UNITED STATES DISTRICT COURT EASTERN DISTRICT OF OKLAHOMA MUSKOGEE DIVISION

UNITED STATES OF AMERICA	§	
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	§	
VS.	§	**CRIMINAL CASE 6:21-cr-358-RAW**
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SILVIA VERONICA FUENTES	§	

DEFENDANT SILVIA VERONICA FUENTES' REPLY TO THE GOVERNMENT'S POST HEARING FINDING OF FACT AND MEMORANDUM OF LAW

Defense files the following reply to the government's post-hearing proposed finding of facts and memorandum of law in opposition to Ms. Fuentes November 18, 2022, motion to suppress.

PROCEDURAL HISTORY

A motion to suppress was filed by the defense on November 18, 2022. The government filed a response in opposition on November 30, 2022. A hearing on the motion was held on September 25-26, 2023. Post-hearing findings of fact and memorandum of law were filed on December 7, 2023. This reply is filed in response to the government's opposition papers and in accordance with the schedule set by the court.

REPLY MEMORANDUM OF LAW

The government's post hearing memorandum of law asks the court to reimagine the central tenants of Fourth Amendment law to suit their warrant and the actions of Trooper Thornton. The government's arguments, at base, ask the court to invert the probable cause

analysis, eschew the particularity requirement, and stretch the boundaries of the *Leon* good faith exception beyond their breaking point. Furthermore, the government's brief contains misstatements of fact and implies clarity where there is none.

I. Standing

Ms. Fuentes has standing to challenge this warrant both because she has a reasonable expectation to privacy in her Location History data, and because that data is her property. The government, however, attempts to obfuscate both the facts of the hearing and the law.

First, the government presents a myopic view of the Court's decision in *Carpenter* by focusing on one issue—voluntary disclosure. *See* ECF No. 131 at 26-27. Second, the government attempts to muddy the waters around voluntary consent by employing generalized statements about the technology used. *See id.* at 26-30. Third, the government provides nothing more than conjecture as to what if any notice Ms. Fuentes received. *Id.* Finally, the government attempts to gloss over both the facts and law establishing Ms. Fuentes property rights in Location History.

The record here is at best speculative as to whether Ms. Fuentes "opted in" to Location History. Google's policies around opting in have changed over time. Tr. 45:9-47:4. When Ms. Fuentes set up her account in 2011, or made changes to it in 2013, she was likely opted in to Location History by default. *See id.* at 48:2-5; *see also* 49:6-50:10. While the government speculates that she would have had to opt in with a new device in 2020, there is no record of that in the "account change history"—the only definitive record kept by Google. *Id.* at 48:19-49:5. Those records show that Ms. Fuentes opted into Location History in 2013, prior to when Google was known to have created "consent flows" for people to "voluntarily" "opt in" to Location History. *See id.* at 48:2-5; *see also* 49:6-50:10.

The government ignores the intricacies of the record and makes generalized statements that conflate Google Location History with "location-based services" used by customers. *See* ECF No. 131 at 27-30 (referring to all Google location data as "location-based services" rather than the Location History collected by the government here).[1] The government falsely states that the voluntary nature of Ms. Fuentes disclosure was "evident from the nature of the relationship between Google and its users – users must provide their devices' location to Google to obtain location-based services." ECF No. 131 at 27. This statement appears intended to mislead the court. "Location-based services" are not synonymous with Location History. *See* Ex. A(2) at ¶ 16-17; *see also* Tr. 37:6-16. Google maps and other "location-based services" work without Google actively collecting Location History data. *See* Ex. A(2) at ¶ 3; Ex. A(5) 162:8-25.[2]

Additionally, there is no record whatsoever of *what* Ms. Fuentes was supposedly consenting to even if she had intentionally "opted in" to Location History. Google's privacy policies and consent flows have changed over time, and although they have become more explicit, one court described them as "less than pellucid." *Chatrie*, 590 F.Supp.3d at 936; *see also* Tr. at 47:5-48:18. As the court in *Chatrie* noted a user simply cannot forfeit the protections of the Fourth Amendment for years of precise location information by selecting "YES, I'M IN" at midnight while setting up Google Assistant, even if some text offered warning along the way." *Chatrie*, 590 F.Supp.3d at 936. Here the government did not introduce any evidence of what the

