

>> ALL RISE.

HEAR YE, HEAR YE, THE SUPREME COURT OF FLORIDA NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEAD, DRAW NEAR, GIVE ATTENTION, YOU SHALL BE HERD.

GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA. AND THIS HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE SUPREME COURT OF FLORIDA, PLEASE BE SEATED.

>> WELCOME TO THE FLORIDA SUPREME COURT.

FIRST CASE FOR THE DAY IS TRACEY VERSUS STATE OF FLORIDA. YOU MAY PROCEED.

>> MAY IT PLEASE THE COURT, MY NAME IS TATIJANA OSTAPOFF. I'M AN ASSISTANT PUBLIC DEFENDER IN WEST PALM BEACH. I'M HERE ON BEHALF OF SHAWN TRACEY.

IN THIS CASE THE TRIAL COURT ISSUED AN ORDER, THE APPLICATION ONLY OCCURRED FOR PEN REGISTER TRAP AND TRACE DEVICES BUT THE TRIAL COURT ISSUED AN ORDER RETRIEVAL OF HISTORICAL CELL SITE DATA.

42 DAYS LATER THE STATE OBTAINED USAT ORDER IN ORDER TO OBTAIN REAL SITE LOCATION DATA. IN OTHER WORDS THEY TRACKED MR. TRACEY FROM PRESUMABLY FROM HIS HOME ON THE WEST COAST OVER TO THE EAST COAST, IN BROWARD COUNTY.

>> WHEN YOU SAY THEY, COULD YOU EXPLAIN HOW THAT WORKS?

IN OTHER WORDS, THIS IS NOT THEIR OWN MONITORING.

THEY HAVE TO GET SOMETHING THROUGH THE PHONE COMPANY.

IS THAT THE, BECAUSE THE STATUTE REQUIRED ORDERS OR METROPCS REQUIRES THE ORDER IN ORDER TO, THEY JUST DON'T GET IT.

THEY HAVE TO GO THROUGH IT.

HOW DOES IT GO WHERE THE ORDER DOESN'T SAY THAT THEY CAN HAVE

REAL-TIME MONITORING OR
WHATEVER?

AGAIN I KNOW THERE IS A
TECHNICAL TERM TO WHERE THE
PHONE COMPANY JUST ALLOWS THEM
TO GET THAT?

DO YOU, IS THERE ANYTHING IN THE
WITH REGARD THAT --

>> THERE IS NOT AND FRANKLY IT
IS A HUGE PUZZLE BECAUSE
ORDINARILY YOU WOULD HOPE THAT
THE PHONE COMPANY WOULD NOT JUST
RELEASE THE DATA WITHOUT HAVING
A COURT ORDER, INDICATING THAT
IT WAS OBTAINED, THAT THE ORDER
WAS OBTAINED WITH THE CORRECT
LEGAL PREDICATE.

WE DON'T REALLY KNOW WHAT
HAPPENED IN THIS CASE.

WHAT THE POLICE ARE ABLE WITH
THEIR OWN EQUIPMENT IS TO USE THE
CELL SITE, THE TOWERS, TO TRACK
A DEFENDANT.

IN THIS CASE THE DETECTIVE
WHO IS DOING THE MONITORING SAID
THAT HE DID, THAT HE IN FACT
USED THE METROPCS INFORMATION
FROM THE PHONE COMPANY IN ORDER
TO DO THE TRACKING, IMPLYING
THAT HE DIDN'T USE HIS OWN
POLICE EQUIPMENT.

IT'S A LITTLE BIT UNCLEAR
BECAUSE --

>> IS THERE A DIFFERENCE HERE
THEN IF THE POLICE ARE USING
ITS OWN EQUIPMENT, WITHOUT
GOING THROUGH THE PHONE
COMPANY, WOULD WE HAVE THE SAME
KIND OF ISSUES?

>> YES.

BECAUSE IT IS THEN, IN FACT,
EITHER WAY, THERE IS NO LEGAL
AUTHORIZATION FOR WHAT THEY DID.
THERE IS NO COURT ORDER THAT
JUSTIFIES WHAT WAS DONE IN THIS
CASE AND IT IS OUR POSITION WE
HAD A REASONABLE EXPECTATIONS OF
PRIVACY.

>> SO WHAT WAS AUTHORIZED BY THE
PEN REGISTRY APPLICATION WAS

INTERCEPTION OF PHONE NUMBERS?

>> THAT'S RIGHT.

>> AND PHONE NUMBERS ONLY?

>> THAT'S RIGHT. THAT'S RIGHT.

BECAUSE, THAT'S RIGHT.

BECAUSE EVEN THOUGH PEN REGISTER TRAP AND TRACE, THEY HAVE THE CAPABILITY TO RETRIEVE LOCATION INFORMATION BUT BY STATUTE THAT LOCATION INFORMATION CAN NOT BE OBTAINED, FLOW SOLELY BY REFERENCE TO THE ORDER THAT'S REQUIRED FOR A PEN REGISTER --

>> COULD THE PEN REGISTRY ORDER HAVE INCLUDED INFORMATION ABOUT LOCATION?

NOT JUST THE NUMBERS, BUT COULD THE APPLICATION FOR INFORMATION ABOUT LOCATION?

>> THE APPLICATION POTENTIALLY COULD HAVE BEEN BUT IT WOULD HAVE BEEN REQUIRED TO SATISFY AN ADDITIONAL BURDEN.

IN FACT THE APPLICATION IN THIS CASE ONLY ASKED FOR PHONE NUMBERS.

THE DETECTIVE HENDRICKS WHO REQUESTED THE APPLICATION, STATED, TESTIFIED AT THE MOTION TO SUPPRESS HEARING BASICALLY WHAT THEY WERE LOOKING FOR PHONE NUMBERS OF MR. TRACEY'S CONTACTS TO DO ADDITIONAL INVESTIGATION. IN FACT DURING THAT 42-DAY PERIOD, THE DETECTIVE SAID THAT THEY WERE OBTAINING PHONE NUMBERS OF ADDITIONAL CONTACTS AND ISSUING SUBPOENAS AND GET INFORMATION WHO THE PHONE NUMBERS BELONGED TO AND THAT KIND OF INVESTIGATION WAS GOING ON.

IN OTHER WORDS, HE NEVER IN HIS APPLICATION SUGGESTED THAT THEY WERE GOING TO USE THIS INFORMATION TO --

>> LET ME ASK YOU THIS.

>> TALK ABOUT EXPECTATION OF PRIVACY IN 2011 THE UNITED

STATES VS. JONES.

>> YES, THEY DID.

>> IN JONES, JUSTICE SCALIA SAID THE, MADE IT A POINT THAT THE COURT WAS NOT DEVIATING FROM ITS PREVIOUS RULINGS, A PERSON OCCUPYING VEHICLE ON PUBLIC STREETS HAS NO REASONABLE EXPECTATION OF PRIVACY.

WHAT DIFFERED JONES WAS THAT THE COURT REQUIRED THE DEVICE THAT WAS INSTALLED TO TRACK HIM AS A TRESPASS AND THAT WAS A VIOLATION OF THE EXPECTATION OF PRIVACY I GUESS.

>> NO, THAT WAS -- WELL, I'M SORRY.

>> JUSTICE SOTOMAYOR EXPRESSED CONCERN ABOUT THE WAY WE TRACK PEOPLE AND BASICALLY SHE NOTED THAT USING TRADITIONAL SURVEILLANCE TECHNIQUES, THE GOVERNMENT WOULD NOT BE ABLE TO SURVEIL SOMEONE FOR A LENGTHY PERIOD OF TIME BECAUSE IT WOULD REQUIRE AN ENORMOUS AMOUNT OF MANPOWER, AIRPLANES AND VEHICLES.

SO YOU COULDN'T DO IT FOR A LONG TIME.

SO IT'S A SELF-CHECK WHEN IT COMES TO THAT.

HOWEVER, SOMEONE SITTING IN A COMPUTER AND IN A POLICE STATION TRACKING SOMEONE DOESN'T COST ANYTHING.

THEREFORE GOVERNMENT CAN DO IT FOR AS LONG AS THEY WANT TO AND THAT'S THE CONCERN THAT SHE HAD.

JUSTICE SCALIA RESPONDED TO THAT BY BASICALLY SAYING, AND I HAVE IT HERE, MAY BE ACHIEVING THE SAME RESULTS THROUGH ELECTRONIC MEANS WITHOUT A TRESPASS IS AN UNCONSTITUTIONAL INVASION OF PRIVACY BUT THEY DECIDED THIS WASN'T THE RIGHT CASE FOR IT, MEANING JONES.

WHERE IS THE SUPREME COURT OF

THE UNITED STATES GOING GIVEN
THAT STATEMENT BY JUSTICE
SCALIA?

>> JUSTICE SCALIA DECIDED THE
CASE BASED ON A TRESPASS, THAT
THE FOURTH AMENDMENT PROTECTS
AGAINST GOVERNMENT TRESPASS ON
PROPERTY BUT FIVE JUSTICES OF
THE COURT JOINED HIM IN THAT
DECISION INCLUDING JUSTICE
SOTOMAYOR BUT FIVE JUSTICES OF
THE COURT ALSO INCLUDING JUSTICE
SOTOMAYOR, JOINED JUSTICE
ALITO'S DECISION.

