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2012 SIGNIFICANT PROSECUTION CASES

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Keeping up with the *Jones's*

Some Thoughts About Writing an Affidavit and Order for a Ping or Stingray that Complies with Various Opinions in *Jones v United States*

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Introduction

So, this case catches us up a bit short, despite the outcome not being a surprise. The reasoning, however, certainly surprised me! The majority redefines a search:

> ***We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search."***

This holding alone isn't a problem. The Court was unanimous that had the warrant issued in the case been executed legally (i.e. within the 10 days it was valid and in the jurisdiction of the issuing magistrate) the "search" would have been "reasonable" and hence legal. For our cases, getting a warrant prior to installation of trackers on vehicles isn't unusual; however, the thing that we've been doing, is replacing trackers with GPS orders pinging our target's phones to monitor their location over extended periods of time. We've also been using stingrays (typically as part of a wiretap investigation) to gather information telling us the phone number being used by our targets; occasionally while they are in public places but other times in protected places such as a home, office or their vehicle. Our approach in getting authorization for these techniques has ranged from adaptations of "go bys" written for pen registers to search warrants to wiretaps. In some cases the approach followed is inspired by Nike (we just do it).

These two techniques, pings and stingrays, while not specifically addressed in the ***Jones*** holding, must be reviewed in light of the majority and concurring opinions. ***I believe both are likely going to be viewed as "searches" whether used against target in public places or in homes and will require an authorization that is the equivalent of a search warrant, (i.e. based on an affidavit stating probable cause the location or identification of particularly described items or persons are evidence that will tend to establish the commission of a crime or tend to connect a person(s) to its commission.) Further I believe the Court's order will need to make appropriate findings and define the manner and time of the execution.***

A search occurs with any trespass on or in personal property to gather information.

The ***Jones*** majority holds even a technical physical intrusion, or "trespass" into or even on a protected place for the purpose of gathering information, constitutes a search. Thus, even though the tracker was only stuck on the outside of the undercarriage of a car, this was a "trespass" and when done to gather information, the majority holds, a search. But, we exclaim, our pings do no such thing! In fact, like the beepers placed in barrels of chemicals later bought by the bad guys in ***Knott and Karo,*** the technology that

lets us ping was in the device when our target purchased it so, *caveat emptor,* baby! Similarly, stingrays read signals floating through the air requiring no "trespass". Unfortunately, the ***Jones*** majority and concurring opinions didn't stop there.

The majority double taps us by holding that even if we avoid a physical intrusion, the information we gather may still be a "search" if it violates ***Katz's*** "reasonable expectation of privacy" so, to not "search" we not only have to avoid physical trespasses to obtain information but survive a newly minted " ***Katz*** invasion of privacy analysis This means even without a "trespass", if we intrude on a reasonable expectation of privacy to obtain information, we still have conducted a "search":

> ***We do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to Katz analysis.*** (at pg 11)

The Court continues by addressing Justice Alito's concurrence which agrees we lose but for a different reason. Justice Alito and his 3 concurrers believed the "trespass" isn't a big deal but that it's a "search" based on ***monitoring*** the beeper for 30 days:

> "Thus, even assuming that the concurrence is correct to say that "[t]raditional surveillance" of Jones for a 4-week period "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance," our cases suggest that such visual observation is constitutionally permissible. ***It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy,*** but the present case does not require us to answer that question. We may have to grapple with these "vexing problems" in some future case where a classic trespassory search is not involved and resort must be had to ***Katz*** analysis; but there is no reason for rushing forward to resolve them here."

While a unanimous Court believes we <u>may</u> be "searching" with pings and stingrays; a majority of the Court believes gathering electronic information even without a trespass is still a "search"

So, here's where we stand. A majority of the Court (the 4 justices joining in the majority opinion plus Sotomayor concurring) say we "search" with any "trespassory" placement of a device to gain information and every member of the Court agreed that at least we "may" commit an "unconstitutional invasion of privacy" by achieving the same result as extensive traditional surveillance through electronic means (such as a ping or stingray).

Whether it's a "may" or "is" will wait for a future case. But reading the opinions more carefully strongly suggests the answer and the path we should take immediately.

The Alito led concurrence got 4 votes arguing that a ***Katz*** "invasion of privacy" analysis (which every member of the Court agreed is the correct standard) would lead to a conclusion of an unconstitutional invasion of privacy for use of techniques like pings and stingrays. Again, the majority said Justice Alito "may" be correct, but is there a 5th vote already giving the Alito view the majority?

Sadly, yes. Justice Sotomayor ends any hope of treating pings (or stingrays) the same as a pen register. In her concurrence she fully embraces Justice Alito's view that 30 day pings are "searches":

> "In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, [read pings and stingray] the majority opinion's trespassory test may provide little guidance. But situations involving merely the transmission of electronic signals without trespass would remain subject to Katz analysis."