[1] Google "location-based service" refers to a host of services provided by Google- not just to Location History. *See* Manage you Android device's location settings, https://support.google.com/accounts/answer/3467281?hl=en (last viewed Dec. 14, 2023). Google retains three types of location data related to these services: Location History, Web and App Activity and Google Location Accuracy data. *See* Ex. A(5) at ¶ 16-17; Tr. 37:6-16. Each of these can be used to provide data to different "location-based services" and are considered "location-based services" themselves. *See* Manage you Android device's location settings *supra*. Although, Google used to have Google "Location Services," that was simply the older version of Google Location Accuracy which combines multiple forms of location data. *See id.* Additionally, devices have something called "location services" which is a device level setting on iPhones. In other words, references to "location-based services" are both overinclusive and misleading.

[2] Again, because the government chose not to use the language in the record, defense counsel is relying on context to infer that they are referring to "location-based services" like Google maps.

consent flow was when Ms. Fuentes Location History was activated (because they do not know when or how it was activated). Given the timing of her account activation in the "account change history" (2013) it was likely less clear than the notice in *Chatrie*. *See* Tr. *Id.* at 47:5-48:18. At best the record here, as in *Chatrie*, was "murky" and "indeterminate" such that the court cannot affirmatively say Ms. Fuentes voluntarily shared the data at issue. *See Chatrie*, 590 F.Supp.3d at 935.

The government focuses on this "voluntary" disclosure to distract from the fact the Court's decision in *Carpenter,* when read as a whole, requires a finding that there is a reasonable expectation of privacy. *See* ECF 130 at 13-21. First, as noted in the dissent in *Carpenter*, cell phone providers contract with their customers regarding location data. *See Carpenter v United States*, 138 S.Ct. 2206, 2225 (Kennedy dissenting). However, this fact did not impact the majority decision. *See id.* Second, the data here is significantly more precise than CSLI, passively collected several times per minute, and has the capability to show individuals within homes and other protected spaces. *Id.* at 14-17. Moreover, the time machine like capability means that it cuts against us all and allows surveillance of non-suspects. *Id.* For this reason every court to examine the issue has found a reasonable expectation to privacy in location history data. *Id.* at 13. On the other hand, no court has ruled that Google customers lack a reasonable expectation to privacy in their Location History data. *Id.* at 14.

Furthermore, the government's response fails to even address the facts establishing Ms. Fuentes property interest in Google Location History. Instead, they simply dismiss the property interest argument as "rooted in Justice Gorsuch's solo dissent in Carpenter," ECF No 131 at 30, ignoring decades of jurisprudence applying it as an independent test. *See, e.g., Jones*, 565 U.S. at 409 ("[A]s we have discussed, the *Katz* reasonable-expectation-of-privacy test has been added to,

not substituted for, the common-law trespassory test."); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) ("[W]ell into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass."); *Soldal v. Cook County*, 506 U.S. 56, 62 (1992) ("[O]ur cases unmistakably hold that the Amendment protects property as well as privacy."). Therefore, this Court should find the government has conceded Ms. Fuentes property interest in her Location History.

Additionally, Google announced on December 12, 2023, that it will no longer store private location history data on its servers, and those who wish to enable location history will store such information on their devices. *See* Marlow McGriff, *Updates to Location History* (Dec. 12, 2023), available at: https://blog.google/products/maps/updates-to-location-history-and-new-controls-coming-soon-to-maps/. In fact, if users wish to store a back-up copy of their data on "the cloud" – which simply means Google's servers – Google will "automatically encrypt your backed-up data so no one can read it, including Google." *Id.* According to Google, because "your Timeline will be saved right on your device," a user will have "even more control over your data." *Id.*

Furthermore, Google is changing the default auto-delete control to 3 months, rather than 18 months. As Google reiterated in its announcement of these changes, "Your location information is personal." These changes were made in the interest of "keeping [this information] safe, private, and in your control." *Id.* Accordingly, any doubt about whether location history data is personal, private, and protected by the Fourth Amendment from dragnet searches conducted without probable cause should be eliminated by Google's announcement.