JUSTICE ALITO SAID THERE IS
EXPECTATION, A REASONABLE
EXPECTATION OF PRIVACY AT LEAST
INSOFAR AS AN EXTENDED SEARCH OR
TRACKING OF A PERSON'S LOCATION
IS CONCERNED.

>> WELL THAT WOULDN'T HELP YOU
IN THIS CASE, WOULD IT?
THIS IS RELATIVELY SHORT TERM.
THE DISTINCTION BETWEEN LONG
TERM AND SHORT TERM, THIS WOULD
HAVE TO FALL ON THE SHORT TERM
END OF THAT CONTINUUM, IS THAT
RIGHT?

>> THE DIFFERENCE BETWEEN THIS
CASE AND JONES THIS CASE IS A
CELL PHONE A CELL PHONE BY ITS
VERY NATURE IS CARRIED ON A
PERSON'S PERSON EVERYWHERE HE
GOES, INCLUDING INTO HIS HOME
AND INCLUDING IN, YOU KNOW,
OTHER --

>> BUT ALSO DISTINGUISHABLE
BECAUSE THERE IS NO PHYSICAL
INTRUSION AS THERE WAS IN JONES.

>> YES.

>> LET ME ASK YOU ABOUT AN
EARLIER CASE, IF I COULD?

>> ALL RIGHT.

>> IT'S A DECISION OF UNITED
STATES SUPREME COURT, SMITH
VERSUS MARYLAND.

AS HAS THE COURT RECEDED FROM OR
OVERRULED OR ABROGATED SMITH
VERSUS MARYLAND?

>> I THINK THE COURT IS WALKING

IN A DIFFERENT DIRECTION.

>> WELL, THAT IS NOT MY QUESTION.

WE CAN SPECULATE ABOUT WHAT DIRECTION THEY MIGHT BE WALKING IN BUT THEY HAVE DECIDE AD CASE IN SMITH VERSUS MARYLAND.

UNDER THE CONFORMITY CLAUSE OF THE FLORIDA CONSTITUTION WE'RE BOUND IN THIS CONTEXT BY THEIR DECISIONS.

>> AND I'M HAVING TROUBLE, IF YOU CAN HELP ME WITH THIS, I'M HAVING TROUBLE SEEING HOW WE COULD DISTINGUISH WHAT THEY SAY IN SMITH VERSUS MARYLAND FROM THIS CASE.

WHEN, AND THE REASONING THEY USE.

SPECIFICALLY WHEN THEY SAY, WHEN HE USED HIS PHONE, THAT IS, WHEN MR. SMITH USED HIS PHONE, PETITIONER VOLUNTARY LITTLE CONVEYED NUMERICAL INFORMATION TO THE TELEPHONE COMPANY AND EXPOSED THAT INFORMATION TO ITS EQUIPMENT IN THE ORDINARY COURSE OF BUSINESS. IN SO DOING THE PETITIONER ASSUMED THE RISK THAT THE COMPANY WOULD REVEAL TO THE POLICE THE NUMBERS WE DIALED.

I DO NOT SEE HOW THE INFORMATION THAT WAS CONVEYED TO THE CELL TOWER HERE IS ANY DIFFERENT THAN THE INFORMATION THAT IS MENTIONED IN ANY MATERIAL RESPECT DIFFERENT FROM THE INFORMATION THAT IS REFERRED TO IN SMITH VERSUS MARYLAND.

WHY AM I WRONG?

>> BECAUSE I THINK NUMBERS, PHONE NUMBERS, LIKE WHAT YOU WOULD GET FROM THE PEN REGISTER, I THINK THAT IS DIFFERENT AND FROM TRACKING A PERSON TO HIS, WHEREVER HE GOES IN THE COURSE OF THE DAY, OR THE MONTH OR WHATEVER.

>> BUT THE INFORMATION, ANYBODY USING A CELL PHONE IS GOING TO UNDERSTAND THAT IN ORDER FOR THAT TO WORK THERE'S GOT TO BE INFORMATION GOING BACK AND FORTH FROM THE CELL PHONE TO THE TELEPHONE COMPANY'S CELL PHONE TOWERS, ISN'T THAT CORRECT? IT DOESN'T HAPPEN BY MAGIC.

>> NO, BUT I DON'T THINK PEOPLE MAKE THE LEAP FROM, THIS IS HOW THE TECHNOLOGY WORKS TO, THEREFORE THE GOVERNMENT CAN GET THAT INFORMATION AND TRACK ME WHEREVER I'M GOING.

>> IN SMITH VERSUS MARYLAND THE DISSENTERS THOUGHT THAT THE MAJORITY THERE WAS MAKING A LEAP BECAUSE I DON'T KNOW THAT MOST PEOPLE WOULD EXPECT THAT WHEN THEY DIAL UP A PHONE NUMBER, THAT SOMEBODY, AT THE PHONE COMPANY IS GOING TO BE LOOKING AT THE INFORMATION RELATED TO THE DIALING OF THAT PHONE NUMBER.

THAT IS KIND OF, I WOULD THINK YOU WOULD THINK ORDINARILY THAT WOULDN'T HAPPEN BUT NOT WITHSTANDING THAT, THAT FACT, IN SMITH VERSUS MARYLAND THE COURT DECIDED THE WAY THEY DID AND I'M JUST HAVING TROUBLE SEEING HOW WE CAN DISTINGUISH THIS GIVEN THE REASONING THAT WAS USED IN SMITH BECAUSE, WHY IS THIS NOT A VOLUNTARY DISCLOSURE OF INFORMATION OF THE SORT THAT WAS DISCUSSED IN SMITH?

>> BECAUSE I DON'T, BECAUSE I THINK THERE IS A DIFFERENCE BETWEEN LOCATION TRACKING, INFORMATION AND THE COURTS HAVE RECOGNIZED THAT TRACKING SOMEONE, LEADS TO MUCH MORE DETAILED INFORMATION ABOUT THAT PERSON THAT CAN BE OBTAINED SIMPLY FROM PHONE NUMBERS AND I THINK THAT WAS RECOGNIZED IN THE U.S. SUPREME COURT'S DECISION IN

JONES WHERE JUSTICE SOTOMAYOR CERTAINLY EXPRESSED HER CONCERNS.

JUSTICE ALITO AS WELL, IN TERMS OF HOW MUCH EXPANDED NOW THE SCOPE OF GOVERNMENTAL INTRUSION AND SURVEILLANCE OF CITIZENS HAS BECOME WITH THE, WITH THE AVAILABILITY OF THIS NEW TECHNOLOGY AND I THINK IN THAT IN JONES, THE COURT HAS EXPRESSED ITSELF NOT JUST WILLING, BUT ALREADY ON THE WAY, TO LIMITING THAT KIND OF GOVERNMENTAL INTRUSION, ABSENT A WARRANT.

IN OTHER WORDS THERE IS A REASONABLE --

>> SO WHAT DO YOU CONTEND THE GOVERNMENT NEEDED TO DO IN THIS CASE IN ORDER TO GET THE INFORMATION, THE LOCATION INFORMATION?

WHAT, DID THEY NEED A WARRANT OR WHAT?

>> YES, THAT'S OUR POSITION THAT THEY DID REQUIRE A WARRANT AND YOU KNOW --

>> BECAUSE?

>> BECAUSE IT'S A CELL PHONE. IT WAS USED TO TRACK HIM, FROM HIS HOME TO THIS OTHER LOCATION WHICH WAS ACTUALLY ALSO INSIDE OF A HOUSE.

IN THIS CASE THEY WERE ABLE TO TRACK HIS LOCATION SO, SO CLOSELY THAT THEY ULTIMATELY FOUND HIM INSIDE A SPECIFIC HOUSE AND THEN THEY, WHEN THEY CAME UP TO THAT HOUSE, THEY SAW HIS VEHICLE OUTSIDE THE HOUSE AND THAT IS HOW THEY KNEW WHAT KIND OF VEHICLE HE WAS DRIVING.

>> LET ME, ON ANOTHER CASE JUSTICE CANADY MENTIONED THE SMITH CASE AND WE ARE, YOU WOULD ACKNOWLEDGE, WE'RE BOUND BY WHAT THE UNITED STATES SUPREME COURT SAYS IN THE FOURTH AMENDMENT AREA?

