stations set up by cell phone service providers, registering every seven seconds with nearby stations and creating a log of its location. Service providers can use this data to locate a cell phone user with increasing accuracy, potentially even within "individual floors and rooms within buildings." State v. Earls, 70 A.3d 630, 637 (N.J. 2013) (quoting *ECPA Reform and the Revolution in Location Based Technologies and Services: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 25 (2010) (statement of Professor Matt Blaze)) (internal quotation marks omitted); *see also id.* at 636–38.

[3] *Compare In re* Application of the U.S. for Historical Cell Site Data, 747 F. Supp. 2d 827, 846 (S.D. Tex. 2010) (holding that the Fourth Amendment precludes the government from obtaining CSLI without a warrant), *vacated*, 724 F.3d 600 (5th Cir. 2013), *with* United States v. Graham, 846 F. Supp. 2d 384, 404–06 (D. Md. 2012) (mem.) (holding that the government may introduce into evidence CSLI obtained without a warrant).

[4] 70 A.3d 630.

[5] Article I, paragraph 7 of New Jersey's constitution contains language substantially identical to the Fourth Amendment of the U.S. Constitution. *Compare* U.S. CONST. amend. IV, *with* N.J. CONST. art. I, para. 7.

[6] *Earls*, 70 A.3d at 644.

stacles: the third-party disclosure doctrine expounded upon by the U.S. Supreme Court in *Smith v. Maryland*,[7] which provides that individuals who voluntarily disclose information to third parties surrender their Fourth Amendment rights to that information,[8] and the public-private distinction established by the Court in *United States v. Knotts*,[9] which maintains that people lack Fourth Amendment rights to their location when they are located in a public place.[10] However, these doctrines need not foreclose reaching the same holding under the federal constitution as the *Earls* court did under the state constitution.

In 2006, while investigating a series of residential burglaries, the Middletown Township Police Department obtained a warrant to determine the location of a stolen cell phone.[11] The individual in possession of the cell phone, whom the police soon located, told them that his cousin, the defendant Thomas Earls, had sold him the phone and that Earls had perpetrated several burglaries, storing the stolen goods in a storage locker rented either by Earls or by his ex-girlfriend, Desiree Gates.[12] The police then located Gates, who consented to a search of the locker, in which the police found numerous stolen items.[13] The next day, Gates's cousin informed the police that Earls had learned of Gates's cooperation and had threatened her and that Gates had been missing since the search of the locker.[14] In order to locate Earls and Gates, the police requested and received — without first obtaining a warrant for this particular cell phone — the CSLI associated with the defendant's cell phone from T-Mobile, his service provider, three times over the course of one night.[15] Using the third set of information, the police were able to locate Earls and Gates and arrested Earls.[16] They also found and seized a variety of stolen goods in the motel room in which Earls and Gates were found.[17]

---

[7] 442 U.S. 735 (1979).

[8] *See id.* at 743–44 (holding that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties"); *see also* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563, 566–70 (2009).

[9] 460 U.S. 276 (1983).

[10] *Id.* at 281 ("A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."). *Knotts* is a species of the third-party disclosure doctrine, but it is a factually distinctive subcategory such that it is considered herein as a separate doctrine with its own set of implications for CSLI.

[11] *Earls*, 70 A.3d at 633.

[12] *Id.*

[13] *Id.*

[14] *Id.* Gates's cousin also explained that Earls and Gates had been involved in several incidents of domestic violence in the past and that she was "concerned about Gates's safety." *Id.*

[15] *Id.* at 633–34.

[16] *Id.* at 634.

[17] *Id.*

Earls was charged with third-degree burglary, among several other crimes.[18] The trial court denied his motion to suppress evidence seized from the motel room, which he claimed the police had only been able to locate via an unconstitutional search of his CSLI.[19] Employing the test introduced by the U.S. Supreme Court in *Katz v. United States*,[20] under which the protections of the Fourth Amendment apply where a person has a "reasonable expectation of privacy,"[21] the trial court determined that Earls did have such an expectation in his CSLI.[22] However, it found that the emergency aid exception[23] to the warrant requirement invalidated Earls's privacy argument.[24] Earls then pled guilty and was sentenced to seven years in prison with three years of parole ineligibility, but appealed the court's suppression ruling.[25]