II. Probable Cause

The government's probable cause argument boils down to this: a crime was committed, Google Location History exists, and people use it, therefore police may search Google Location History. As a result of this flawed logic, the government fails to even engage with defense arguments regarding the lack of probable cause to seize data from individual users found to have been within the geofence. However, even if the court was to ignore the Fourth Amendment requirement of individualized probable cause the government's argument fails, because they did not establish probable cause that relevant Google Location History existed in the first place.

As the court explained in *Chatrie*, "warrants must establish probable cause that is 'particularized with respect to the person to be searched or seized.' This warrant did no such thing. It first sought location information for all Google account owners who entered the geofence over the span of an hour." *Chatrie*, 590 F.Supp.3d at 929 (citations omitted). There the government asserted that they could search anyone in the area of a crime because they could be a witness, accomplice or suspect. *Id.* at 929. The *Chatrie* Court soundly rejected what it called the government's "inverted probable cause argument" argument under *Ybarra*. *Id.* at 933.

Here the government attempts the same inverted probable cause argument rejected in *Chatrie*. They contend that *Ybarra* and its progeny are an "exception to the general rule for search warrants" and that probable cause need only be particularized for searches of people, not things. ECF 131 at 36. But *Ybarra* suggests no such thing and provides no rationale for treating "persons" differently from their "houses," "papers," and "effects." *See Ybarra v. Illinois*, 444 U.S. 85 (1979).

Rather, *Ybarra* applied the basic principles of probable cause, concluding that a person's mere proximity to a crime, without more, is insufficient to justify their search or seizure. *Id.* at

91. Just as probable cause to search a house will not justify a search of the neighbors, the district court in *Chatrie* found that this reasoning applies equally to searches of individual Google accounts and the Location History therein. *Chatrie*, 590 F.Supp.3d at 932; *also Matter of Search of Information Stored at Premises Controlled by Google*, 481 F. Supp. 3d 730, 753 (N.D. Ill. 2020) ("Fuentes Opinion"). ("The Seventh Circuit's treatment of *Ybarra* teaches us that . . . that at least some evidence of a person's involvement in the suspected crime is required, in order for the Fourth Amendment to allow . . . the seizure of that person's things, such as location information, in which the person has a constitutionally protected expectation of privacy.").

The government counters that *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), allows a warrant to establish only that the things to be searched for are at the property to which entry is sought. ECF 131 at 35. But the search and seizure *Zurcher* is not analogous to the geofence here. *Zurcher* involved a search for photographs a newspaper employee took of unidentified demonstrators who had allegedly assaulted police. 436 U.S. at 551. Unlike Location History data, those photographs did not belong to individual demonstrators; they belonged to the newspaper. Unlike here, the warrant established a nexus between the crime and what police sought: published photographs from the protest-turned-crime-scene from the photographer who was present at the protest. *Id.* By contrast, the geofence warrant offers no evidence that Ms. Fuentes possessed relevant Location History data. The facts in *Zurcher* would be analogous to this case only if the newspaper happened to store private pictures belonging to tens of millions of non-employees.

The government cites *Illinois v. Lidster*, 540 U.S. 419 (2004), which involved stopping motorists to investigate a hit-and-run and is likewise inapposite. ECF 131 at 37. Those stops relied on the diminished expectation of privacy in automobiles and were permissible only

because they sought the public's voluntary cooperation. 540 U.S. at 424-25. By contrast, checkpoints intended to reveal that a motorist has committed some crime are unconstitutional. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 40-44 (2000). Thus, because the search here sought to identify the robber, the better analogy is to an unconstitutional checkpoint that stopped every car near the bank during rush hour and demanded drivers unlock their phones and allow police to see their location history. As *Edmond* teaches, such a checkpoint would be impermissible for the same reason that the geofence warrant also fails: "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." 531 U.S. at 42.

