Updating New York's Search Warrant Legislation for A Modern Era

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By **Corey Stoughton**, special counsel

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The Supreme Court will decide how the Fourth Amendment applies to geofence warrants for location data. New York's outdated laws struggle to address modern digital surveillance, leading to legal uncertainty. Legislation to update the law is needed to clarify rules and protect privacy in the digital age.

This month, in the case of *Chatrie v. United States*, the Supreme Court will rule on a constitutional question for modern times: the Fourth Amendment's application to "geofence" warrants seeking information from third party service providers about all devices within a particular geographic area during a particular time period.

Chatrie is the latest in a series of disputes applying longstanding privacy principles to newfangled surveillance technologies. For many years now, the Supreme Court, in cases such as *Carpenter v. United States* (2018) and *Riley v. California* (2014), as well as the New York Court of Appeals in cases such as *People v. Weaver* (2009), has noted the strain technological developments place on traditional conceptions of constitutional privacy.

Technological change also strains New York's statutory framework governing search warrants. That framework, codified the Criminal Procedure Law (CPL), originated in a time before the internet, smartphones, and cloud storage, and when cutting-edge questions included whether one has a reasonable expectation of privacy in a public telephone booth. To date, the major technological distinction reflected in the CPL is between telephonic and telegraphic communication.

The CPL's provisions governing search warrants are divided between Article 690, which covers physical searches of premises, people, and personal property for the purposes of seeking evidence of the commission of a crime, and Article 700, which covers electronic surveillance. The statute's shortcomings with regard to digital information first arose in the 1980s, when the statute's unclear application to the proliferation of video recording technology created a judicial dilemma.

In *People v. Teicher* (1981), a dentist appealed from his conviction for sexually assaulting unconscious patients. His conviction was based, in part, on video evidence purportedly authorized by a warrant. The problem was that, at the time, the CPL's provisions for electronic surveillance warrants did not cover video surveillance.

To avoid the unpalatable result of overturning the conviction, the Court of Appeals interpreted CPL 690.10, which authorizes the seizure of "personal property," to include the "seizure of an intangible visual image secured by a video recording." Reflecting the discomfort reasonable minds felt at such interpretive acrobatics, the legislature later amended Article 700 to expressly cover video surveillance.

Then, as now, legislative gaps are placing pressure on courts to stretch the statutory language to cover new technological developments. Neither Article 690 nor Article 700 neatly applies to the reams of data held by third party service providers or to electronic information obtained from devices such as GPS trackers or cell-site simulators.

This legislative gap has been clear at least since the Court of Appeals' 2009 decision in People v. Weaver. In holding that GPS tracking of a criminal suspect's vehicle was a search requiring a warrant, Weaver pointed to the need for a statutory framework for issuing such warrants.

That need became even more acute in 2018, when the Supreme Court held in *Carpenter* that obtaining cell site location information required a warrant issued on probable cause, at least if it allowed longer-term location tracking. Practice commentary issued in the wake of those decisions suggested that New York state legislation to fill the statutory gap was inevitable.

But legislation never came. Instead, courts have struggled to fit law enforcement tactics involving location information into the existing CPL statutory framework.

In *People v. Schneider* (2021), the Court of Appeals discussed how the robust procedural protections of Article 700 were developed specifically to give effect to New York's "strong public policy of protecting citizens against the insidiousness of electronic surveillance." That observation suggests the wisdom of channeling requests for electronic surveillance, including digital location tracking, through Article 700.

Some early state court decisions preceding *Carpenter,* such as *People v. Hernandez,* (Sup. Ct. Kings Co. 2017), suggested as much. But, as currently drafted, Article 700 expressly excludes any "device which permits the tracking of the movement of a person or object."

As a result of that exclusion, law enforcement officers since *Carpenter* have defended warrants seeking location information under CPL 690.10—the same provision that the Court of Appeals resorted to in *People v. Teicher* to resolve the video-surveillance gap—which authorizes searches of "personal property" where there is reasonable cause to believe that the property "constitutes evidence" of a crime.

Often, however, the purpose of obtaining location information is not to gather evidence of a crime but to locate a person in order to arrest them, something that under New York law is only possible if an arrest warrant has already issued on probable cause of a crime. By and large, courts have blessed warrants seeking location information for the purpose of facilitating an arrest, but the reasoning is not always elegant.

In *People v. Davis* (Sup. Ct. Bronx Cty. 2021), for example, the court acknowledged the mismatch between the CPL's focus on seeking evidence of a crime and the warrant's focus on facilitating arrest. Nonetheless, the court found the gap could be bridged by "inference," drawing on the Court of Appeals' analysis in Weaver, even though that case was analyzing constitutional, not statutory, provisions.

In *People v. Cutts* (Sup. Ct. NY Cty. 2018), the court accepted that it was enough for the location information to be "relevant to an ongoing criminal investigation" notwithstanding the CPL's much narrower language. And in *People v. Higgins* (Sup. Ct. Kings Cty. 2023), the court endorsed the idea that "police apprehension of the defendant" is "a necessary step in the process of gathering evidence against him," an assumption that the Fifth Amendment's right against self-incrimination casts at least some doubt on.

Perhaps seeking to avoid the disconnect between the purpose of such warrants and the focus of CPL 690.10, some New York courts have suggested that no statutory authorization for a warrant seeking location information is necessary as long as the location information is short-term, as that falls into a gap arguably left open by the Supreme Court's decision in *Carpenter.* See, e.g., *People v. Edward*s (Sup. Ct. Bronx Cty. 2019). New York's appellate courts have still not ruled on this issue.

As the *Chatrie* case itself shows, legal uncertainty is bound to follow as new surveillance technologies outpace the evolution of legal frameworks. When the case was heard before the en banc Fourth Circuit, no opinion could command a majority. The court issued eight concurring opinions and a dissent all disagreeing about how the Fourth Amendment should apply to the government's ability to access the vast troves of location data maintained by private companies. Oral argument suggests the possibility of a similarly fragmented outcome before the Supreme Court.

Whether or not the Supreme Court brings order to this chaos, a definitive judgment from New York's legislature could provide additional clarity. It also provides an opportunity to establish enduring protections for civil liberties as technology evolves to allow for greater and greater surveillance powers.

Legislative options already exist. The Office of Court Administration's Advisory Committee on the Criminal Procedure Law (which I serve on) has proposed a bill to create a framework for geolocation search warrants informed by the perspective of experts from judicial, prosecutorial and defender background.

That bill has been printed but still lacks sponsorship in either house. Whether through this proposal or another, the legislature should turn its attention to the CPL's search warrant framework and bring it up to date for our modern age.

Attorney

- Corey Stoughton