>> THAT'S CORRECT.
>> BUT IF THEY HAVEN'T SPOKEN WE CAN LOOK TO THE FEDERAL COURTS AND AS YOU SAID A MART MAJORITY OF THEM SAID THIS KIND, AS OPPOSED TO THE PHONE NUMBERS, THAT THE TRACKING IS A SEARCH. THAT IS THE FIRST ISSUE WE HAVE TO GET TO.
IF IT'S A SEARCH, I GUESS THEY COULD DO ANYTHING TO ANY OF US ANYTIME IN TERMS OF OUR CELL PHONE INFORMATION.
SO, BUT WHAT ABOUT THE KNOX CASE?
THAT IS SOME OTHER, SOMETHING ELSE REQUIRED THE TRACKING.
>> A BEEPER PLACED ON TO A CANISTER.
>> NOW YOU PROBABLY, SO HAS THAT BEEN OVERRULED?
BECAUSE IS THAT A TRESPASS BECAUSE THE BEEPERS WERE IN THE VEHICLE, THAT THERE'S A TRESPASS?
WHAT, DO YOU DO YOU DISTINGUISH KNOX?
>> KNOX WAS BECAUSE OF A BEEPER.
ALSO IN JONES WHERE IT WAS A GPS LOCATOR, THOSE ARE ATTACHED TO A VEHICLE.
THEREFORE THEY'RE NOT GOING TO FOLLOW THE DEFENDANT AROUND HIS HOUSE OR INSIDE ANY AREA WHERE HE HAS A REASONABLE EXPECTATION OF PRIVACY.
>> SO WHAT YOU'RE SAYING, I'M TRYING TO MAKE SURE, THIS IS WORSE THAN A GPS ON A VEHICLE OR A BEEPER IN A CANISTER WHICH I GUESS WAS AGREED TO BY THE OWNER?
>> THAT'S RIGHT.
>> BUT SO YOU DON'T THINK THAT CASE CONTROLS THE OUTCOME OF THIS?
>> NO, I THINK THIS CASE IS MORE LIKE KARO WHERE THE BEEPER WAS PLACED ON A CANISTER BUT THE

CANISTER WAS LOCATED INSIDE THE DEFENDANT'S HOUSE.

>> WHAT I DON'T UNDERSTAND HERE, I WANT TO GO BACK TO THE PROCEDURE.

THE STATE, ONLY UNDER THE STATUTE THAT THEY WERE GOING UNDER, REALLY ONLY ALLOWS, IT DISALLOWS THE PEN REGISTER, CORRECT, THE NUMBERS?

>> THAT'S CORRECT.

>> I MEAN I, TO ME WE ALL KNOW THE NUMBERS AND THEY APPEAR ON OUR PHONE BILL THAT THOSE ARE IN A SEPARATE CATEGORY BUT DON'T, SO COULD THEY HAVE, AND THIS IS GOING BACK TO WHAT JUSTICE QUINCE WAS ASKING, IF THEY HAD ON THE SAME AFFIDAVIT ASKED THE JUDGE FOR THE REAL TIME CELL PHONE DATA, BASED ON JUST WHAT WAS IN THAT AFFIDAVIT, COULD THEY HAVE GOTTEN THAT FROM THE JUDGE?

>> NO. AND THE STATE'S CONCEDED THAT. I MEAN THE STATE HAS CONCEDED THAT --

>> THE ONLY WAY THE STATE REALLY WINS HERE IF THIS ISN'T A SEARCH?

>> THAT'S RIGHT.

THAT'S RIGHT. AND --

>> IF IT IS NOT A SEARCH, AGAIN THEY, WHY WOULD THEY EVEN NEED TO GO TO THE JUDGE?

>> RIGHT.

BECAUSE THERE IS NO, THERE IS NO EXCLUSIONARY REMEDY UNDER THE STATUTE.

>> LET ME ASK YOU THIS.

IN READING THIS, WHY WASN'T IT SIGNIFICANT, IT WASN'T ARGUED, WHY WASN'T IT SIGNIFICANT THAT HE WAS TRACKED INTO THE HOUSE? I UNDERSTAND THAT HE WASN'T TRACKED GOING FROM THE BATHROOM TO THE BEDROOM AND THAT KIND OF THING BUT HE IS ACTUALLY TRACKED GOING INTO THIS HOUSE, WHY WASN'T THAT SIGNIFICANT?

>> I THINK IT IS SIGNIFICANT AND I THINK IT IS ALSO SIGNIFICANT THAT WHEN HE BEGAN, I MEAN OUR RECORD IS NOT AS CLEAR AS I WOULD LIKE.

BUT WHEN HE BEGAN THEY STARTED OUT BY TRACKING HIS PHONE, PRESUMABLY, FROM INSIDE HIS OWN HOME BECAUSE THAT'S WHERE HE LEFT FROM.

SO, THAT'S RIGHT, IN THIS CASE, THERE WAS, THAT IS WHAT A CELL PHONE DOES.

YOU CAN NOT KNOW BEFOREHAND, THE STATE CAN NOT, THERE IS NO WAY FOR THE STATE TO KNOW WHEN THEY'RE MAKING APPLICATION FOR CELL PHONE, REAL-TIME DATA, THAT THE PERSON IS NOT GOING TO GO INSIDE OF A PROTECTED AREA. THAT IS TO SAY HIS HOME.

>> THIS NOTION ABOUT THE PROTECTED AREA, THE, WHEN THERE'S A TRACK AND TRACE OR TRAP AND TRACE I GUESS THEY CALL IT, OR A PEN REGISTER THAT CAN BE FOR SOMETHING THAT'S GOING INTO OR COMING FROM SOMEONE'S HOME.

SO THE FACT THAT THERE'S A CONNECTION WITH THE HOME DOES NOT RESOLVE THE ISSUE, ISN'T THAT CORRECT?

>> I DON'T THINK THAT IS COMPLETELY CORRECT.

>> WHY IS NOT THAT CORRECT IN CONNECTION WITH THE TRACK AND TRACE AND THE PEN REGISTER? ISN'T THAT CORRECT IN CONNECTION WITH THOSE?

>> WELL, INSOFAR, WELL THE ONLY WAY YOU GET LOCATION FROM PEN REGISTER IS A LANDLINE PHONE. THEN YOU KNOW, IT IS OFF THE LANDLINE PHONE. IT CAN'T MOVE.

IF IT'S A CELL PHONE, WHICH APPARENTLY THE CALLS THAT WE KNOW ABOUT IN THIS CASE WERE ALL CELL PHONE CALLS BECAUSE FRANKLY

HOW MANY PEOPLE HAVE LANDLINE PHONES ANYMORE?

I MEAN THE CELL PHONE HAS REALLY REPLACED THAT LOCATION KIND OF TECHNOLOGY.

THERE'S NOT, YOU KNOW, IT WOULD BE HARD TO FIND A PUBLIC PHONE HERE IN TALLAHASSEE PROBABLY.

THEY USED TO BE EVERYWHERE.

AND THE REASON IS BECAUSE PEOPLE NOW HAVE CELL PHONES.

SO THEY'RE VERY PORTABLE AND THAT'S WHY IF YOU GET A CELL PHONE NUMBER FROM A PEN REGISTER THAT DOESN'T TELL YOU ANYTHING ABOUT THE LOCATION OTHER THAN THE ADDRESS OF THE PERSON WHO IS REGISTERED AS THE OWNER.

>> I UNDERSTAND THE POINT YOU'RE MAKING THERE BUT THE QUESTION I HAD FOR YOU WAS, ABOUT YOUR EMPHASIS ON THE FACT THAT HE WAS TRACKED FROM HIS HOME TO ANOTHER DWELLING.

YOU SEEMED TO PUT SOME GREAT SIGNIFICANCE ON FACT, THAT FACT, THAT WHICH IS A SUPPOSITION, AT LEAST, AS TO WHERE IT STARTED I WOULD THINK.

BUT ISN'T IT TRUE THAT WHEN THERE IS A PEN REGISTER ORDER ON A LANDLINE, THAT THE FACT THAT THE LANDLINE IS LOCATED AT SOMEONE'S HOME, DOES NOT EVEN ENTER INTO THE ANALYSIS UNDER SMITH VERSUS MARYLAND.

>> THAT'S TRUE.

I THINK THAT'S TRUE BUT I MEAN, AGAIN, I HAVE TO TOUCH BASE BACK WITH UNITED STATES v. KARO WITH THE BEEPER LOCATED ON THE DRUM OF CHEMICALS AND IT WAS PLACED INSIDE THE HOME AND U.S. SUPREME COURT SAID, CAN'T DO THAT WITHOUT A WARRANT BECAUSE THE HOME IS A PROTECTED AREA. AND I'M JUST MAKING THE EXTENSION THAT --

>> IN THAT CASE DID THEY FOCUS ON THE LENGTH OF TIME THAT THE

BEEPER WAS THERE?

>> NO. THEY, IT WAS FOR MORE THAN AN INSTANT. IT WAS THERE --

>> THERE WAS NO FOCUS IN THE DECISION ON --

>> IT WASN'T THE CONTROLLING FACTOR.

I MEAN THE CONTROLLING FACTOR WAS INSIDE THE HOUSE AND THEY WERE ABLE TO TRACK THE FACT THAT THE CANISTER, THE DRUM HADN'T BEEN MOVED FOR A WHILE.

>> CAN YOU CLARIFY SOMETHING FOR ME??

THEY GET TO THE HOUSE AND HE GETS OUT.

WHAT HAPPENED, WHAT EXACTLY HAPPENED, WHEN HE WAS EVENTUALLY ARRESTED STOPPED DRIVING HIS ENVOY?

>> HE WAS IN THE HOUSE AND SO WAS THE CODEFENDANT.

BOTH THE CARS WERE THERE.

