

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

JUAN MANUEL SANCHEZ-JARA,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

FEDERAL DEFENDER PANEL
ATTORNEY PROGRAM
John F. Murphy
Executive Director

John T. Kennedy
Panel Attorney, Federal
Defender Program
820 Davis Street, Suite 434
Evanston, IL 60201
(847) 425-1115
Email: kennedy3317@aol.com
Counsel for Juan Manuel
Sanchez-Jara

August 9, 2018

QUESTIONS PRESENTED

I. Whether location of a cell phone user in his residence through use of a cell site simulator, without a probable cause warrant, but with a “warrant and order” issued under 18 U.S.C. sec. 2703, is barred by the Fourth Amendment?

This Court has a pending petition raising a similar issue involving location of an individual in a parked automobile through use of a cell site simulator under a location-tracking warrant, though a search characterized by the appellate decision as being in a public place. United States v. Patrick, No. 17-6256, cert. filed October 15, 2017.

II. Whether even if a probable case warrant had been obtained for use of a cell site simulator, use of the device would have resulted in a general search barred by the Fourth Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
PETITION FOR WRIT OF CERTIORARI.....	1
OPINION BELOW.....	1
JURISDICTION.....	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	1
INTRODUCTION.....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS.....	4
REASONS FOR GRANTING THE WRIT.....	7
I. Location of a cell phone user in his residence through use of a cell site simulator, without a probable cause warrant, but with a “warrant and order” issued under 18 U.S.C. sec. 2703, is barred by the Fourth Amendment.....	9
II. Even if a probable cause warrant had been obtained for use of a cell site simulator, use of the device would have resulted in a general search barred by the Fourth Amendment.....	19
CONCLUSION.....	22
APPENDIX	
<u>United States v. Sanchez-Jara</u> , No. 17-2593 (7 th Cir. 2018).....	A.1
Order and mandate denying petition for rehearing.....	B.1
Title 18, U.S.C. section 2703.....	C.1
Warrant and Order.....	D.1

TABLE OF AUTHORITIES

CASES

<u>Boyd v. United States</u> , 116 U.S. 616 (1886).....	11
<u>Carpenter v. United States</u> , 585 U.S. ____ (2018).....	8, 9, 11, 12, 15, 20
<u>Prince Jones v. United States</u> , No. 15-CF-322 (D.C. Cir. 2017)....	8, 13, 16
<u>Katz v. United States</u> , 389 U.S. 347 (1967).....	11, 17
<u>Kyllo v. United States</u> , 533 U.S. 27 (2001).....	10, 14, 18
<u>Marshall v. Barlow’s, Inc.</u> , 436 U.S. 307 (1978).....	19
<u>New York v. Belton</u> , 453 U.S. 454, 459-60 (1981).....	9
<u>Riley v. California</u> , 134 S.Ct. 2473 (2014).....	12, 14, 20
<u>Smith v. Maryland</u> , 442 U.S. 735 (1979).....	11, 15
<u>State of Maryland v. Andrews</u> , 227 Md.App. 350, 134 A.3d 324 (Md.App. 2016).....	16
<u>United States v. Di Re</u> , 332 U.S. 581 (1948).....	12
<u>United States v. Hinton</u> , 219 F.2d 324 (7 th Cir. 1955).....	20
<u>United States v. Karo</u> , 468 U.S. 705 (1984).....	17
<u>United States v. Miller</u> , 425 U.S. 435 (1976).....	15
<u>United States v. Patrick</u> , 842 F.3d 540 (7 th Cir. 2016).....	13
<u>United States v. Patrick</u> , No. 17-6256, cert. filed October 15, 2017.....	I, 8
<u>United States v. White</u> , 416 F.3d 634 (7 th Cir. 2005).....	20
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963).....	18, 21

CONSTITUTION AND STATUTES

U.S. Const. amend IV.....	19
18 U.S.C. sec. 2703(d).....	2

OTHER AUTHORITIES

Stephanie K. Pell & Christopher Soghoian, Your Secret Stingray's No Secret Anymore: The Vanishing Government Monopoly over Cell Phone Surveillance and Its Impact on National Security and Consumer Privacy, 28 HAR. J.L. & TECH. 1, 11-12 (2014).....	13
--	----

PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan Manuel Sanchez-Jara respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals appears in the Appendix to this Petition at page 1.

