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The Supreme Court's Criminal Law Decisions In 2018

Part One of a Two-Part Article

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The United States Supreme Court's October Term 2017 was a good year for criminal defendants in areas as varied as the Fourth Amendment, obstruction of justice, the death penalty, and criminal restitution. As in recent years, the Court continued to express concern about government overreach. This concern often unites justices who do not agree on other issues, as placing limitations on government authority can draw support from both liberal and conservative members of the Court. There was only one major criminal law decision this term — *Carpenter v. United States* — but there were several decisions that defense counsel would do well to study.

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Carpenter: A New Limitation on Modern Technological Government Surveillance

The one case from this year's term that will be taught in law school criminal procedure classes is *Carpenter v. United States*, 138 S. Ct. 2206 (2018). In *Carpenter*, the Court found a privacy interest in cell site location information (CSLI) when it is sought by the government for lengthy periods of time and when no exigencies support a warrantless search. CSLI is the information constantly collected by cellphone companies that reflects the approximate location of the user of a cellphone. The lower court ruled for the government, relying upon the third-party doctrine, which provides that "a person has no legitimate expectation of privacy in information he voluntarily turns over the third parties." *Smith v. Maryland*, 442 U.S. 735, 743-44 (1977). As a result, the government does not need a search warrant when it seeks bank records or records showing the phone numbers called by a particular land-line phone. *See*, *id*. (pen register); *United States v. Miller*, 425 U.S. 435, 443 (1976) (bank records).

The Court declined to extend *Smith* and *Miller*, holding that obtaining CSLI for seven days or more (a time frame drawn from the facts of *Carpenter*) amounts to a Fourth Amendment search, even if the information is voluntarily provided by the defendant to the cellphone company. The Court recognized that the realities of modern life oblige us to carry cellphones. Collection of CSLI allows perpetual surveillance, a kind of panopticon enabled by new technology. After *Carpenter*, the government may obtain CSLI if it obtains a warrant based on probable cause. *Carpenter* is deliberately narrow, and it leaves it to lower courts and future Supreme Court decisions to decide what other types

of records might fall within or outside of the third-party doctrine. Given the march of technology, we can expect to see future litigation over the question of what types of information or investigative steps are akin to CSLI.

Microsoft: Congress Fixes the Problem

At the opening of the term, observers anticipated a second major case arising out of what Justice Kennedy has described as "the cyber age." In *Microsoft v. United States*, 829 F.3d 197 (2d Cir. 2016), the Second Circuit had limited the government's ability to obtain emails stored on servers located outside of the United States, even when those emails were accessible from within the United States. But, as the Supreme Court recognized in April (*see*, *United States v. Microsoft*, 138 S. Ct. 1186 (2018)), this case about the extraterritorial nature of search warrants for email was mooted by a new congressional statute, the CLOUD Act, which allows the government to require United States firms that store electronic data for United States citizens on their servers to be compelled to produce these documents to the government, regardless of where the servers are located. There are exceptions for where such production would violate the privacy rights of the technology company in the country where the server is located. At the end of oral argument in the Second Circuit, Judge Lynch wryly observed that "the one thing that probably everyone agrees on is that, as so often, it would be helpful if Congress would engage in that kind of nuanced regulation, and we'll all be holding our breaths for when they do." Hearing Transcript, *Microsoft v. United States*, No. 14-2985, at 99. We hope that Judge Lynch can exhale!

Marinello: Tax Obstruction Statute Read Narrowly

In *Marinello v. United States*, 138 S. Ct. 1101 (2018), the Court continued its long-running effort to limit the reach of obstruction of justice prosecutions, which it believes are often brought without sufficient justification. This trend goes back many years to *United States v. Aguilar*, 515 U.S. 594 (1995), *Arthur Andersen v. United States*, 544 U.S. 696 (2005), and most recently in *Yates v. United States*, 135 S. Ct. 1074 (2015). Each case read additional limitations into the obstruction statutes. In *Marinello*, the Court considered the tax obstruction statute (26 U.S.C. §7212(a)) and held that the government needs to prove that the defendant was aware of a pending tax-related proceeding, such as a particular investigation or audit, when he engaged in the alleged obstructive act. Similar to the general obstruction statute interpreted in *Aguilar*, the government needs to prove a nexus between the defendant's conduct and the particular tax proceeding. Defense counsel should continue to challenge obstruction charges based on the *Aguilar* line of cases — the Court seems very receptive to such challenges.

Next month we will discuss several more U.S. Supreme Court decisions of interest to the criminal defense bar.

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