THEY FIGURED OUT THAT IT WAS HIM IN THE HOUSE WITH HIS CODEFENDANT AND THEY FIGURED OUT WHICH CAR HE WAS DRIVING.

SO THEN HE LEFT AND AS HE LEFT THEY FOLLOWED HIM, TRIED TO STOP HIM AND THAT'S WHEN HE TRIED TO ESCAPE.

>> OKAY.

SO, I MEAN, I'M THINKING ABOUT THE STATE'S ARGUMENT ON THIS INEVITABLE DISCOVERY SITUATION.

>> OH.

>> AND IT SEEMS TO ME, IF I UNDERSTAND THE FACTS CORRECTLY, BEFORE HE GOT TO THE HOUSE, THAT THE STATE HAD BEEN TRACKING HIM FROM CAPE CORAL AND BEFORE THE TRACKING INDICATING, INDICATING WHERE HE WAS HEADING, THE STATE, THE POLICE HAD TWO DIFFERENT STASH HOUSES THEY WERE SURVEILLING AND THEY ACTUALLY MOVED THE OFFICERS FROM THE TWO STASH HOUSES TO THIS ONE AND THE REASON THEY DID THAT IS BECAUSE OF THE TRACKING.

BUT FOR THE TRACKING THEY WOULD NOT HAVE ARRIVED AT THIS HOUSE?

>> EXACTLY CORRECT.

THAT IS WHAT THE TRIAL COURT FOUND AND THAT IS WHAT THE DISTRICT COURT OF APPEAL FOUND BASICALLY THAT ABSENT BEING TRACKING THEY WOULDN'T HAVE KNOWN WHAT KIND OF CAR HE WAS DRIVING AND THEY COULDN'T HAVE KNOWN WHERE HE WAS OTHER THAN BETWEEN THE EAST COAST AND WEST COAST.

THAT'S RIGHT.

THAT'S RIGHT.

>> YOUR TIME IS EXPIRED.

I GIVE YOU TWO ADDITIONAL MINUTES ON REBUTTAL.

THANK YOU VERY MUCH.

>> GOOD MORNING.

MELYNDA MELEAR ON BEHALF OF THE STATE OF FLORIDA.

IT IS THE STATE'S POSITION IN THIS CASE NO FOURTH AMENDMENT VIOLATION OCCURRED.

BASICALLY THE ANALYSIS FOR THE RIGHT OF PRIVACY WITH REGARD TO CELL PHONE OR GPS IS SOMEWHAT SIMILAR.

IT'S RIGHT OF PRIVACY AND THE DATA, I.E., THE CELL PHONE RECORDS OR, GPS MONITORING.

>> LET ME ASK THE SAME QUESTION I ASKED COUNSEL.

>> YES.

>> JUSTICE SCALIA'S QUOTE IN JONES, IN RESPONSE TO JUSTICE SOTOMAYOR'S CONCERNS ABOUT THE LENGTH OF THESE TYPE OF TRACKING AND I WILL READ IT AGAIN.

IT MAY BE THAT ACHIEVING THE SAME RESULT BY ELECTRONIC MEANS WITHOUT AN ACCOMPANYING TRESPASS IS AN UNCONSTITUTIONAL INVASION OF PRIVACY.

WHERE IS HE GOING WITH THIS?

>> HE ALSO ADDRESSED, YOUR HONOR, JUSTICE ALITO'S SPECIAL CONCURRENCE WHERE HE SAID HE DID NOT SEE WHAT THE DIFFERENCE

WOULD BE, WOULD BE A LONG-TERM MONITORING SITUATION OR WHY DRUG TRAFFICKING WASN'T SERIOUS ENOUGH CRIME TO WARRANT THAT. WE'RE NOT ADDRESSING THAT. WE'RE ADDRESSING THE MINIMAL CONSTITUTIONAL VIOLATION WHICH WAS A TRESPASS TOOK PLACE BY THE GPS BEING ATTACHED TO THE CAR.

>> THE CONCERN AGAIN, THIS IS MY CONCERN, WE'RE TALKING ABOUT CELL PHONES HERE, BUT CELL PHONES, GPS, THE WHOLE TECHNOLOGY TODAY, IT ALLOWS THE POLICE TO BASICALLY SIT IN THEIR OFFICE ON A COMPUTER, TRACK WHOEVER THINK WANT, AS LONG AS THEY WANT TO.

IT DOESN'T COST ANYTHING. I SEE SOME PROBLEMS WITH THAT.

>> IT IS TRUE AND AS JUSTICE ALITO AND OTHER COURTS HAVE SAID THIS IS PROBABLY AN ISSUE THAT WOULD BE BEST ADDRESSED WITH THE LEGISLATURE OR CONGRESS BECAUSE PEOPLE'S EXPECTATION OF PRIVACIES HAVE ALTERED WITH THE ADVANCEMENT OF TECHNOLOGY.

>> INTERESTING YOU MENTIONED THAT.

BECAUSE OUR LEGISLATURE PASSED THIS YEAR A STATUTE THAT PROHIBITS THE USE OF DRONES BY LAW ENFORCEMENT.

AND INTERESTING ENOUGH THE TITLE OF THE STATUTE THEY CHOSE WAS, QUOTE, FREEDOM FROM UNWARRANTED SURVEILLANCE ACT. I MEAN, THAT SEEMS TO BE WHERE THE LEGISLATURE IS GOING.

>> BUT THE LEGISLATURE HASN'T ADDRESSED THIS PARTICULAR ISSUE.

>> WELL, NOT YET.

>> I WOULD ALSO LIKE TO POINT OUT, JUSTICE LABARGA, THAT THIS CASE IS A 2007 CASE WITH A CELL PHONE.

AND SO IT IS VERY MUCH DIFFERENT THAN THE JONES CASE WE WERE

DISCUSSING BECAUSE IN JONES YOU HAD A PROLONGED SURVEILLANCE. YOU HAD A PRECISE SURVEILLANCE AND PROCUREMENT BY THE GOVERNMENT.

IN THIS CASE YOU HAVE A DEFENDANT, THE ONLY TIME THAT THE PHONE WAS EVER REGISTERED IS YOU CAN TALKING ON THE TELEPHONE OR THE CELL PHONE AND THE CASE LAW GOES THAT AS HE USES THE PHONE HE IS VOLUNTARILY CONVEYING THE INFORMATION AS TO HIS LOCATION BY VIRTUE OF THE USE.

THE REASON THAT KIND OF ANALYSIS HAS COME ABOUT IS BECAUSE OF SMITH v. MARYLAND AND THEY WERE TALKING ABOUT --

>> LET ME UNDERSTAND SOMETHING HERE.

FIRST YOU SAID THE LEGISLATURE SHOULD ADDRESS IT.

WHAT I UNDERSTAND THIS PIN REGISTER STATUTE THEY WENT UNDER DID NOT AUTHORIZE THIS? IS THAT CORRECT OR NOT?

>> THAT IS A VERY COMPLICATED ISSUE BECAUSE BASICALLY THE PEN REGISTER, JUDGE, THAT THEY WENT UNDER IN OF ITSELF MAY HAVE NOT ADDRESSED THAT HOWEVER THE TRIAL COURT DID ADDRESS IT BY, BY AUTHORIZING HISTORICAL CELL SITE DATA AND --

>> THIS IS NOT HISTORICAL. THIS IS REAL TIME.

>> THAT IS AN INTERESTING POINT, YOUR HONOR.

>> EVERYTHING IS INTERESTING IN THIS CASE.

>> IT IS REAL TIME AND WE HAVE REFERRED TO IT AS REAL TIME. I WILL BE PERFECTLY HONEST THAT YES, THE COURTS HAVE CALLED THIS REAL TIME BUT HISTORICAL IS ALL PERSPECTIVE AND IN THIS PARTICULAR CASE, IT WENT TO THE CELL PHONE COMPANY. THEN THE CELL PHONE COMPANY SENT

OUT CELL SHEETS.

BY THE TIME THE CELL PHONE GOT
IT I THINK THERE WAS PROBABLY
SOME CONFUSION --

>> YOU'RE NOT TRYING TO SAY THIS
IS HISTORICAL DATA PERHAPS, IN
OTHER WORDS, WE HAD A CASE
RECENTLY WHERE THE CRIME'S
COMMITTED AND AFTERWARD THEY CAN
RECONSTRUCT WHERE THE DEFENDANT
WENT.

>> EXACTLY.

>> YOU GOT PROBABLE CAUSE.

>> RIGHT.

>> WE'RE TALKING REALLY ABOUT,
CAN THE GOVERNMENT DO THIS TO
ANY CITIZENS, ANYTIME, FOR A DAY
OR AS LONG AS --

>> NO, YOUR HONOR.

>> I DON'T UNDERSTAND WHY WE'RE
NOT?

>> I WOULD NOT SUGGEST THE
GOVERNMENT CAN DO THAT, HOWEVER,
WHERE THERE IS VIOLATION
PURSUANT TO A STATUTE THERE IS
NO EXCLUSION REMEDY UNDER OUR
STATUTE OR UNDER --

>> I THINK YOU WERE SAYING NOW,
I ASKED YOU, YOU SAID THE
LEGISLATURE SHOULD ADDRESS IT.
WELL, THEY DID ADDRESS IT. THEY
DON'T ALLOW THIS. NOW YOU'RE
TRYING TO SAY --

>> NO, YOUR HONOR.