JURISDICTION

A final judgment of conviction and sentence in a criminal case was entered against Juan Manuel Sanchez-Jara by the district court on August 1, 2017. The district court had jurisdiction pursuant to 18 U.S.C. sec. 3231.

Juan Manuel Sanchez-Jara filed a timely appeal, and the Court of Appeals affirmed on May 3, 2018. Sanchez-Jara filed a petition for rehearing on May 11, 2018, which was denied on June 1, 2018. The Appellate Court issued its certified copy of opinion and mandate on June 11, 2018. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

place to be searched, and the persons or things to be seized.

STATUTES INVOLVED

The Stored Communications Act, 18 U.S.C. sec. 2703, provides in relevant part:

(d) Requirements for court order.-A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. ***. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or compliance with such order otherwise would cause an undue burden on such provider. 18 U.S.C. sec. 2703(d).

INTRODUCTION

The defendant Sanchez-Jara sought to quash his arrest and suppress evidence on the basis that he was located in his residence through the use of a cell site simulator. He asserts that use of the cell site simulator comprised a search, and that it was a warrantless search barred by the Fourth Amendment. Even if a warrant was issued, it was not a probable cause warrant, and was only an 18 U.S.C. section 2703 order. He also asserts that even if there was a warrant, it did not comply with the particularity requirements of the Fourth Amendment.

The issue is similar to that in United States v. Patrick, No. 17-6256, cert. filed October 5, 2017, raising the issue of whether there was a Fourth Amendment violation in law enforcement's use of a cell site simulator to locate the defendant Patrick, for whom an arrest warrant had been issued for violations of parole. The decision states that a second warrant, a location tracking warrant, was also issued. The decision states that Patrick was found in an automobile on the street; the brief for Patrick states that he was found in an apartment parking lot, and raises the questions of whether his cell phone was initially located within his apartment.

Sanchez-Jara also raises the issue of whether the warrant was a general warrant allowing for a general search without particularity.

STATEMENT OF THE CASE

In the district court, in Case No. 15 CR 457, Sanchez-Jara entered a conditional plea to charges of possession of cocaine with intent to distribute and possession of a firearm in furtherance of a drug trafficking crime. The plea was conditional to preserve an appeal from denial of his motion to suppress evidence.

On appeal, in Case No. 17-2593, Sanchez-Jara raised the issue of whether the search of his residence conducted with a cell site simulator under color of a "Warrant and Order" conforming to 18 U.S.C. sec. 2703, but not a probable cause warrant, was an

unreasonable search under the Fourth Amendment. The appellate court affirmed the denial of his motion to suppress.

On May 14, 2018 the defendant filed a Petition for Panel Rehearing. On June 1, 2018 the Petition was denied. This Petition for Certiorari follows that ruling.

STATEMENT OF FACTS

On July 27, 2015, the defendant Sanchez-Jara resided in a basement apartment at 3606 W. 81st Street, Chicago, which appears to be a single family home. He had his cellular telephone, ending with the numbers 2832, with him in his basement apartment. Government agents located him through use of a cell site simulator. His residence was searched, and cocaine and guns were found.

Sanchez-Jara was charged in an indictment alleging three counts:

- 1) possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. section 841(a)(1);
- 2) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. section 924(c)(1)(A); and
- 3) unlawful possession of a firearm by an illegal alien, in violation of 18 U.S.C. section 922(g)(5)(A).