Finally, the government's reliance on *United States v. James*, 3 F.4th 1102 (8th Cir. 2021), involving a cell phone tower dump, is unpersuasive. The Tenth Circuit has never found tower dumps constitutional, and *Carpenter* explicitly declined to bless them. 138 S. Ct. at 2220. Moreover, the number of people a typical tower dump searches is far smaller than the "numerous tens of millions" a geofence warrant searches. What these searches have in common is the absence of particularized probable cause, which *James* failed to consider. *Chatrie*, 590 F.Supp.3d at 932; *see also Fuentes Opinion* at 751-52.

However, even assuming the court were to adopt the government's inverted probable cause analysis, they failed to establish probable cause that relevant Location History existed. *See* ECF 130 at 22-25. This is because they failed to establish a fair probability that the person involved in the collision had a Google account or had Location History activated at the time of the collision. *See id.* They provided no data specific to the driver and failed to even provide a statistical likelihood that the driver had Google or Location History activated. *Id.* Instead, the government's warrant consisted of the following assertions – Google Location History exists,

and people use it, therefore we want to search everyone's data to see if they were using their device near the scene of the crime. *See id.* As the court stated in *Chatrie*, "it is difficult to overstate the breadth of this warrant, particularly in light of the narrowness of the Government's probable cause showing." *Chatrie*, 590 F.Supp.3d at 930.

III. Particularity

The government's particularity arguments are based on the false premise that nothing of consequence occurs at step one inside Google, and that the subsequent seizure by the government is valid because it targets a small geographic area over a short period of time. Amazingly, the government also asserts that step two of their warrant was unnecessary, and that they had probable cause to search everyone's account inside (or near) the geofence.

Ordinarily, a warrant is required to search any single Google account. To obtain such a warrant, the police must identify the account to be searched. That does not mean that police must identify an account by the owner's name; they can provide a username or account number. But the warrant must identify the account to be searched in some way. Ordinarily, a warrant missing such information violates the Fourth Amendment's particularity requirement because it invites impermissible officer discretion on which accounts to search. Yet that is what happened here. The government asks this Court to dispense with that particularity requirement if police want to search 592 million accounts simultaneously.

The government counters that the warrant "specified with precision the items to be seized," ECF 131 at 40, but the scope of the search lacked any limit and allowed a search of all of Google's location data. Searching for a needle in a haystack, even if described precisely, still requires searching the whole haystack. The warrant did not specify Ms. Fuentes account as the place to be searched, or any other account. Instead, it identified Google's headquarters at

1600 Amphitheater Parkway, the equivalent here of every haystack in the world. Furthermore, it allowed the seizure of every device "within"[3] the geofence. It did not identify the name of the account holder, the account number, or any individual identifying devices.

The government claims that the process engaged in by Google at step one is mere "filtering" that is analogous to every other search warrant and third-party subpoena. ECF 131 at 44-57. That ignores the record and Google's description of this search. Google states that with a typical warrant "Google must search for and retrieve only the responsive data that is associated with the particular users or accounts identified in the warrant." Ex A(6) at 11. However, with a geofence warrant Google, "has no way to know *ex ante* which users may have LH data indicating their potential presence in particular areas at particular times. In order to comply with the first step of the geofence protocol, therefore, Google must search across ***all*** LH journal entries to identify users with potentially responsive LH data, and then run a computation against every set of coordinates to determine which LH records match the time and space parameters in the warrant." *Id.* at 12-13 (emphasis added); *see also* Ex. A(3) ¶ 7. Therefore, the government assertions that this warrant operated like every other warrant for a third-party provider is false. Here neither Google nor the government knew *ex ante* what was to be seized. Instead, the government conscripted Google to search their records for a suspect and provide any incriminating data to them. This is analogous to ordering a building superintendent to search every apartment for evidence of a crime because the government has probable cause to believe one unit contains evidence of a crime. That is not the same act as ordering the super to open a particular door in search of particular evidence. The latter is particularized—the former is not.

[3] As explained previously, the warrant although appearing to limit the seizure to accounts within the confines of the geofence, actually allowed for a much broader seizure. *See* ECF 130 at 33-35.