>> IT WAS REALLY HISTORICAL.
IT WASN'T REAL TIME.

I THINK WE'RE PLAYING WITH --

>> NO, NO.

I DON'T WANT TO BE CONFUSED
HERE.

I SAID THAT JUSTICE ALITO
SUGGESTED THAT WITH THE
ADVANCEMENT OF TECHNOLOGY THAT
WHAT REASONABLE IS MIGHT BE
BETTER GAUGED BY THE LEGISLATURE
GETTING PUBLIC OPINION.

YES, YOU'RE ABSOLUTELY RIGHT, WE
DO HAVE A PEN REGISTER STATUTE.
PLEASE REMEMBER THE PEN REGISTER
STATUTE IS MODELED AFTER 18 USC

TITLE 2 OF THE ELECTRONIC COMMUNICATIONS PRIVACY ACT AND THAT WAS ENACTED IN 1986.

>> HAVEN'T THE MAJORITY OF FEDERAL COURTS, AND I KNOW THERE'S A SPLIT, FOUND THIS TYPE OF INFORMATION, THE REAL-TIME REPORTING OF IT, IS A SEARCH UNDER THE FOURTH AMENDMENT?

>> NO, YOUR HONOR.

IN FACT, ALL OF THE COURTS THAT HAVE BEEN CITED IN OUR BRIEFS HAVE, THE VAST MAJORITY OF THEM FOUND THERE IS NO FOURTH AMENDMENT VIOLATION AND THE ONLY CASE THAT HAS BEEN CITED BY THE DEFENDANT IN THE BRIEF THAT IS ADDRESSED THE FOURTH AMENDMENT AS OPPOSED TO WHAT STATUTE AUTHORIZES, THOSE ARE TWO COMPLETELY DIFFERENT THINGS. THERE'S A LOT OF CONFUSION AS TO HOW TO FIT THIS UNDER THE STATUTORY SCHEMES.

WHEN COURTS COULD NOT FIND, FIGURE OUT HOW TO DO IT, AND A LOT OF COURTS WENT BY HYBRID, I.E., THE PEN REGISTER AND STORED COMMUNICATION ACT TO GET THE INFORMATION.

WHEN THEY DIDN'T FEEL THAT FIT NICELY WITHIN THAT FRAMEWORK, SOME COURTS HAVE SAID WELL, YOU HAVE TO GO GET A WARRANT UNDER MOTION 41.

HOWEVER, THERE HAVE BEEN COURTS THAT EVEN FOUND THAT SAID WE DON'T BELIEVE THERE'S A FOURTH AMENDMENT VIOLATION BECAUSE OF CAROLYN KNOX.

THE ONLY CASE THAT FINDS A FOURTH AMENDMENT VIOLATION IS IN RE, HISTORICAL SITE INFORMATION AT, IT WAS IN EASTERN DISTRICT OF NEW YORK CASE IN 2011.

>> LET ME ASK YOU

>> 809.

>> I UNDERSTAND YOUR ARGUMENT BEING NO PRIVACY RIGHT BEING ON PUBLIC ROADS AND KNOX'S

ANALYSIS IN JONES WOULD CONTROL THAT IT SEEMS TO ME BUT WHY IS IT THE TRANSMISSION FROM THE CELL PHONE IN EFFECT UNDER THE CONSTITUTIONAL ANALYSIS SO THE THAT STATE SOMEHOW SEARCHED OR SIZED IN EFFECT THE TRANSMISSION ITSELF IN REAL TIME TO CREATE A CONSTITUTIONAL PROBLEM?

>> WHY WOULD --

>> YES.

>> IT IS THE STATE'S POSITION THAT IT WOULD NOT CREATE A CONSTITUTIONAL PROBLEM.

>> WOULD YOU CONSIDER THE TRANSMISSION AN EFFECT?

>> THE TRANSMISSION OF, I WOULD, THE ARGUMENT IS THAT IT IS VOLUNTARILY CONVEYING INFORMATION TO A THIRD PARTY.

>> I UNDERSTAND.

WOULD YOU UNDER THE CONSTITUTIONAL ANALYSIS WOULD YOU CONSIDER THAT TRANSMISSION AN EFFECT FROM THE CELL PHONE?

>> YES.

>> OKAY.

>> YES, YOUR HONOR.

>> SO WHY IN REAL TIME THEN WOULD NOT THAT BE A SEARCH OR SEIZURE IN SOME WAY?

>> IN REAL TIME IT'S NOT BECAUSE AT THAT MOMENT THE USER OF THE PHONE IS CONVEYING INFORMATION TO THE CELL PHONE COMPANY TO ROUTE THE CALLS.

AND, YOU KNOW, TO ADDRESS DEFENSE COUNSEL'S ARGUMENT THAT IT IS NOT SOMETHING THAT SOCIETY EXPECTS. THAT IS WHY WE HAVE, CRIMINALS USE BURNER PHONES. THAT'S WHY --

>> IT FALLS UNDER SMITH VERSUS MARYLAND, IS THAT YOUR ARGUMENT?

>> MY ARGUMENT IN THIS CASE IS TWOFOLD.

THE FIRST ONE GOES TO THE DATA, THE RIGHT OF PRIVACY OF THE DATA AND IT'S THE STATE POSITION THAT IN STATE v. MARYLAND AND U.S.

v. MILLER THAT THESE ARE
CONSIDERED BUSINESS RECORDS OF
THE CELL PHONE COMPANY AND THAT
THE USER OF THE PHONE WHICH IS
THE ONLY TIME THAT HE WAS
MONITORED, USED THIS AND
CONVEYED IT, HAD TO CONVEY IT SO
IT COULD GO TO THE QWEST
SWITCHING OFFICE AND HAVE IT
PLACED IN THE APPROPRIATE CELL.
THE SECOND PRONG IS RIGHT TO
PRIVACY AND LOCATION.

WE HAVE THE KNOX CASE.

WE HAVE THE KARO CASE.

BOTH THOSE CASE I SHOULD SAY IN
KNOX CASE, TRAVELING ON THE
ROAD FROM MICHIGAN TO WISCONSIN
AND THE ARGUMENT WAS THAT HE DID
NOT HAVE A RIGHT OF PRIVACY ON
HIS TRAVEL, THAT CAN BE VISUALLY
OBSERVED.

IN THIS, INTERESTINGLY ENOUGH, I
WOULD LIKE TO POINT OUT, JUSTICE
CANADY, YOU ASKED ABOUT THE TIME
IN CAROT WAS THREE DAYS AND YOU
DID POINT THAT OUT.

INTERESTING ENOUGH ABOUT KARO
WHEN I WAS REVIEWING FOR THIS
THE WARRANT IN THAT CASE CAME
OUT IN SEPTEMBER OR THE ORDER IN
THAT CASE CAME IN SEPTEMBER.
THEY WERE MONITORING NEXT YEAR,
SEPTEMBER 1971.

YOU WILL NOTE THE UNITED STATES
SUPREME COURT INDICATED THAT THE
MONITORING OF THE BEEPER AT THE
LOCKER WAS FINE DURING THAT
PERIOD OF TIME.

SO IT'S THE STATE POSITION --

>> WHAT IS THE LEGAL DEFINITION
OF PROLONGED?

>> TWO DAYS --

>> IS TWO DAYS PROLONGED?

>> I WOULD NOT SAY.

I WOULD CITE TO U.S. v.
SKINNER, CITED BY THE STATE IN
THIS CASE, THAT IS A SIXTH
CIRCUIT CASE AND IN THAT CASE IT
WAS THREE DAYS AND CAME NOWHERE
NEAR PROLONGED OR LONG-TERM

MONITORING.

>> LET ME ASK YOU THIS, IF WE ASSUME IN THIS CASE THAT THERE WAS NO PEN REGISTRY APPLICATION AND POLICE SIMPLY WANTED THE REAL-TIME INFORMATION, WHAT DO YOU CONTEND THEY COULD HAVE DONE TO DO IT?

GO TO THE POLICE.

GO TO THE PHONE COMPANY WITH WHAT?

WHAT DO THEY HAVE TO BRING TO THE PHONE COMPANY TO VALIDLY GET THAT INFORMATION?

>> THEY ALWAYS HAVE TO BRING AN ORDER.

>> OKAY, AN ORDER FROM THE TRIAL COURT?

>> CORRECT.

>> BASED ON WHAT?

WHAT DO THEY HAVE TO DEMONSTRATE TO THE TRIAL COURT TO GET THAT --

>> YES, YOUR HONOR.

SPECIFIC AND ARTICULABLE FACTS INDICATING REASONABLE GROUND TO BELIEVE THAT INFORMATION WITH REGARD TO LOCATION DATA WOULD BE RELEVANT AND MATERIAL IN THE ONGOING INVESTIGATION.

>> LET ME ASK YOU A TECHNICAL QUESTION.