On the day of his arrest, sometime before 7:55 a.m. on July 27, 2015 the Secret Service began using a cell site simulator to obtain the exact location of the telephone. Through the Global Positioning System (GPS), a different technology, the cell phone

had been located within a 561 meter (about 1/3rd mile) radius, indicated by the ping.

The cell phone simulator works by transmitting a false tower signal to the cell phone and compelling the cell phone to transmit a response.

Once the exact residence address of the house was found, the government agents set up surveillance, followed Sanchez-Jara, did a traffic stop of him in a green Ford Freestyle, and identified him as the driver. At 1:45 p.m. he drove to a restaurant, and at 2:25 p.m. he returned to his residence as a passenger in a Honda Element. Later, government agents stopped him at about 3:45 p.m. after he got into a Honda Element parked in the alley behind his garage. The agents detained him, questioned him, and eventually found 9 kilograms of cocaine and two handguns in a safe in the house, and another handgun in a bedroom chest of drawers. The agents found 90 kilograms of cocaine contained within three roll-on suitcases inside the bed of a Nissan truck in the garage.

The defense filed a motion to suppress, alleging a violation of the Fourth Amendment, asserting that the probable cause requirement under 18 U.S.C. sec. 2703 was insufficient to satisfy the Constitutional probable cause provision of the Fourth Amendment.

Request for an evidentiary hearing was made in open court, and the request was opposed by the government. The request was denied.

The defense argued that through use of the cell site simulator the Secret Service was able to locate the particular cell phone ending with the numbers 2832 in a residence at 3606 W. 81st Street, Chicago. In locating this cell phone, the cell site simulator also obtained cell phone information as to every other cell phone in the 561 meter (one-third mile) radius. Basically, the Secret Service did what is historically called a general search of the residences and everything else in the 561 meter radius area.

The defense argued that the government search was conducted under a warrant in name only, issued under a telecommunications law, 18 U.S.C. sec. 2703. Sanchez-Jara asserted that because the search was of his residence, the Fourth Amendment applies. The standard for probable cause for issuance of a search warrant under the Fourth Amendment is totally different from the standard of 18 U.S.C. sec. 2703.

At the close of argument on the motion to suppress, the district court denied the motion from the bench. The court stated:

I have considered the filings and the authority cited in those filings and the arguments of counsel. And it's my finding that pursuant to Kyllo, that the government did need a warrant to conduct the electronic search that it conducted on the date in question. It's my finding that the government did obtain a warrant. It's my finding that the warrant that they obtained was valid and that it contemplated the sort of search that was conducted here and authorized the search that was conducted here.

After this adverse ruling, Sanchez-Jara did not proceed with two other search and seizure motions (not based upon use of the

cell site simulator, but based upon lack of probable cause to arrest and coercion) and entered a conditional plea of guilty.

Sanchez-Jara was sentenced to the mandatory minimum sentence of 10 years on the cocaine count and a consecutive five years on the gun count, for a total of fifteen years incarceration. The judgment order was filed on August 2, 2017.

The defendant took an appeal from the denial of his motion to suppress evidence. The Seventh Circuit court of appeals affirmed his conviction. The decision is United States v. Juan Manuel Sanchez-Jara, No. 17-2593 (May 3, 2018, 7th Cir.). The defendant's Petition for Rehearing was denied.

In his petition for certiorari, Sanchez-Jara raises the issue of the constitutionality of the government search of his residence, without a probable cause warrant, for the location of his cell phone, and of himself, through use of a cell site simulator.

REASONS FOR GRANTING THE WRIT

Location of a cell phone user in his residence through use of a cell site simulator, without a probable cause warrant, but with a "warrant and order" issued under 18 U.S.C. sec. 2703, is barred by the Fourth Amendment.

First, given the ubiquity of cell phones, and the ability of law enforcement to remotely extract data from them, including location information, this case involving the search of a

residence for a cell phone, without a probable cause warrant, presents an important question of federal law that has not been, but should be, settled by this Court.