The government tries to obscure the unique nature of this search by suggesting that it is analogous to the searches in *Ameritech Corp. v. McCann*, 403 F.3d 908, 910 (7th Cir. 2005). ECF 131 at 44. Again, the government glosses over the very real technical differences between that search and the geofence here. The searches in *Ameritech* involved what are called "terminating AMA reports" for landline phone calls. *Id.* at 910. "Unlike cell phone companies, which bill their customers for calls received as well as calls made, landline phone companies bill for outgoing calls only. The network that routes and connects each call "knows" its destination; how else could it connect the call and compute the customer's bill (which may vary by distance between the call's origin and destination)?" *Id.* However, since the phone companies billed customers for only the calls they placed, they did not have preexisting records of who placed those calls. *Id.* As a result they had to generate "terminating AMA reports," which took approximately two hours per report. *Id. Ameritech* was simply challenging claims that these "terminating AMA reports" were preexisting business records that fell under subsection (c) of 18 USC § 2706. *Id.* They were not challenging the constitutionality of the search. *See id.* Most importantly there is nothing to suggest that these requests by law enforcement in Wisconsin failed to name the numbers or accounts to be searched. *See id.* In fact, that is exactly how searches of that kind would work. The government must know and identify the account where the calls are being received prior to making the request. Therefore, this case provides no support for the government's argument and instead demonstrates how uniquely unparticularized the warrant here was.

Finally, and most shockingly, the government claims that the two-step process devised in their warrant was unnecessary. They make this assertion because they have no choice in the face of the undeniable text granting Trooper Thornton full discretion what data to further search and seize in step two. However, whether they like it or not, that is the text of the warrant. It granted

Trooper Thornton something prohibited by the Fourth Amendment—absolute discretion as to what was to be searched and seized. Furthermore, this argument was rejected by the court in *Chatrie* where they explained the particularity rule, "cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." *Chatrie*, 590 F.Supp.3d at 933 (citing *Ybarra*, 444 U.S. at 91).

IV. Good Faith

The government argues against several exceptions to the *Leon* good faith rule. Defense counsel addressed each of these arguments in prior motions and will not restate them all here. *See* ECF at 38-42. However, the government's claims regarding Trooper Thornton's material omissions and misstatements necessitate a response.

Trooper Thornton began his affidavit by deceiving the magistrate as to his training and experience to establish his credibility regarding Google technology. ECF 130 at 31-37. He then omitted the fact that step one required a search across all 592 million Google users with Location History activated regardless of their location. *Id.* He deceived the magistrate as to the display radii, error rates, and the potential scope of the government's seizure at step one. *Id.* He lied about having read studies he used in his "probable cause" section of the application. *Id.* Finally he said the search would be conducted with Reverse Location Obfuscation Identifiers or "RLOIs" and instead demanded unique account identifiers from Google. *Id.*

The government claims these misstatements and omissions were all excusable and played no role in the magistrate's decision to issue the warrant. However, when examined closely, none of their arguments hold water.

First the government claims that Trooper Thornton immunized because he "consulted" with an AUSA. The word "consult" misstates what occurred here. Trooper Thornton didn't consult with an AUSA. The AUSA drafted the entire warrant and warrant application. Trooper Thornton merely acted as a rubber stamp for the affidavit. The record shows that paragraphs 21-23 were the only sections he played a role in drafting. Tr. 127:15-25; 141:22-142:1; 143:10-151:12. He openly admitted to not verifying portions of the application that he swore to. Tr. 149:2-25. Furthermore, the difference between what the warrant and warrant application allowed with regard to RLOI's and unique device identifiers similarly indicates that he did not even read the warrant before signing it. To make matters worse he didn't know if the AUSA who drafted the warrant and application had any experience in the area of geofences. Tr. 150:25-151:12. Failing to confirm information contained in a sworn affidavit, written by another person with whom you have no experience, is definitively reckless. One cannot stick their head in the sand and simultaneously claim good faith.

