
Massachusetts Supreme Judicial Court Rules in Favor of WilmerHale and ACLU in Case Involving Cell Phone Privacy

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On February 18, 2014, the Massachusetts Supreme Judicial Court ruled in *Commonwealth v. Augustine* that a warrant will often be required when local or state police attempt to track the cell phones of Massachusetts residents. The ruling confirms that people have a reasonable expectation of privacy for data that cell phone companies hold about them.

This appeal was litigated by the American Civil Liberties Union of Massachusetts and the national ACLU, while WilmerHale submitted an *amicus* brief supporting Augustine on behalf of the Massachusetts Association of Criminal Defense Lawyers and assisted the defendant's attorneys in preparing for oral argument before the Court.

The Court heard arguments in October, during which the central issue was whether people have a constitutionally protected interest in the location data that is automatically generated when they make or receive cell phone calls. This data, known as cell site location information or CSLI, can be used to reconstruct a person's movements and location over time. It has become common for cell phone service providers to turn over these records to the government.

Adopting much of the reasoning in the *amicus* brief, the Court determined that the third party doctrine did not apply to a person's CSLI. It distinguished the leading Supreme Court case involving disclosure of land-line telephone information, *Smith v. Maryland*, on several grounds suggested in the brief: a cell phone user does not knowingly or intentionally transmit his or her location; the disclosure of CSLI is not known or apparent to a user; and there is an enormous difference between cell phones and land lines in terms of how much personal information each can reveal. The Court accordingly held that Augustine had a reasonable expectation of privacy in his CSLI records and remanded to the Superior Court for the motion judge to determine whether the police had probable cause to search Augustine's records.

The Court's decision in this case holds that the state constitution's warrant requirement applied to the Commonwealth's attempt to obtain two weeks' worth of CSLI about ACLU of Massachusetts client Shabazz Augustine. The Court reasoned that "the tracking of [Augustine's] movements in the urban Boston area for two weeks was more than sufficient to intrude upon [his] expectation of

privacy safeguarded" by the state Declaration of Rights. It did not matter, the Court held, that "CSLI is business information belonging to and existing in the records of a private cellular service provider."

"This ruling is an important step towards protecting privacy rights in the digital age," said [Kevin Prussia](#), lead WilmerHale counsel on the case. "While the decision was specific to Massachusetts law, hopefully it will contribute to the ongoing national discussion regarding privacy and the appropriate limits that should be placed on high-tech government surveillance."

The matter was handled by the firm on a pro bono basis. Along with Counsel Kevin Prussia, the WilmerHale team included Senior Associates [Thaila Sundaesan](#) and [Matthew Tokson](#), with Partner [Louis Tompros](#) providing additional guidance.

More information about this case can be found on the [ACLU's site](#).