

If so, how short is short enough not to be a search? In *Kinslow v. State*, 2019 WL 2440229 (Ind. Ct. App. 2019), investigators placed a GPS device inside a package that Kinslow later picked up and placed in his car. The police tracked the location of Kinslow's car as it drove around for about six hours. The Indiana Court of Appeals held that no search occurred under *Carpenter*:

While the United States Supreme Court found that tracking such information violated *Carpenter*'s expectation of privacy, we read the Court's holding to apply to records, such as cellphone tracking data, that hold for many Americans the 'privacies of life.' Cell phone location data provides an intimate window into a person's life, revealing not only his particular movements, but through them his professional, political, religious, and sexual associations. Because the tracking of Kinslow lasted only approximately six hours and because the electronic devices used here do not provide an intimate window into a person's life, we find that *Carpenter* has no bearing on this case.

Id. at *3 n.6. See also *Sims v. State*, 569 S.W.3d 634 (Tex. Ct. Crim. App. 2019) (holding that *Carpenter* applies to real-time cell-site pinging, but that obtaining real-time location with five pings over less than three hours was insufficient to trigger a *Carpenter* search).

C. EXCEPTIONS TO THE WARRANT REQUIREMENT

2. EXIGENT CIRCUMSTANCES

At the top of page 477, before the beginning of Section 3, add the following new Notes 5 and 6:

5. *When does seizing a computer for too long without a warrant justify suppression of the evidence found inside it?* In *United States v. Jobe*, 933 F.3d 1074 (9th Cir. 2019), the Ninth Circuit added a wrinkle to the question of how long an officer can seize a computer before obtaining a warrant to search it. Even if a computer was seized and held for an overly long period, the court reasoned, the good-faith exception to the exclusionary rule may apply if the extended period of the warrantless seizure was not particularly culpable and the officer reasonably believed the seizure was reasonable. In that setting, there may be no suppression remedy for the failure to obtain a warrant promptly. *Id.* at 1079–80.

If *Jobe* is correct that the good-faith exception can apply in these circumstances, how much more time should the good-faith exception add to the period over which a warrantless seizure of a computer is effectively allowed?

6. *Exigent circumstances requires reason to believe digital evidence will be destroyed or concealed.* In *Hupp v. Cook*, 931 F.3d 307 (4th Cir. 2019), Trooper Cook testified that he had a regular practice of seizing any computer or cell phone that he believed might contain video of a crime he was

investigating. He did this, he claimed, because digital evidence can be easily deleted or destroyed. The Fourth Circuit concluded that Trooper Cook's regular practice was not permitted by the exigent circumstances exception:

In an era in which cell phones are increasingly used to capture much of what happens in daily life, it is important to emphasize the limitations that the Fourth Amendment continues to place on a state's seizure of video evidence.

The exigent circumstances exception does not permit police officers to do what Trooper Cook routinely does: seize video evidence without a warrant even when there is no reason to believe that the evidence will likely be destroyed or concealed. Such a rule would allow officers to seize as a matter of course video-recording devices from not just those involved in an incident, but also from neighbors and other curious bystanders who happen to record the events as they transpire. Under this view, police officers would lawfully be permitted to enter the home of every person living nearby who stands in her doorway or window recording an arrest, to seize her recording device, and to do so without a warrant or her consent—simply because video evidence, by its nature, can be easily deleted.

Such a view finds no support in our Fourth Amendment jurisprudence. While video evidence contained in a cell phone can be easily deleted or concealed, it is not merely the ease with which evidence may be destroyed or concealed that dictates exigency. An officer must also have reason to believe that the evidence will be destroyed or concealed. In short, adopting the broad definition of exigency urged by Trooper Cook would remove the exigent circumstances exception to the warrant requirement from the class of narrow and well-delineated exceptions permissible under the Fourth Amendment. It would convert exigency from an exception to the rule.

Id. at 329–30.