The Appellate Division affirmed, but relied on different grounds.[26] Looking primarily to *Knotts*, the court held that CSLI is "simply a proxy for [the defendant's] visually observable location."[27] Because people have "no reasonable expectation of privacy in their movements on public highways or the general location of their cell phone," the panel determined that law enforcement did not need a warrant to access the defendant's CSLI.[28] The court applied this logic from *Knotts* to both the Fourth Amendment and its state constitutional complement, holding that neither provision had been violated.[29]

The New Jersey Supreme Court reversed and remanded the case for further proceedings.[30] Writing for a unanimous court, Chief Justice Rabner began by observing that the state constitution "has offered greater protection to New Jersey residents than the Fourth Amend-

---

[18] *Id.*; *see also* N.J. STAT. ANN. § 2C:18-2 (West 2005 & Supp. 2013). Earls was also charged with third-degree theft, third-degree receiving stolen property, and fourth-degree possession of a controlled dangerous substance — marijuana. *Earls*, 70 A.3d at 634.

[19] *Earls*, 70 A.3d at 634, 636.

[20] 389 U.S. 347 (1967).

[21] *Id.* at 360 (Harlan, J., concurring). The New Jersey Supreme Court adopted this test under article I, paragraph 7 of the New Jersey constitution. *See* State v. Hempele, 576 A.2d 793, 802 (N.J. 1990). The *Katz* test involves two discrete inquiries; it asks both whether an individual has in fact exhibited an expectation of privacy and whether such an expectation is one that society is prepared to recognize as reasonable. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring).

[22] *See* State v. Earls, 22 A.3d 114, 118 (N.J. Super. Ct. App. Div. 2011).

[23] The emergency aid exception provides that "exigent circumstances may require public safety officials . . . to enter a dwelling without a warrant for the purpose of protecting or preserving life, or preventing serious injury." State v. Frankel, 847 A.2d 561, 568 (N.J. 2004).

[24] *Earls*, 70 A.3d at 635. The trial court made its determination under state law. *Id.*

[25] *See id.*

[26] *Earls*, 22 A.3d at 116, 124–25.

[27] *Id.* at 123 (alteration in original) (quoting United States v. Forest, 355 F.3d 942, 951 (6th Cir. 2004)).

[28] *Id.* at 124.

[29] *Id.* Earls had appealed the suppression decision as violative of his rights under both the state and federal constitutions. *Id.* at 116.

[30] *Earls*, 70 A.3d at 646–47.

ment."[31] He then made two conclusions that proved critical to the court's holding: first, individuals do hold an expectation of privacy in their CSLI as they do not "expect law enforcement to convert their phones into precise, possibly continuous tracking tools"[32] and, second, society should recognize that expectation as reasonable because CSLI can "provide an intimate picture of one's daily life" by revealing "not just where people go . . . but also the people and groups they choose to affiliate with and when they actually do so."[33] As a result, the court found that Earls possessed a reasonable expectation of privacy in his CSLI. Chief Justice Rabner held that this expectation was not defeated by the third-party disclosure doctrine, as the court had previously discarded that principle as inapplicable under the state constitution.[34]

While analyzing the protections provided by the state constitution, Chief Justice Rabner also questioned the utility of the *Knotts* doctrine in this context.[35] Cell phones "blur the historical distinction between public and private areas," he observed, because they "emit signals from both places"[36] such that CSLI "does more than simply augment visual surveillance in public areas."[37] The Chief Justice also took note that some members of the U.S. Supreme Court itself had seemingly questioned the reasoning underlying *Knotts*,[38] pointing to Justice Alito's and Justice Sotomayor's concurrences in *United States v. Jones*,[39] in which they argued that long-term GPS surveillance of a person's public movements could violate his or her expectation of privacy.[40] Ultimately, the New Jersey Supreme Court held that, unless an exception to the warrant requirement applied, the state constitution required police to obtain a warrant based on a showing of probable cause before accessing an individual's CSLI.[41] Nonetheless, in dicta throughout the decision, the court suggested that, as a result of the third-party disclosure and *Knotts* doctrines, the Fourth Amendment might require the

---

[31] *Id.* at 632.