As Justice Sotomayor incisively observes:

> "...the same technological advances that have made possible non trespassory surveillance techniques will also affect the Katz test by shaping the evolution of societal privacy expectations. Post, at 10–11." ***Under that rubric, I agree with JUSTICE ALITO that, at the very least, "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." Post, at 13.***

In fact, the only reason Justice Sotomayor doesn't join the Alito concurrence (which would have made it the majority opinion rather Justice Scalia's) is because *it didn't go far enough* in doing us dirty. First, she likes the majority's automatic loss for us with an investigatory trespass:

By contrast, the trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs.

Next, Justice Sotomayor (alone, thank goodness) makes the case the Court should reverse the unprotected status of the data we collect with pen registers and subpoenas that require (by statute) nothing other than a certification of relevance:

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. E.g., Smith, 442 U. S., at 742; United States v. Miller, 425 U. S. 435, 443 (1976) (holding the Fourth Amendment doesn't protect against use of pen registers or subpoena's for records, respectively).

Simply put, while every member of the Court may agree, it is inconceivable that there aren't at least 5 votes putting pings and stingrays as "searches" presumptively requiring a warrant.

Does the automobile exception allow placement and monitoring of trackers?

The Government, by failing to argue from the get go the automobile exception permitted the use of the tracker on Jones's vehicle even without a warrant, forfeited the opportunity for the Supreme Court to address it (majority opinion at 12). Thus, I certainly feel that for cases where our pc is strong and time is short making a warrant not feasible, relying on the automobile exception ***to place*** a tracker isn't foreclosed by ***Jones***. This allows time to then obtain an order to monitor the tracker for an extended period of time.

Information gathering using Stingrays is a "search"

These devices read cell phone signals in an area (the size of which can vary). When combined with visual surveillance we can deduce what cell number a target is using after taking readings from several locations the target is observed. Typically, the readings are taken while the target is in both public and private places. Until ***Jones***, I had advised agents that readings taken while the target is in public places were safer "legally" as opposed to the target's home. I thought (and still think) we're "searching" when stingraying or pinging targets who are using their phone while in a home based on ***KYLLO V. UNITED STATES*** 533 U.S. 27 (2001). Agents used a thermal imager to build p.c. for a warrant to seize a grow operation. The Court (again with Justice Scalia doing us in) held:

> *"Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant."*

Kyllo's holding, seems to control when we ping and learn our target phone is in (or *not* in) a home. Or use a stingray and gather data from which we deduce the cell number being used from inside a home. It is true these devices often tell us nothing about

what's going on in a home as when they put our phone down in a public place, such as a road or restaurant.

However, as discussed above, ***Jones*** reinvigorates the "Katz invasion of privacy" analysis and there appear to be at least 5 votes that "Owners of GPS-equipped cars and smartphones do not contemplate that these devices will be used to enable covert surveillance of their movements." (Sotomayor concurring at 5), much less the number of the cell phone in their hand.

Can we use existing provisions of state law to obtain constitutionally sound ping and stingray orders?

Justice Alito's concurrence also invited Congress to address these issues with legislation as they did with the wiretap and pen register statutes.

In the meantime, we can ping and stingray using our state wiretap, pen register and search warrant statutes as the authority for orders. To protect our cases, our affidavits and the court's orders have to be focused on the legal issues relevant to pings and stingrays.

This means we need to add information to our ping affidavits beyond the minimal showing sufficient for a pen register application. Ironically, the showing needs to be different than even a wiretap affidavit and focused not on the use of the phone to facilitate criminality but how *locating* the device or *identifying* its assigned number are "evidence" and thus subject to seizure. Below are suggestions for the different situations we're seeking pens and stingrays:

Our authority (and the requirements) for a search warrant are in our statutes:

13-3911. <u>Definition</u>
A search warrant is an order in writing issued in the name of the state of Arizona, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, persons or items described in section 13-3912.

ARS13- 3913 incorporates the Fourth Amendment by requiring:

a. 13-3913. Conditions precedent to issuance
b. No search warrant shall be issued except on probable cause, supported by affidavit, naming or describing the person and particularly describing the property to be seized and the place to be searched.

The stuff we can seize is listed in ARS 13-3912:

13-3912. Grounds for issuance

A search warrant may be issued upon any of the following grounds:

1. When the property to be seized was stolen or embezzled.

2. When the property or things to be seized were used as a means of committing a public offense.

3. When the property or things to be seized are in the possession of a person having the intent to use them as a means of committing a public offense or in possession of another to whom he may have delivered it for the purpose of concealing it or preventing it being discovered.

4. When property or things to be seized consist of any item or constitute any evidence which tends to show that a particular public offense has been committed, or tends to show that a particular person has committed the public offense.

5. When the property is to be searched and inspected by an appropriate official in the interest of the public health, safety or welfare as part of an inspection program authorized by law.

6. When the person sought is the subject of an outstanding arrest warrant

I've highlighted the two provisions that may apply to us pinging or stingraying to learn the location (or number) of a device.