DOES A PEN REGISTER HAVE TO BE IN PLACE TO GET THIS INFORMATION? TO GET THE PHONE TRACKING?

>> I BELIEVE THE SHORT ANSWER TO THAT IS, YES. IT DOES.

AND THAT IS BASED ON THE READING OF ALL THE FEDERAL CASE LAW FOR WHICH WE HAVE MODELED.

>> THIS IS THE SAME, YOU HAVE THE SAME BURDEN OF SHOWING TO THE TRIAL COURT TO GET TRACKING, REAL-TIME TRACKING INFORMATION AS YOU DO TO GET THE PEN REGISTRY INFORMATION?

>> NO.

PEN REGISTRY YOU SHOW RELEVANCY TO THE --

>> ONGOING INVESTIGATION.

>> ONGOING INVESTIGATION.

>> OKAY.

>> TO GET ANY KIND OF CELL SITE LOCATION INFORMATION ACCORDING TO THE CASE LAW YOU HAVE TO HAVE THE PEN REGISTRY AND GO UNDER THE STORED COMMUNICATIONS ACT WHICH IS ANOTHER SECTION. THEN THE STANDARD GOES TO REASONABLE GROUNDS TO BELIEVE THAT IT WOULD BE RELEVANT AND MATERIAL IN THE INVESTIGATION.

>> I'D LIKE TO GO BACK AND ASK YOU A QUESTION FOLLOW UP ON A QUESTION THE CHIEF JUSTICE ASKED YOU.

IF I UNDERSTOOD CORRECTLY, THE CHIEF JUSTICE ASKED IF THE STATE CONSIDERED THE TRANSMISSION FROM THE CELL PHONE TO THE TOWER TO BE AN EFFECT?

AND YOU SAID YES.

I'M VERY PUZZLED BY THAT RESPONSE.

DO YOU MEAN IT IS AN EFFECT AS IT IS REFERRED TO AS EFFECT IS REFERRED TO IN THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE IT TALKS ABOUT THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES PAPERS AND EFFECTS?

>> NO, JUSTICE CANADY I DIDN'T. I THINK I MISUNDERSTOOD THE QUESTION, I APOLOGIZE.

I INTERPRETED THAT TO MEAN AN EFFECT IN THIS CASE AND I WOULD SAY THAT THEY HAVE STRUGGLED WITH WHETHER OR NOT THIS IS AN EFFECT.

I WOULD SAY BASED ON DEVELOPMENT OF CASE LAW THERE IS SOME TYPE OF RIGHT TO PRIVACY IN YOUR LOCATION DATA BUT AS FAR AS THE CASES WITH REGARD TO HOW SMITH APPLIES, NO, THEY HAVEN'T, THEY HAVE NOT CONSIDERED THAT TO BE AN EFFECT AND I DON'T HONESTLY KNOW EXACTLY WHEN AN EFFECT IS,

BECAUSE IT HAS SO MANY DIFFERENT APPLICATIONS.

>> WELL ISN'T THAT WHAT IS INTENDED TO BE?

IT IS NOT INTENDED TO HAVE ONE MINIMAL APPLICATION?

>> THAT IS CORRECT, YOUR HONOR.

>> IT IS INTENDED TO BE THAT BROAD.

>> AND IN LIGHT OF THAT, THE STATE'S POSITION IS, NO, CHIEF JUSTICE.

>> WELL IT MUST BE SOMETHING OR WE WOULDN'T BE HERE TALKING ABOUT ALL THESE THINGS.

>> IT IS --

>> SOMETHING IN THE NATURE OF THIS, WHAT'S HAPPENING, THIS TECHNOLOGY, IS THAT IT IS CERTAINLY IS, IF IT IS NOT RIGHT IN THE HEART OF THE FOURTH AMENDMENT IT IS DANCING AROUND EVERY HEDGE OF IT.

>> THAT IS WITHOUT QUESTION, YOUR HONOR, EXCEPT WE HAVE TO REMEMBER THERE HAS BEEN SURVEILLANCE FOREVER SO THE ISSUE --

>> NOTHING LIKE THIS.

THERE HAS NOT BEEN TECHNOLOGY FOREVER AND TIN CANS WITH STRINGS BACK WHEN THEY WROTE THE DOCUMENT.

>> CORRECT.

AND I MEAN, AND WE HAD BEEPERS IN ONE CASE AND CELL PHONE IN ANOTHER CASE AND A GPS IN ANOTHER CASE BUT THE STATE'S POSITION WITH REGARD TO THE BEEPER VERSUS THE CELL PHONE WHICH WE HAVE IN THIS CASE WOULD BE THAT A BEEPER, YOU CAN'T TURN OFF.

YOU CAN MAYBE NOT TURN YOUR RECEIVER OFF BUT YOU CAN'T TURN THE BEEPER OFF.

YOU CAN TURN YOUR CELL PHONE OFF.

YOU CAN CHOOSE NOT TO GET A CELL PHONE.

YOU CAN CHOOSE TO GO GET A DISPOSABLE PHONE.

SO THERE'S, IDEA IS THAT THE CONTROL IS IN THE USER.

>> I GUESS, AS WE TALK ABOUT WHAT THIS IS YOU, AND I WAS ASKING WHAT THE MAJORITY OF THE COURTS HAVE SAID, IF EVERYONE IS STRUGGLING YOU WOULD AGREE, INCLUDING US AND WE'RE STRUGGLING?

>> YES.

>> AND THEY SEEM, THE COURTS SEEM TO MAKE A DISTINCTION BETWEEN LOCATION DATA AND THE PHONE NUMBERS, IS THAT CORRECT?

>> THAT'S CORRECT.

>> THAT THERE IS WHATEVER THRESHOLD THERE IS, THERE IS EITHER NONE OR THE LOWEST FOR THE PHONE NUMBER?

>> THE LOWEST IS THE PHONE NUMBER, CORRECT.

>> WHICH IS, AGAIN, THERE IS SOME IRONY IN THAT BECAUSE YOU COULD BE CALLING YOUR, THEY TALK ABOUT COULD BE CALLING THE PSYCHIATRIST AND OR CALLING THE LOCAL PUB, YOU KNOW, AT 8:00 IN THE MORNING, YOU KNOW.

SO IT STILL COULD BE SOME INFORMATION YOU REALLY WOULDN'T WANT TO HAVE OUT THERE IN THE PUBLIC.

YOU'RE SHARING IT WITH THE PHONE COMPANY.

SO LOCATION DATA HAS REQUIRED A HIGHER THRESHOLD, WHATEVER THAT IS, IS THAT CORRECT?

>> IT IS CORRECT.

THE WAY IT IS DEVELOPED IT IS INTERMEDIARY LEVEL BECAUSE --

>> WHERE IS SOMEONE, THE QUESTION IS, IF THE FOURTH AMENDMENT SAYS THAT THERE IS, THERE SHALL NOT BE UNREASONABLE SEARCHES OR SEIZURES, SEARCH, UNREASONABLE SEARCH, SO IT GOES BACK TO THE QUESTION THAT IF ANYTHING, LOCATION DATA, IF IT

IS NOTHING, FOR THE PURPOSES OF THE FOURTH AMENDMENT, YOU DON'T NEED TO DISTINGUISH BETWEEN WHETHER YOU NEED REASONABLE ATTACHABLE FACTS OR PROBABLE CAUSE BECAUSE YOU HAVE GIVEN IT UP JUST LIKE YOU SAY YOUR GMAIL OR YOUR EMAIL OR YOUR FACEBOOK, ALL OF THIS IS THE POLICE'S TO DO WHAT THEY WANT WITH IT.

>> NO, YOUR HONOR.

>> WHAT WOULD --

>> THERE IS DIFFERENCE BETWEEN THE CELL PHONE DATA THAT GOES TO THE CELL PHONE COMPANY WHICH IS PROXIES FOR LOCATION DATA AND WHERE --

>> THE QUESTION IS, IF THERE IS A FOURTH AMENDMENT THAT IS GOING TO CONSTRAIN, IT IS UP TO THE COURTS, NOT THE LEGISLATURE TO DECIDE WHETHER FOURTH AMENDMENT VIOLATION HAS OCCURRED.

IF THE FOURTH AMENDMENT DOESN'T REGULATE IT, YOU'RE SAYING IT IS NOT ABOUT THE RIGHTS, THE CONSTITUTIONAL RIGHTS, IT IS JUST A MATTER OF THE PUBLIC POLICY AS TO WHAT WE FIND TOLERABLE?

IS THAT IT?

>> NO, STATE-SPECIFIC ARGUMENT IN THIS CASE THAT MR. TRACEY NOT ONLY DID NOT HAVE AN ACTUAL, SUBJECTIVE, EXPECTATION OF PRIVACY IN HIS CELL DATA AND LOCATION, TRAVELING THE ROADS BUT IT IS ALSO, IF HE DID HAVE ONE, IF HE INDEED HAD ONE, IT WAS NOT ONE THAT --

>> THAT WAS REASON --

>> IT IS NOT JUST MR. TRACEY. ISN'T IT MISS MELEAR AND MISS O --

>> THAT IS WHERE THE OBJECTIVE STANDARD COMES IN.