[32] *Id.* at 643.

[33] *Id.* at 642.

[34] *See id.* at 632.

[35] Chief Justice Rabner also looked to *United States v. Karo*, 468 U.S. 705 (1984), in which the Supreme Court held that the monitoring of a beeper in a private home, "a location not open to visual surveillance," *id.* at 714, violated the Fourth Amendment by revealing that the container in which the beeper had been placed remained in the home. *See Earls*, 70 A.3d at 639.

[36] *Earls*, 70 A.3d at 642.

[37] *Id.* at 643.

[38] *See id.* at 642–43.

[39] 132 S. Ct. 945 (2012). The Court in *Jones* reiterated the pre-*Katz* notion that Fourth Amendment protections ought to apply when there is a physical trespass of one's property. *See id.* at 949. It distinguished *Knotts* because the beeper in that case had been placed in the container the police were tracking before it came into Knotts's possession. *See id.* at 951–52.

[40] *See id.* at 955 (Sotomayor, J., concurring); *id*. at 964 (Alito, J., concurring).

[41] *Earls*, 70 A.3d at 644. The court also held that this new rule would not apply retroactively. *Id.* at 644–46.

opposite holding,[42] frequently referencing both explicitly and by implication differences between federal and state law in this area.[43] Finally, because the Appellate Division had not reached the issue, the court remanded the case to determine if, given the concern about Gates's safety, the emergency aid exception to the warrant requirement had relieved police of their obligation to obtain a warrant.[44]

The *Earls* court indicated that Fourth Amendment case law might require a holding that police do *not* need a warrant to access CSLI, but this insinuation is not necessarily accurate. The two major doctrinal bases for such a holding are not unavoidably applicable in the CSLI context because — as for the third-party disclosure doctrine — the disclosure of CSLI is not clearly voluntary and — as for the *Knotts* doctrine — CSLI bridges the gap between public and private. Both doctrines may also be inapposite because they provide for exceptions where particularly sensitive privacy interests are at stake. As this issue percolates through the court system,[45] courts should keep in mind that federal precedents justifying warrantless searches in certain contexts may not apply with regard to CSLI.

Even if a court applied the third-party disclosure doctrine, it might still conclude that CSLI is protected by the Fourth Amendment because the disclosure of CSLI is not necessarily voluntary. The opinion in *Smith* and the doctrine for which it stands rely on the notion that an individual has voluntarily conveyed information to a third party, thus "assum[ing] the risk that the information would be divulged to

---

[42] *See, e.g.*, *id.* at 644 ("Our ruling today is based solely on the State Constitution. We recognize that *Jones* and *Smith*, to the extent they apply, would not require a warrant in this case.").

[43] *See, e.g.*, *id.* at 641 ("[T]he State Constitution provides greater protection against unreasonable searches and seizures than the Fourth Amendment. . . . [A]n individual's privacy interest under New Jersey law does not turn on whether he or she is required to disclose information to third-party providers to obtain service. . . . [W]e have departed from federal case law that takes a different approach.").

[44] *Id.* at 646.

[45] The Third, Fifth, and Sixth Circuits have addressed the issue. *See In re* Application of the U.S. for Historical Cell Site Data, 724 F.3d 600, 613–15 (5th Cir. 2013); United States v. Skinner, 690 F.3d 772, 777–81 (6th Cir. 2012); *In re* Application of the U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't, 620 F.3d 304, 312–13, 317–19 (3d Cir. 2010). The Fourth Circuit is currently reviewing it. *See* United States v. Graham, 846 F. Supp. 2d 384 (D. Md. 2012), *appeal docketed*, No. 12-4659 (4th Cir. Aug. 22, 2012). Numerous district and state courts have already decided it. *See, e.g.*, United States v. Dye, No. 1:10CR221, 2011 WL 1595255, at *9 (N.D. Ohio Apr. 27, 2011); State v. Griffin, 834 N.W.2d 688, 695–97 (Minn. 2013). The cases that have reached the federal appellate courts involved governmental applications for CSLI under the Stored Communications Act, 18 U.S.C. §§ 2701–2712 (2012), (SCA), which permits a court to issue an order requiring disclosure of communications records on a showing of "specific and articulable facts" that there exist reasonable grounds to believe that the records are "relevant and material" to an ongoing criminal investigation, *id.* § 2703(d). Were a court to require police to obtain a warrant before accessing CSLI *under the Fourth Amendment*, it would be implying that this section of the SCA is unconstitutional as applied to CSLI.