Second, the Supreme Court decision in Carpenter v. United States, 585 U.S. ____ (2018) held that the Fourth Amendment requires a probable cause warrant, as compared to a section 2703 order, to obtain cell phone location records from a provider. By extension, Carpenter supports the assertion that the Fourth Amendment requires a probable cause warrant to search for a cell phone, and its subscriber, in a residence through use of a cell site simulator.

Third, the Seventh Circuit court of appeals decision is in conflict with the District of Columbia court of appeals decision in Prince Jones v. United States, No. 15-CF-322 (D.C. 2017), decided 09/21/2017. In Prince Jones, the warrantless real time tracking of a cell phone with a cell site simulator without first obtaining a warrant was held to violate the Fourth Amendment. There is a conflict among the circuit courts as to the necessity of obtaining a probable cause warrant allowing use of a cell site simulator to search a residence.

Further demonstrating the split among the circuits is the pending certiorari petition in another Seventh Circuit court of appeals decision, United States v. Patrick, No. 17-6256, cert. filed October 15, 2017 raising the issue of use of a cell site simulator without a probable cause warrant as a violation of the

reasonable expectation of privacy under the Fourth Amendment, where the cell phone subscriber was located in an apartment parking lot, and it is unknown whether he was located elsewhere earlier, such as in his apartment.

Fourth, there is a substantial question of how the Fourth Amendment applies to use of a cell site simulator to locate a phone within a residence. There is a need for guidance from this Court, for without such guidance, a cell phone user “cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.” New York v. Belton, 453 U.S. 454, 459-60 (1981).

I. Location of a cell phone user in his residence through use of a cell site simulator, without a probable cause warrant, but with a “warrant and order” issued under 18 U.S.C. sec. 2703, is barred by the Fourth Amendment.

Location of a cell phone user in his residence through use of a cell site simulator, without a probable cause warrant, but with a “warrant and order” issued under 18 U.S.C. sec. 2703, is barred by the Fourth Amendment. The issue is ripe for guidance from the Court, particularly after the Court has issued its decision in Carpenter v. United States, 585 U.S.____(2018), holding that generally, under the Fourth Amendment, a probable cause warrant is required to obtain the cell site records for a subscriber’s cell phone.

The appellate court decision

The crux of Sanchez-Jara's case is that the cell site simulator was used to search for his cell phone, and thus himself, in his residence, a place where he had a reasonable expectation of privacy. This is not a case of the search being made on the street or in a public place. The implication of the search of Sanchez's residence is that, just as in Kyllo, use of technology has enabled a search of a home that otherwise could not be searched without a physical intrusion. See Kyllo v. United States, 533 U.S. 27 (2001).

In its decision, the Seventh Circuit avoided this question entirely. Nowhere does the Seventh Circuit include the information that the cell phone was found inside a residence. The fact of the probing of a residence for a cell phone is the fundamental basis of this case.

The Seventh Circuit decision discusses the standard for a section 2703(d) order and probable cause warrant, and appears to conclude that the difference is meaningless. This is contrary to the Fourth Amendment. The appellate court avoids the issue of a general search with a discussion of tangential historical issues.

The issues in this case are of significance in the digital age. They need to be addressed so that the public, and law enforcement, consistently in the different circuits, know what rights and obligations they each have.

General principles

The recent Supreme Court decision in Carpenter v. United States, 585 U.S. ____ (2018) interprets the Fourth Amendment in light of modern times. The issue was whether the Fourth Amendment requires a probable cause warrant, as compared to a section 2703 order, to obtain cell phone location records. In holding that a probable cause warrant was required, Carpenter set out an interpretation of basic legal principles and how they are to be interpreted in the modern electronic age.

Carpenter notes that decisions preceding the cell phone age still apply:

The Fourth Amendment protects not only property interests but certain expectations of privacy. Katz v. United States, 389 U.S. 347, 351 (1967), cited in Carpenter v. United States, 585 U.S. ____ (2018), slip op. at 5.