The bottom line is we must establish pc that a given phone is being used:

1. to commit our offenses ***and***
2. that locating that instrument (for a ping) ***or***

Learning the number (for a stingray) will:

1. Tend to show an offense is being committed, or
2. Tend to show a particular person is committing the offense.

In our cases, typically, we're intercepting calls indicating a partially identified bad guy is doing bad things and planning to do more, often with other bad guys we've not identified at all. In these cases we easily show the necessary stuff by describing the calls and stating that:

1. Bad guy Inu is a using this phone to commit offenses.
2. We don't have bad guy Inu fully identified.

3. Locating bad guy Inu will enable us to identify him fully, thus tending to connect him to the offenses described in (1)

In other cases we're hearing the bad things may be occurring at locations that our guy may be traveling to. In these cases:

1. Listed offenses are occurring at static locations such as stash houses for drugs or money.
2. Our bad guy is visiting them while carrying our target phone
3. Tracking our bad guy's location will lead us to the places these offenses are being committed thus tending to establish the listed offenses are occurring
4. Finding these locations will also identify co-conspirators and tend to connect them to the commission of the listed offenses.

Additionally, when seeking ping or stingray orders during an investigation with an ongoing wire intercept authorization:

- We should incorporate the previously filed affidavits and 10 day reports when going back to our judge. If we're forced to go to another judge (due to availability issues) we should cut and paste your qualifications and experience from those affidavits.
- We've got to add the language from the search warrant statutes that make the ***location*** of the target phone subject to seizure in both the affidavit and the order as described above.

How long can the order authorize pinging or stingraying?

Our affidavits and the judge's order must also address the time frame in order to avoid the "general warrant" label that would be fatal. Our affidavits should describe the offenses are ongoing (or incorporate relevant portions of other submitted affidavits) and provide a basis to believe the "evidence" we've described will be available to be seized for the period of time we request.

SUMMARY OF THE 2011 – 2012

U.S. SUPREME COURT DECISIONS

FOR TRIAL DOGS

Summaries of Opinions and Cases Granted Review by
the NAAG Supreme Court Project

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Introduction

The United States Supreme Court has, since the founding of the republic been assigned - and assumed - the authority to say, "what the law is" *Marbury v. Madison*, 5 U.S. 137 (1803). Sadly, riven by politics, internal and external, crippled by the same inability to resolve policy conflicts in a decisive manner that afflicts our country as a whole, the nation has a Court extruding decisions comprised of pluralities, concurrences and inferences from dissents. Not only does Stare Decisis have little heft, its existence is doomed in opinions that have no "holding" to which deference *can* be given.

For trial dogs, the problem is particularly acute. While we'd like to prevail, at a minimum, we'd like to avoid committing misconduct. This requires being able to understand "what the law is". As we review the cases this term that impact the criminal justice system, we begin with the shock of being told this is a misnomer, for now, we are told in order to justify the creation of a new branch of constitutional criminal procedure it's really a "criminal plea bargaining system" see, *Lafler v Cooper* and *Missouri v Frye.* These two cases, the term's most important for us in my view, will require us to re-think how we do business every day.

Almost every case any of us try (yes, Justice Kennedy, we are trying cases!) requires the admission of evidence that has been examined or tested and requires authentication and a chain of custody. At the end of that chain there is often a nest of technicians and experts who after doing their thing, work just as hard at *not* coming to court when we need them. The collision of statutes adopted to help us logistically, the evidence code and the legal tsunami known as Crawford, have combined to leave us like a duck hit on the head, not sure where to go. The only folks less sure of what the law is are those supposed to tell us. See *Williams v Illinois.*

The victims we represent, victims first of the crime and then of our "system", have received a particularly cruel blow this term in *Miller v Alabama*. Having been told juveniles couldn't be sentenced to death for heinous murders because LWOP was enough to accomplish society's interest, see *Roper v Simmons*, then to be told LWOP for non-homicides was too much, because killing is so much worse. See *Graham v Florida*, but victims were assured individual hearings on punishment weren't required when the penalty wasn't death, See *Harmelin v Michigan*, so, we believed statutes mandating LWOP for certain offenses regardless of the circumstances of the offender were going to be ok, until...Miller.

Now, in order to impose LWOP on the worst under 18 killers, victim's families must endure a full capital punishment stage. Until the next case.

Nor have our friends in law enforcement been spared, the Court again, unable to muster a consensus on any meaningful holding; have treated the Fourth Amendment's privacy jurisprudence like a piñata. They've beaten it hard enough to knock all kinds of interesting things out of it that the different kids at the party have picked up and started to play with. As soon as five agree on which is the most fun, we'll have some law. In the meantime basic investigative tools (e.g. subpoenas for telephone tolls, pen registers) are very clearly in jeopardy as are the officers using them. See *U.S. v Jones.*

The cases garnering the most headlines are mostly not ones that impact prosecutors, but still shake our confidence that cases are being decided on the law versus other factors.

One critique addressed to the Court's Chief, seems more and more appropriate:

> You seem to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other[s]... not more so. They have, with others, the same passions for party, for power, and the privilege of their corps.... Their power [is] the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves

Please note, these harsh words come not from a Justice Scalia Dissent or some talk radio tirade, but a guy who surely paid his dues.[1]

[1] Thomas Jefferson (1830). *Memoir, correspondence, and miscellanies, from the papers of Thomas Jefferson*. Gray and Bowen. pp. 372–375

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