The government also suggests that Trooper Thornton should be excused because of the "novelty" of geofences. ECF at 53. There was nothing novel about geofence warrants at the time Trooper Thornton requested this. The warrants had grown so common that in 2018 the DOJ and Google developed its three-step process (which Thornton ignored). Ex. A(5) 456:16-457:19. By 2020 Google was receiving 11,554 geofence warrants annually. Additionally, by the time Trooper Thornton sought this warrant a number of courts had courts had started to raise serious concerns over the legality of geofence warrants. *See e.g. In re Search of Info. That Is Stored at the Premises Controlled by Google*, 542 F. Supp. 3d 1153 (D. Kan. 2021) (Mitchell, Mag. J.); *Matter of Search of Information Stored at Premises Controlled by Google*, 2020 WL 5491763, at *5 n7 (N.D. Ill. July 8, 2020); *Matter of Search of Information Stored at Premises Controlled by*

Google, 481 F. Supp. 3d 730, 737 (N.D. Ill. 2020). Moreover, while the technology was new the prohibition on general warrants is not. *See* ECF 130 at 39-40. If Trooper Thornton had any real training and experience (as his affidavit claimed he did) he would have recognized that geofence warrants are general warrants prohibited by law.

Shockingly, the government then pivots to saying these misstatements were immaterial because the magistrate here should have known about the display radius, Google's 68% accuracy goal, and the potential for false positives. *See* ECF 131 at 51. In other words, the government would hold the magistrate responsible for having the training and experience that Trooper Thornton professed to have. This inverts the warrant process. The affidavit is supposed to provide a judge with the facts necessary to make a judgement on probable cause and the scope of the warrant. The judge is not expected to have technical knowledge on geofences, cell site analysis, IMSI catchers or any other police tool or tactic. *See e.g. State v. Andrews*, 227 Md. App. 350, 413, 134 A.3d 324, 361 (2016). The affidavit must be drafted and/or affirmed by a person with sufficient expertise in the area so that they can include the facts necessary for a judge to make those determinations. Trooper Thornton, not the Magistrate, was responsible for knowing and explaining how the technology he wanted to use was going to work.

In support of their argument that the lies about Trooper Thornton's "training and experience" were not material, the government cites *United States v. Smith*, 2023 WL 1930747 at *12 (N.D. Miss. February 10, 2023). However, there the agents did not deceive the judge about their training and experience in order to obtain the warrant or bolster their credibility. Instead, they simply lacked training and experience. The government also cites *United States v. Carpenter*, 2023 WL 3352249 (M.D. Florida February 28, 2023) report and recommendation adopted by the District Court, 2023 WL 2910832 (M.D. Florida April 12, 2023). ECF 131 at 51.

There the court found the officers misstatements about their "training and experience" were "negligent at worst" and applied the good faith doctrine. *Carpenter*, 2023 WL 3352249 at *11. However, the agent's experience in *Carpenter* was significantly greater than Trooper Thornton's. Although the special agent also had no formal training he had been aware of geofence warrants since 2017 or 2018. *Id.* at *7. He spoke with several agents and technical advisors who had used geofence cases in the past successfully. *Id.* He could name those agents and explain their level of expertise. *Id.* The agent also drafted the affidavit himself based on what he had learned and edited the affidavit with the AUSA sending "multiple drafts back and forth." *Id.* at *8. So, his level of experience and involvement in the warrant was considerably greater than Trooper Thornton's and demonstrated some level of actual experience. However, here the issue is not just that Trooper Thornton deceived the magistrate about his credentials, he also failed to provide the judge with material facts that would have affected the scope and issuance of the warrant. The court in *Carpenter* specifically noted that "Mr. Carpenter does not argue that any of the information contained in the "training and experience" paragraphs was factually false or misleading." *Id.* at * 11. Here however, defense demonstrated that Trooper Thornton omitted the fact that step one required a search across all 592 million Google users with Location History activated regardless of their location. He also deceived the magistrate as to the display radii, error rates, and the potential scope of the government's seizure at step one. Therefore, even if *Carpenter* was binding or persuasive, it is distinguishable.

CONCLUSION

The Warrant in this case was devoid of probable cause, overbroad, unparticularized and almost unimaginable in scale. Furthermore, it was obtained only through intentional, reckless, and grossly negligent omissions and deceptions. Therefore, all evidence flowing from the Warrant must be suppressed.

Respectfully Submitted,

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