If the expectation of privacy is "one that society is prepared to recognize as reasonable," governmental intrusion into that sphere generally is a search and requires a probable cause warrant. Smith v. Maryland, 442 U.S. 735, 740 (1979), cited in Carpenter v. United States, 585 U.S. ____, slip op. at 5.

The Fourth Amendment seeks to secure "the privacies of life" against "arbitrary power." Boyd v. United States, 116 U.S. 616, 630 (1886), cited in Carpenter v.

United States, 585 U.S. ____, slip op. at 6. Relatedly, the aim of the Framers was “to place obstacles in the way of a too permeating police surveillance.” United States v. Di Re, 332 U.S. 581, 595 (1948), cited in Carpenter v. United States, 585 U.S. ____, slip op. at 6.

The ubiquity of cell phones

Because cell phones are ubiquitous, the question presented concerning search of cell phones is an important federal question. Cell phones are so common that the Court has already observed that cell phones “are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important part of human anatomy.” Riley v. United States, 134 S.Ct. 2473, 2485 (2014). They are also archives of a person’s life. “[I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives - from the mundane to the intimate.” Riley v. United States, 134 S.Ct. at 2490. In a country of 326 million people there are 396 million cell phone service accounts. Carpenter v. United States, 585 U.S. ____, slip op. at 1.

The cell site simulator

Cell site simulators are instruments of search. Because of government secrecy, what a cell site simulator does is a hazy question.

The dissent in United States v. Patrick, 842 F.3d 540, 547 (7th Cir. 2016) observed that the Stingray “is much more than a high-tech pen register” and set out some of the qualities of a cell site simulator:

Depending on the particular features of the surveillance device and how they are configured by the operator, IMSI [international mobile subscriber number] catchers can be used to identify nearby phones, locate them with extraordinary precision, intercept outgoing calls and text messages, as well as block service, either to all devices in the area or to particular devices.” Stephanie K. Pell & Christopher Soghoian, *Your Secret Stingray’s No Secret Anymore: The Vanishing Government Monopoly over Cell Phone Surveillance and Its Impact on National Security and Consumer Privacy*, 28 HAR. J.L. & TECH. 1, 11-12 (2014), cited in United States v. Patrick, 842 F.3d at 547.

When a cell site simulator comes across the target phone’s signal, it grabs it and holds on to it. The simulator then reports general location information and signal strength, which can be used to locate the target phone’s real location. Once the cell site simulator grabs the target phone, the target phone is prevented from communicating with an actual tower. Prince Jones v. United States, No. 15-CF-322 (D.C. 2017), slip op. at 7-8.

When a cell phone attaches itself to a cell site simulator, it identifies itself by phone number and various codes, including its IMSI number. Prince Jones v. United States, No. 15-CF-322 (D.C. 2017), slip op. at 8-9.

In summary, the cell site simulator compels the cell phones within its search radius to disconnect from cell site towers and to

connect to the cell site simulator. The cell site simulator then seizes data from the cell phone.

The rule against warrantless searches of cell phones

A warrant is generally required before a search of a cell phone, even when a cell phone is seized incident to an arrest. Riley v. United States, 134 S.Ct. at 2493. The warrant requirement is an important part of our machinery of government, not merely an inconvenience to be somehow weighed against the claims of police efficiency. Riley v. United States, 134 S.Ct. at 2493.

Use of the cell site simulator was a search of both the residence of Sanchez-Jara, and a search of the cell phone itself. It was a search of the residence just like the use of thermal imaging was a search of a residence in Kyllo. Kyllo v. United States, 533 U.S. 27. Agents might as well have climbed through the window of the residence and gone down to the basement apartment to check if Sanchez Jara had the cell phone they were interested in.

It was a search of Sanchez-Jara's cell phone just like the search of a cell phone in Riley. Riley v. United States, 134 S.Ct. 2473. Agents electronically connected the cell site simulator to the phone and snooped in it for the information they wanted, the IMSI number, and whatever else they did not document.