IT WOULD HAVE TO BE DEEMED, BASED ON THE PARTICULAR FACTS THIS CASE AND THE FACT IT IS SHORT TERM.

>> I ASKED YOU THIS QUESTION.

WHY IF WE UPHOLD HAPPENS HERE,
WHY CAN'T THE POLICE DO THIS TO
ANYBODY AND EVERYBODY FOR, ONE
DAY OR 30 DAYS OR 60 DAYS?

>> AND THE ANSWER TO THAT IS
VERY SIMPLE.

FIRST --

>> IT IS NOT VERY SIMPLE.

>> IT IS NOT VERY SIMPLE BUT LET
ME BE VERY DIRECT.

IN THIS PARTICULAR CASE THE
REASON THE CELL PHONE COMPANY
GAVE THE INFORMATION BECAUSE
THERE WAS AN ORDER ALLOWING CELL
SITE INFORMATION IRREGARDLESS
HOW THAT WAS OBTAINED.

THIS WOULD NOT BE A RISK THAT
WAS TAKEN WHERE YOU GENERALLY
HAVE --

>> BUT YOU TOLD JUSTICE QUINCE
THE POLICE CAN DO THIS ANYWAY?
THEY HAVE THEIR OWN COMPUTER
THAT --

>> I NEVER SAID THAT, YOUR
HONOR.

>> I THOUGHT YOU SAID SOMETHING
ABOUT THE POLICE COULD DO IT
WITHOUT --

>> I THOUGHT THEY HAD ONLY
REGISTRY, I THOUGHT THEY ONLY
HAD THE RIGHT UNDER THE ORDER TO
GET PEN REGISTRY INFORMATION?

>> UNDER THIS WE HAD ONLY RIGHT
TO GET PEN REGISTER.

THAT IS WHAT WE ASKED.

LOOK AT ORDER, AND IN THE ORDER
THE TRIAL COURT DID GIVE 60 DAYS
TO OBTAIN HISTORICAL CELL SITE
DATA.

I'M ASSUMING THAT IT WAS
RELEASED IN THIS CASE.

THIS WOULDN'T BE SOMETHING THAT
WOULD HAPPEN ON A REGULAR BASIS
BUT IT HAPPENED IN THIS CASE,
THE STATE MADE THE ARGUMENT THAT
THERE WAS REASONABLE AND
ARTICULABLE SPECIFIC FACTS
ALLEGED IN THE AFFIDAVIT BUT
BEYOND THAT THE STATE'S
POSITION --

>> NO ONE AGREES WITH THAT POSITION, CORRECT?

>> SO THE STATE'S CONCLUSION HERE IS THAT THERE WAS NO VIOLATION OF THE FOURTH AMENDMENT BECAUSE MR. TRACEY DID NOT HAVE A SUBJECTIVE EXPECTATION OF PRIVACY IN HIS CELL SITE DATA AND IT IS NOT ONE THAT SOCIETY IS WILLING TO ACCEPT AS REASONABLE.

>> NOW YOU, IF YOU WOULD, WOULD YOU GO BACK TO THE CHIEF'S QUESTION AND THE DATA THAT HE COMMUNICATES TO ME OVER THE PHONE, IS THAT PROTECTED?

>> THE DATA THAT HE COMMUNICATED --

>> TO ME.

>> IF YOU WERE A PARTY TO THE OTHER SIDE?

IS THAT --

>> HE COMMUNICATES TO ME OVER A LINE, IS THAT, OR A CELL PHONE?

>> ABSOLUTELY NOT.

>> IT IS NOT PROTECTED?

>> IT IS PROTECTED.

>> ALL RIGHT.

>> THAT IS THE DIFFERENCE BETWEEN CONTENT AND ENVELOPE INFORMATION.

>> THAT IS A PLAY ON WORDS. IT IS JUST DIFFERENT KIND OF DATA.

SO WHAT HE CONVEYS TO ME IS PROTECTED DATA, THEN WHY WOULD IT NOT BE THE DATA WHETHER YOU CALL IT TECHNOLOGICALLY --

>> WELL THAT --

>> THANK YOU VERY MUCH. I'M GLAD YOU APPROVE BUT WHAT IS, EXPLAIN THE DIFFERENCE.

>> THE DIFFERENCE IS LOCATION DATA IS FOR THE PURPOSE AND SOLE PERSON OF THE PHONE COMPANY LOCATING THE CELL TOWER AND PLACING THE CALL, ROUTING THE CALL.

THE DATA THAT IS COMMUNICATED OVER THE PHONE, AND I'M NOT SURE

OF ITS CONTENT INTENDED FOR YOU
RECIPIENT OF THE PHONE CALL.
LOCATION DATA IS NOT INTENDED
FOR RECIPIENT OF THE CALL.
THE CELL, PHONE COMPANY ACTS AS
INTERMEDIARY.

>> SO NOW WE GET DOWN AND DRAW
THE DISTINCTIONS ON THE CONTENT
OF THE DATA THEN, IS THAT RIGHT.

>> THAT IS DONE ALWAYS.

THAT IS WHY WE HAVE SUPER
WARRANTS FOR WIRE INTERCEPTIONS.

>> AGAIN I'M NOT SO SURE I AGREE
WITH SOME OF THOSE THINGS YOU'RE
TALKING ABOUT BECAUSE THERE IS
NO REASON FOR THE STATUTE, IF
THIS IS JUST NOTHING, JUST
TECHNOLOGY ON ITS WAY, ROLLING
OVER ALL OF US, THEN, WHY EVEN
NEED A STATUTE?

I MEAN THAT IS WHERE IT COMES.

IT'S FREE GAME.

IT IS NOT PROTECTED.

>> IT IS NOT A FOURTH AMENDMENT
VIOLATION IN THIS CASE.

AND PENNY JUST WANT TO STRESS WE
DID HAVE AN ORDER ALLOWING CELL
SITE INFORMATION.

>> THIS ORDER, I JUST READ IT,
IT SAYS IN ACCORDANCE WITH U.S.
TITLE 18 SECTION 27.03-D.

FURTHER ORDERED METROPCS, AGENTS
AND APPROPRIATE PROVIDERS OF
WIRE AND ELECTRONIC
COMMUNICATIONS SERVICE SHALL
FURNISH THE BROWARD COUNTY
SHERIFF'S OFFICE WITH HISTORICAL
CELL.

>> THAT'S CORRECT.

>> THAT IS NOT REAL-TIME.

THAT IS HISTORICAL, RIGHT?

>> HISTORICAL --

>> INDICATING THE PHYSICAL
LOCATION OF THE CELL SITES ALONG
WITH CELL SITE SECTORS UTILIZED
FOR THE CALLS SO LONGS THE
TELEPHONE NUMBER FACILITIES,
CABLE AND ELECTRONIC CEREAL
NUMBERS REMAIN THE SAME.
SEEMS THEY'RE TALKING ABOUT

HISTORIC, LOOKING BACK, NOT
LOOKING FORWARD.

>> USUALLY IT IS DEFINED BY THE
DATE OF THE ORDER.

HISTORICAL BEFORE THE ORDER.
PERSPECTIVE IS TYPICALLY AFTER
BUT MANY COURTS INCLUDING THE
JONES CASE --

>> HOW COULD IT BE HISTORIC IF THIS
GUY IS MOVING AFTER THE ORDER?

>> IT IS HISTORICAL BECAUSE THE
PHONE COMPANY GETS IT FIRST AND
HAS TO RELAY IT.

NOT LIKE A GPS MONITOR OR, YOUR
HONOR, GETTING IT AS SOON AS IT
TOOK PLACE.

YOU'RE GETTING IT AFTER THE
PHONE COMPANY RECEIVED IT AND
SAID THIS IS THE BEST CELL TOWER
TO PLACE THIS CALL.

YOU'RE ONLY GETTING A CELL TOWER
ADDRESS.

YOU'RE NOT GETTING HOME
LOCATION.

>> I KNOW WE'RE, WAY OVER YOUR
TIME BUT, BECAUSE IT HAS BEEN
BROUGHT UP I THINK I ASKED MY
FIRST QUESTION WAS, DOES THE
FLORIDA STATUTE, AND IT IS
PREEMPTED TO THE EXTENT
INCONSISTENT WITH THE FEDERAL
STATUTE, ALLOWED UNDER THE STATUTE
THAT THEY WENT UNDER, FOR TO YOU
GET ANYTHING TO DO WITH LOCATION
DATA?

>> FOR THE PEN REGISTER DATA,
YOU HAVE TO HAVE A COMBINATION
ACCORDING TO --

>> SO IN THIS CASE THEY WENT AND
THEY WERE ONLY SEEKING --

>> A PEN REGISTER.

>> THE PHONE NUMBERS?

>> THAT IS CORRECT.

>> SOMEHOW IN AN ORDER THAT WAS
SUBMITTED TO THE JUDGE AND WHO
KNOWS WHY THE JUDGE SIGNED IT
BUT ASSUMES IT WAS GOING TO BE
A, GOING ALONG WITH THE
AFFIDAVIT SOMETHING POPS IN THAT
IS HISTORICAL.

