

Vermont Legislative Council

115 State Street • Montpelier, VT 05633-5301 • (802) 828-2231 • Fax: (802) 828-2424

MEMORANDUM

To: House Committee on Judiciary

From: Erik FitzPatrick

Date: April 5, 2016

Subject: Search Warrants: When Required and Exceptions

The Fourth Amendment of the U.S. Constitution provides: “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.”

The first question in determining whether a warrant is required is whether a search occurred at all, thus implicating the Fourth Amendment. A “search” within the meaning of the Fourth Amendment occurs where the government invades a matter in which a person has an expectation of privacy that society is willing to recognize as reasonable. *United States v. Graham*, 796 F.3d 392 (4th Cir. 2015) (citing *Kyllo v. United States*, 533 U.S. 27, 33, (2001)). For example, the U.S. Supreme Court has held that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” *United States v. Miller*, 425 U.S. 435, 442 (1976). Under this analysis, known as the third-party doctrine, courts have held that a warrant is not required to obtain a record of a person’s telephone calls from a telephone company, *Smith v. Maryland*, 442 U.S. 735 (1979) or of a person’s account information from a website operator. *United States v. Bynum*, 604 F.3d 161 (4th Cir.2010). On the other hand, several courts have recently held that a person does have a reasonable expectation of privacy in cell phone site location information (CSLI), and that a warrant is required for that information. *Graham*, 796 F.3d at 349 (collecting cases).

When a search does occur, “the ultimate touchstone of the Fourth Amendment is reasonableness.” When law enforcement engages in a search or seizure under the Fourth Amendment, “reasonableness generally requires the obtaining of a judicial warrant.” *Riley v. California*, 134 S.Ct. 2473, 2482 (2014) (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)). [Note: Although Article 11 of the Vermont Constitution is in some respects interpreted to offer greater privacy protections than the Fourth Amendment, the reasonableness requirement applies similarly to both. *State v. Medina*, 2014 VT 69, par. 13 (citing *State v. Berard*, 154 Vt. 306, 309 (1990)).]

In the absence of a warrant, a search is per se unreasonable unless it falls within a specific exception to the warrant requirement. *Riley*, 134 S.Ct. at 2482 (citing *Kentucky v. King*, 131 S.Ct. 1849, 1856–1857 (2011)); *Graham*, 796 F.3d at 349.

Courts have developed five generally recognized exceptions to the warrant requirement:

(1) Search **incident to a lawful arrest**.

—May extend only to the arrestee’s person and to the surrounding area within his or her immediate control, which the Court has construed to mean “the area from within which he might gain possession of a weapon or destructible evidence.” *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

(2) Search with **consent**.

—Consent must be given voluntarily in light of all circumstances. *Schenckloth v. Bustamonte*, 412 U.S. 218 (1973).

(3) Search in **exigent circumstances**.

—When “the exigencies of the situation’ make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.” *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011) (citing *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)). Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect (i.e., “hot pursuit”), and to assist persons who are seriously injured or are threatened with imminent injury. *Kentucky v. King*, 131 S.Ct. at 1856.

(4) Seizure of objects in **plain view**.

—Objects in plain view may be seized if the officer’s presence in the area is lawful, such as pursuant to a warrant or an exception to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

(5) Search pursuant to a **regulatory statute**.

—The statute must regulate or license a commercial enterprise in circumstances where the regulated party can be said to have submitted to warrantless searches as a part of the regulatory scheme, such as housing and building code violation inspections. *United States v. Biswell*, 406 U.S. 311 (1972).