

## Carpenter, Search Warrants, and Court Orders Based on Probable Cause

**Author :** Jeff Welty

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In *Carpenter v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, 2018 WL 3073916 (June 22, 2018), the Supreme Court ruled that when the government obtains long-term, historical cell site location information (CSLI) about a person, it conducts a Fourth Amendment search and so “the Government must generally obtain a warrant supported by probable cause before acquiring such records.” I previously blogged about *Carpenter* [here](#).

That post referenced the possibility of using a court order supported by probable cause in lieu of a search warrant. The idea behind that suggestion was that some of the statutory execution procedures associated with search warrants are an awkward fit for this type of order. For example, G.S. 15A-252 requires that an officer executing a warrant must “read the warrant and give a copy of the warrant application . . . to the person to be searched, or the person in apparent control of the premises . . . to be searched.” In a case involving CSLI, is the officer supposed to read the warrant to Verizon? Or to the suspect, even though he or she will not be present at the search? But since I wrote my prior post, I’ve been asked several times whether using a court order based on probable cause in place of a search warrant would really be permissible. This post attempts to answer that question.

**No constitutional problem with using a court order.** The case law consistently holds that a court order is the constitutional equivalent of a search warrant so long as the court order (1) is issued by a neutral judicial official; (2) is based on a finding of probable cause; and (3) complies with the particularity requirement. Using the term “order” instead of the term “warrant” is merely a semantic difference, and the rules regarding execution, inventory, return, and the like, are generally statutory rather than constitutional in nature. See *United States v. Sykes*, 2016 WL 8291220 (E.D.N.C. Aug. 22, 2016) (unpublished), M&R adopted, 2016 WL 6882839 (E.D.N.C. Nov. 22, 2016) (unpublished) (considering whether “the state court orders that authorized GPS location tracking [of suspects’ phones] were the functional equivalent of search warrants supported by probable cause,” and finding that at least one was not as it was not supported by probable cause and lacked particularity; in the course of the discussion the court stated that “it is not material whether the applications were for orders as opposed to warrants,” and that “[t]he Supreme Court has interpreted the Fourth Amendment to establish only three requirements for warrants: (1) they must be issued by neutral, disinterested magistrates; (2) supported by probable cause; and (3) particularly describe the place to be searched and the things to be seized,” citing *Dalia v. United States*, 441 U.S. 238 (1979)); *Keeylen v. State*, 14 N.E.3d 865 (Ind. 2014) (ruling that court orders authorizing the installation and monitoring of a GPS tracking device violated the Fourth Amendment because they did not contain findings of probable cause; “it is not dispositive that the trial court’s authorizations were not labeled ‘warrants’”; however, the “defining features of a search warrant” include issuance by a judicial officer, upon a finding of probable cause, and with a particular description of the place to be searched and the things to be seized; the orders in this case appeared to have been issued “on less than probable cause”); *Com. v. Burgos*, 64 A.3d 641 (Penn. Super. Ct. 2013) (ruling that court orders authorizing the installation and monitoring of a GPS tracking device “serve[d] as the functional equivalent of traditional search warrants,” where they were “approved and issued by the judiciary . . . [and] allow[ed] an investigating officer to conduct a search . . . upon a showing of the requisite level of suspicion,” namely, probable cause; the court reversed a lower court’s determination that the orders were not equivalent to warrants because, for example, they did not require execution within 48 hours). So I don’t think there’s any constitutional impediment to using a court order based on probable cause.

**Lack of statutory framework for using a court order.** A potential problem with the use of court orders based on probable cause is that there is no clear statutory authorization for them. Obviously, the search warrant statutes authorize the issuance of search warrants, not other kinds of court orders. And while the federal Stored Communications Act does provide for the issuance of court orders, see 18 U.S.C. § 2703(d), that provision addresses less-than-probable-cause orders, not full probable caused orders to be used in lieu of a search warrant. The lack of a statutory framework isn't necessarily fatal to the use of court orders, as the state supreme court has recognized courts' inherent authority to issue investigative court orders when appropriate. *See In re Superior Court Order Dated April 8, 1983*, 315 N.C. 378 (1986) (“[W]hile there is no statutory provision either authorizing or prohibiting orders of the type here involved, such authority exists in the inherent power of the court to act when the interests of justice so require.”). Still, the lack of statutory authorization may be a reason to prefer a search warrant over a court order when it is feasible to use the former.

**Conclusion.** All in all, I lean towards using a search warrant rather than a court order when feasible, out of an abundance of caution. But there are still circumstances where a court order may be a better fit. For example, when an investigator is seeking access to real-time CSLI, and the suspect is still at large and engaged in criminal activity, the execution requirements associated with a search warrant may be so inappropriate that a court order is a more appropriate choice. (As a reminder, by its terms, *Carpenter* governs only the collection of long-term historical CSLI, but I think it's prudent for investigators to act on the assumption that it may be extended to real-time CSLI collection.) As always, I'd be interested in others' thoughts about this matter.