BUT NOW THEY DON'T USE IT TO GET WHAT HAPPENED BEFORE THE DATE OF THE ORDER.

THEY ARE ARE SOMEHOW, SPRINT PCS SAYS, OKAY, HERE YOU ARE FOR 60 DAYS, YOU CAN GET ALL THIS OTHER DATA?

>> NOT FOR 60 DAYS, YOUR HONOR. FOR WHATEVER PERIOD OF TIME THEY DID THE MONITORING A TRIP ACROSS TOWN OR ACROSS THE STATE.

>> IF THEY GOT HIM IT, WOULD HAVE BEEN LONGER, THEY COULD HAVE DONE IT, HOW LONG COULD THEY HAVE DONE IT UNDER THAT --

>> IT WAS 60 DAYS.

WE WERE ALREADY INTO DAY 42. I DO UNDERSTAND, YOUR UNDERSTANDING OF THE FACTS IS CORRECT.

I WOULD JUST POINT OUT THAT THERE WAS AN ORDER AND, AND --

>> SO THEY COULD NOT GO UNDER THIS STATUTE AND DO THIS IN THE FUTURE, CORRECT?

>> UNDER THIS STATUTE THEY COULD GET HISTORICAL, UNDER THIS STATUTE, STATUTE OR ORDER, STATUTE?

>> THE STATUTE.

>> THE PEN REGISTER STATUTE YOU CAN'T GET EITHER ONE REALLY.

I MEAN IF YOU GO BY WHAT THE, HOW THE COURTS HAVE BEEN DEVELOPING YOU HAVE TO HAVE A COMBINATION WHICH IS, I ASSUME WHY THE TRIAL COURT REFERENCED 18 USC 207.3-D.

WHICH IS DIFFERENT THAN THE PEN REGISTER.

>> DO YOU THINK THERE IS A DIFFERENCE IN THE CONSTITUTIONAL ANALYSIS OF BETWEEN REAL TIME AND HISTORICAL DATA.

>> I DO NOT, YOUR HONOR, I THINK IT IMPLICATES PRIVACY DATA AND LOCATION.

THEY HAVE BEEN ADDRESSED BY KNOX AND BY MARYLAND.

THEY WILL WORK EXACTLY THE SAME.

I WILL KNOW HISTORICAL HOURS
BEFORE THE ORDER CAME OUT
WHETHER YOU HAVE BEEN A TO A
SYNAGOGUE, A BAR, PSYCHIATRIST,
AS I AM AFTER THE ORDER CAME
OUT.

IT IS THE EXACT SAME
INFORMATION.

>> OKAY.

>> ALL RIGHT.

YOU HAVE FIVE ADDITIONAL
MINUTES.

>> OKAY.

EVERY, THE CASES DO DISTINGUISH
UNIFORMLY BETWEEN HISTORICAL AND
REAL-TIME INFORMATION, EVEN THE
CASE THE STATE RECENTLY
SUPPLEMENTED, THE NOTICE OF
SUPPLEMENTAL AUTHORITY.
THAT WAS HISTORICAL CELL TOWER
CASE.

AND THEY WARNED, AT THE END OF
THAT DECISION THEY WARNED NOW,
OF COURSE THIS MAY NOT APPLY TO
REAL-TIME LOCATION INFORMATION.
AND THAT'S PRETTY CONSISTENT
WITH CASES ALL THE WAY THROUGH.

>> BUT YOUR COUNSEL, OPPOSING
COUNSEL SAYS, REALLY WHEN YOU
LOOK AT IT FROM A LEGAL
PERSPECTIVE AND ANALYSIS, THERE
IS NO DIFFERENCE.

THAT WAS HER LAST STATEMENT
BEFORE SHE SAT DOWN.

WHY IS THAT WRONG?

>> SHE ACKNOWLEDGED ALSO
HISTORICAL REFERS TO WHAT WAS
RETRIEVED BY THE COMPANY, THE
METROPCS PHONE COMPANY PRIOR TO
THE DATE THAT THE ORDER IS
WRITTEN.

PROSPELATIVE, WITH REAL-TIME
INSTEAD OF PROSPECTIVE IS
INFORMATION THAT HAS NOT YET --

>> WE UNDERSTAND THAT.

>> RIGHT.

>> WE UNDERSTAND THE DIFFERENCE.

>> SO CAN NOT BE THE SAME.

>> THE LEGAL ANALYSIS SHE SAYS
IS BECAUSE IT REVEALS THE

IDENTICAL, THE IDENTICAL DATA,
WHETHER IT IS BEFORE POINT A OR
AFTER POINT A.

AND --

>> THE RIGHT.

>> THE CONCERNS OF NOT WANTING
TO REVEAL ONE MAY BE AT A
PARTICULAR TIME IS REVEALED
NONETHELESS WHETHER IT HAPPENED
BEFORE POINT A OR AFTER POINT A
IF IT'S IN THAT TYPE DATA.

>> BUT ONCE YOU ALREADY MOVED
FROM SOMEPLACE YOU WILL NOT BE
AS CONCERNED ABOUT THEM
TRACKING, THE GOVERNMENT
TRACKING YOUR PRESENT LOCATION.
I MEAN, THE LEGAL ANALYSIS IS
DIFFERENT AND I THINK --

>> AND THAT IS BECAUSE OF
GOVERNMENT TRACKING YOUR
LOCATION, THAT'S YOUR
DISTINCTION WHAT YOU BELIEVE?

>> THAT'S CORRECT.

THAT IS THE DISTINCTION THE
COURTS HAVE MADE.

THE STATE SAYS, WELL, THE CASES
CITED IN THE BRIEF, IT IS NOT
THE MAJORITY OF CASES MADE THIS
DISTINCTION BETWEEN REAL-TIME
AND HISTORICAL TIME.

THE --

>> LET ME ASK YOU.

>> OKAY.

>> HAS THE U.S. SUPREME COURT
EVER MADE THAT DISTINCTION
BETWEEN REAL TIME AND
HISTORICAL?

>> NO, THAT IS NOT HOW IT COMES
UP.

IT COMES UP, THE CASES FROM THE
SUPREME COURT HAVE BEEN BIKE
BEEPER CASES OR TRACKING DEVICE
CASES.

>> ISN'T IT THE CASE THAT THE
TRAP AND TRACE HE AND PEN
REGISTER ORDERS ARE PERSPECTIVE?
THAT IS NOT HISTORICAL?
IN TERMS OF WHAT YOU'RE SAYING
IT IS ALWAYS GOING TO BE
PERSPECTIVE BECAUSE IT IS AFTER

THE ORDER IS ENTERED THAT THE INFORMATION IS OBTAINED?

>> THAT'S RIGHT AND THAT'S WHY THOSE ORDERS HAVE TO BE FOR A LIMITED PERIOD OF TIME. THEY HAVE TO BE REVIEWED BEFORE THEY'RE RENEWED.

THEY JUST DON'T GO ON AND ON.

>> THAT IS MATTER OF STATUTORY POLICY?

>> WELL THAT --

>> THAT IS NOT A FOURTH AMENDMENT ISSUES, IS THAT CORRECT?

>> THAT'S TRUE.

OKAY.

THE CASES CITED, THAT THE STATE CITES ARE UNIFORMLY HISTORICAL DATA CASES.

I MIGHT, OUR POSITION IS THAT THOSE CASES DO NOT PROVIDE A CORRECT ANALYSIS WHEN YOU'RE TALKING ABOUT LOCATION AND THEY'RE REALLY NOT THAT HELPFUL. AND AGAIN AS I SAID THOSE CASES DO VERY OFTEN DISTINGUISH BETWEEN WHAT THEY'RE DOING, HISTORICAL DATA, AS OPPOSED TO REAL-TIME CONSIDERATION.

NOT ALSO -- KNOX ALSO TALKS ABOUT, KNOXS I BELIEVE TALKS ABOUT WHERE THE SUPREME COURT SAYS WE'RE NOT CONSIDERING HERE A 24-HOUR DRAGNET, YOU KNOW, LOCATION, TRACKING SITUATION. I MEAN THEIR TIME FRAME WAS 24 HOURS.

THEY THOUGHT AT THAT TIME THAT WOULD BE UNACCEPTABLE OR, YOU KNOW, NOT, NOT OKAY UNDER THE FOURTH AMENDMENT.

IT WOULD REQUIRE ADDITIONAL FOURTH AMENDMENT ANALYSIS.

SO, THE SPECIFIC TIME, IT IS DIFFICULT TO KNOW WHEN THE SPECIFIC TIME IS.

IN THIS CASE, THE STATE ARGUES THERE WASN'T PRECISE SURVEILLANCE.

THEY WERE ABLE TO TRACK HIM

RIGHT TO A HOUSE.
SECONDLY, HIS PHONE WAS ON ALL
THE TIME.
THEY SAID IT WAS CONTINUOUSLY IN
USE.
SO BASICALLY THEY WERE ABLE TO
CONTINUOUSLY TRACK HIM.
IF THERE IS NO FURTHER
QUESTIONS.
THANK YOU VERY MUCH.
>> THANK YOU BOTH FOR ALL YOUR
ARGUMENTS.