

## Stingrays

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This weekend, the Charlotte Observer ran [this article](#), entitled *Charlotte Police Investigators Secretly Track Cellphones*. The article concerns the use of so-called stingrays, also known as IMSI catchers or cell site simulators. They are machines that simulate cell towers and connect with the cellular telephones located nearby. Officers frequently use them to triangulate the location of a suspect – or more precisely, the location of a suspect’s phone. There’s a controversy about the legal status of these devices, which I’ll summarize in this post.

**No constitutional or statutory limits on use.** At one end of the spectrum, one could argue that there are no constraints on police use of stingrays.

- Constitutionally, the argument would be that a stingray simply detects the signals that a suspect’s phone voluntarily broadcasts to the world, and so does not infringe on any reasonable expectation of privacy. *Cf. State v. McGriff*, 151 N.C. App. 631, 638 n.1 (2002) (in a case where one neighbor “inadvertently intercepted” another neighbor’s conversation on a cordless phone, apparently because of channel overlap, the court strongly suggested that there is no reasonable expectation of privacy in “cordless telephone conversations”). At a minimum, cell phones send their signals to cellular service providers, which arguably destroys any expectation of privacy in the signals.
- Statutorily, the argument would be that stingrays normally are configured not to collect the content of any communications, so the wiretapping laws don’t apply; and that stingrays operate over the air instead of being installed on a particular phone line, so the pen register statutes don’t apply, see G.S. 15A-260(2) (defining a pen register in part as “a device . . . attached” to a telephone line that tracks activity).

**Pen register/trap and trace order required.** The middle ground position is that, while there is no Fourth Amendment issue for the reasons given above, a pen register order is required. While the state pen register statute applies only to devices attached to telephone lines, the federal pen register statute defines a pen register in part as any “device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument . . . from which . . . [an] electronic communication is transmitted.” 18 U.S.C. §3127(3). Because there’s no reference to attachment to a phone line, that appears to be a broader definition that might apply to stingrays, and state law generally can’t provide less protection than federal law. It sounds like the FBI and USDOJ have taken the position that a pen register order is needed to authorize the use of stingrays, and it appears that the Charlotte police obtain such orders, which may issue on a showing lower than probable cause. [Update: Someone in a position to know contacted me to advise that the Charlotte police actually seek court orders based on, and containing a finding of, probable cause.]

**Full probable cause search warrant required.** Finally, one could argue that because stingrays are essentially tracking devices than enable law enforcement to locate suspects through electronic surveillance, a search warrant based on full probable cause is required. This argument gains some support from the Supreme Court’s decision in *United States v. Jones*, 565 U.S. \_\_\_ (2012), the GPS tracking case. Although the majority’s opinion in *Jones* focused on the *installation of the tracking device* as a Fourth Amendment search, it appeared that there were five votes on the Court to find that *electronic tracking itself* is a search under at least some circumstances. There’s a robust debate in the state and federal courts post-*Jones* about whether and when there is a reasonable expectation of

privacy in location information. I won't get into the back and forth here, but my general advice for officers is that if you have probable cause, getting a search warrant for anything having to do with anyone's location is the safest course of action.

**Other issues.** The Observer article also touched on a couple of other controversies about stingrays, including (1) that the data obtained through stingrays may not be disclosed to the defense, because the federal government contends that stingrays are a secret national security technology, and (2) that the orders authorizing the use of stingrays may be sealed, in some cases effectively permanently. I have thoughts and opinions about both of those issues, but this post is already long enough.

**Further reading.** The ACLU has [this very helpful primer](#) on stingrays that collects most of the (very few) cases about them. It's written from a defense point of view but it's a good overview for anyone.