police."[46] Cell phone users, however, may not assume the risk of disclosure as they may not even be aware that their location information is being shared with anyone, particularly when they merely turn on their cell phones; thus, they arguably maintain their expectation of privacy in their location information.[47] Courts have embraced variations of this idea, suggesting, for instance, that *Smith* is inapplicable because, unlike telephone numbers, cell-site data is "neither tangible nor visible to a cell phone user."[48] Chief Justice Rabner himself, while acknowledging the difficulties of reaching his state-law holding under the Fourth Amendment because of *Smith*, noted that the transmission of CSLI does not involve "a voluntary disclosure in a typical sense."[49] Furthermore, a disclosure that is technically within a person's volition — even if one does not know about the disclosure of CSLI, the decision to use a cell phone is within one's control — is not inevitably "voluntary." Cell phones have become ubiquitous in daily life,[50] and modern society, in its expectation that individuals will possess cell phones, effectively coerces people to use them.[51] Because the disclosure of CSLI is not necessarily voluntary, individuals still may hold an expectation of privacy in their cell-site data even under *Smith*.

The *Knotts* doctrine also may permit a finding that the Fourth Amendment protects CSLI. During the Term after *Knotts*, the U.S. Supreme Court decided *United States v. Karo*,[52] which dictated that location surveillance cannot occur without a warrant when the target is inside a private residence.[53] The public-private distinction highlighted by *Knotts* and *Karo* is immensely important to Fourth Amendment

---

[46] Smith v. Maryland, 442 U.S. 735, 745 (1979).

[47] *See In re Application*, 620 F.3d at 317–18. Some courts have been hesitant to follow this line of reasoning because of its reliance on individuals' positive knowledge rather than normative considerations of whether one should be able to expect privacy in his or her location data. *See In re* Application of the U.S. for an Order Authorizing the Release of Historical Cell-Site Info., 809 F. Supp. 2d 113, 121 (E.D.N.Y. 2011) (cautioning that "[p]ublic ignorance as to the existence of cellsite-location records, however, cannot long be maintained").

[48] *In re Application*, 809 F. Supp. 2d at 121 (quoting *In re* Application of the U.S. for Historical Cell Site Data, 747 F. Supp. 2d 827, 844 (S.D. Tex. 2010)).

[49] *Earls*, 70 A.3d at 641.

[50] *See Wireless Quick Facts*, CTIA — WIRELESS ASS'N, http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts (last visited Mar. 30, 2014) (noting that, as of December 2012, there were 326.4 million active devices with wireless subscriptions in the United States, a figure that exceeded the U.S. and territorial populations at that time).

[51] This legal argument is related to, although distinct from, the policy argument that certain information that *is voluntarily disclosed* to third parties should still be protected by the Fourth Amendment. *See* United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (suggesting that the Court should cease "to treat secrecy as a prerequisite for privacy" and noting that "I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection").

[52] 468 U.S. 705 (1984).

[53] *Id.* at 718.

law. The Amendment itself specifically enumerates "houses" as protected locations,[54] and the U.S. Supreme Court has continuously insisted that Fourth Amendment protections are particularly heightened when an individual is inside his or her home, observing that, "when it comes to the Fourth Amendment, the home is first among equals."[55] As law enforcement will likely be unable to determine, before accessing CSLI, whether a cell phone is located in a private home or in a public space, the notion that law enforcement can freely access this information thus runs counter to *Knotts*, *Karo*, and the Court's wider Fourth Amendment jurisprudence.

The third-party disclosure doctrine and the public-private distinction, both developed by the U.S. Supreme Court during a decidedly different technological era, do not necessarily obstruct a finding that the Fourth Amendment protects CSLI for another reason as well: both doctrines provide for exceptions to the relinquishing of Fourth Amendment rights where a privacy interest is particularly sensitive. The Court in *Smith* was careful to note the "limited capabilities"[56] of the technology at issue — a pen register, which was unable to record the content of the surveillance target's telephone conversations. Because a telephone company can record the content of a telephone conversation just as easily as it could the numbers dialed, the *Smith* Court's "content exception" implies that situations exist in which "society's recognition of a particular privacy right as important swallows the discrete articulation of Fourth Amendment doctrine in *Smith*."[57] *Knotts* provides a similar exception; the technological constraints of beeper surveillance and the limited amount of information that could be learned about a person through beepers were critical to the Court's holding.[58] The *Knotts* Court relied on the idea that the beeper technology was merely an extension of police officers' sensory faculties, specifically reserving judgment as to whether "dragnet-type" surveillance in public places would be constitutional.[59] In doing so, the Court suggested that both the *duration* of surveillance and the *quanti-*

---

[54] U.S. CONST. amend. IV.

[55] Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013); *see also* Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); Kyllo v. United States, 533 U.S. 27, 31–41 (2001) (addressing the manner in which the Fourth Amendment specially protects privacy within the home); Minnesota v. Carter, 525 U.S. 83, 88–91 (1998) (same).

[56] Smith v. Maryland, 442 U.S. 735, 742 (1979).

[57] *In re* Application of the U.S. for an Order Authorizing the Release of Historical Cell-Site Info., 809 F. Supp. 2d 113, 124 (E.D.N.Y. 2011). Note that this interpretation of the "content exception" allows one to use existing legal doctrine to arrive at the policy position advocated by Justice Sotomayor in her concurrence in *Jones*. *See* United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

[58] *See* United States v. Knotts, 460 U.S. 276, 283–85 (1983).

[59] *Id.* at 284.

ty of information that could be obtained are relevant to a Fourth Amendment analysis.[60]

Cell phone location data fits well into these exceptions for information in which individuals have a particularly sensitive privacy interest. The nature of cell phones — the fact that most people have them in their possession at all times — suggests that law enforcement could use CSLI to know a person's location at every moment of every day, vastly expanding the universe of information available to law enforcement. In her concurrence in *Jones*, Justice Sotomayor expressed concern that government surveillance can reveal "a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[61] The *Earls* court reiterated these concerns with regard to CSLI, declaring that "[l]ocation information gleaned from a cell-phone provider can reveal not just where people go . . . but also the people and groups they choose to affiliate with and when they actually do so."[62] Given the extensive information CSLI can provide about an individual, CSLI would seem to be precisely the type of sensitive data that the *Smith* and *Knotts* Courts would have been hesitant to allow the government to access without a warrant.

The New Jersey Supreme Court struck a counterpunch against a progression of judicial opinions permitting law enforcement to access CSLI without a warrant, a practice that is widespread throughout the country.[63] Nonetheless, the *Earls* court unnecessarily approved of, in dicta, the idea that the third-party disclosure doctrine and the public-private distinction might require a finding that, under the Fourth Amendment, police do *not* need a warrant before obtaining CSLI. By intimating as much, the *Earls* court both failed to arm future state and federal courts as they come to deal with this issue and may have needlessly provided fodder for those courts to reach a holding under federal law contrary to the one the *Earls* court reached under state law. In 1967, in the transformative *Katz* decision, the U.S. Supreme Court held that a person's conversation in a phone booth was protected by the Fourth Amendment, declaring, "To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."[64] It may now be time for courts to recognize the "vital role" the cell phone has come to play in private communication as well.

---

[60] *See In re Application*, 809 F. Supp. 2d at 117.

[61] 132 S. Ct. at 955 (2012) (Sotomayor, J., concurring).

[62] *Earls*, 70 A.3d at 642.

[63] *See* Eric Lichtblau, *Police Are Using Phone Tracking as Routine Tool*, N.Y. TIMES, Apr. 1, 2012, at A1. Several states have adopted legislation requiring police to obtain a warrant before accessing CSLI in lieu of waiting for their courts to decide the issue, although at least one governor has vetoed such legislation. *See* Somini Sengupta, *Warrantless Cellphone Tracking Is Upheld*, N.Y. TIMES, July 31, 2013, at B1.

[64] Katz v. United States, 389 U.S. 347, 352 (1967).