No probable cause warrant

The search was done without a probable cause warrant. "Reasonable grounds" for believing that records were "relevant and

material to an ongoing investigation” falls well short of the probable cause required for a warrant. Carpenter v. United States, 585 U.S. at ____, slip op. at 18-19.

No extension of Smith and Miller

In Carpenter v. United States, the Court declined to extend the third-party principle of Smith v. Maryland, 442 U.S. 735 (1979) and United States v. Miller, 425 U.S. 435 (1976) that certain records were business records resulting from information voluntarily turned over to third parties. Carpenter v. United States, 585 U.S. at ____ (slip op. at 4). Carpenter held that because of the unique nature of cell phone records, the fact that information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection. Carpenter v. United States, 585 U.S. at ____, slip op. at 11.

Reasonable expectation of privacy in location

A person has a reasonable expectation of privacy in the record of his physical movements as captured through cell site location information; in Carpenter’s case, obtaining of those records was a search. Carpenter v. United States, 585 U.S. at ____, slip op. at 11. Such a search requires a probable cause warrant, not just a section 2703(d) order. Carpenter v. United States, 585 U.S. at ____, slip op. at 18-19.

In Prince Jones v. United States, No. 15-CF-322 (D.C. 2017), the warrantless real time tracking of a cell phone with a cell site

simulator without first obtaining a warrant was held to violate the Fourth Amendment. An individual having a certain cell phone number, and the two victims' cell phones, was wanted for sexual assault. Law enforcement first determined his general location from real time geographic coordinates provided by the telecommunication provider. The police used a cell site simulator to determine the precise location of the suspect's phone. It led them to Prince Jones sitting in a parked Saturn. Inside the car law enforcement found the complainants' and the suspect's cellphones, along with a folding knife. Prince Jones v. United States, No. 15-CF-322, (D.C. 2017), slip op. at 5-7. The court held that use of the cell site simulator without first obtaining a warrant was a warrantless search made in violation of the Fourth Amendment. Prince Jones v. United States, No. 15-CF-322, (D.C. 2017), slip op. at 3.

Illustrative of the timeliness of the issue, in State of Maryland v. Andrews, the Maryland court held that people have an objectively reasonable expectation of privacy in real-time cell phone location information, and held that use of a cell site simulator generally requires a valid search warrant. State of Maryland v. Andrews, 227 Md.App. 350, 134 A.3d 324, 327 (Md.App. 2016).

The reasonable expectation of privacy

In Katz, the Court announced the "reasonable expectation of

privacy" principle derived from the Fourth Amendment. Katz v. United States, 389 U.S. 347, 360 (1967). Just as Katz had a reasonable expectation of privacy on a coin-operated public phone in a phone booth, Sanchez-Jara has a reasonable expectation of privacy with his cell phone in his basement apartment residence.

In Karo, the Court reiterated the sanctity of the home against government intrusion: "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of government intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle." United States v. Karo, 468 U.S. 705, 714 (1984).

Karo went on to hold that monitoring a beeper required a warrant when the monitoring revealed information that could not be obtained through visual surveillance. United States v. Karo, 468 U.S. at 714. Sanchez-Jara finds himself in the same situation as Karo - subjected to government monitoring without a warrant. As in Karo, while the monitoring of the cell phone (instead of a beeper) was less intrusive than a full-scale search, it was still revealing a critical fact about the interior of the premises, and a probable cause warrant was necessary. See United States v. Karo, 468 U.S. at 715.

Kyllo v. United States held that a "Fourth Amendment search

occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." Kyllo v. United States, 533 U.S. 27, 33 (2001). At the core of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Kyllo v. United States, 533 U.S. at 31.

These are the principles that Sanchez-Jara relies upon. When in his home, early in the morning, he cannot be more dependent on his expectation of privacy. He, as everyone else who goes home and shuts the door, has retreated from the cares of society and is at home free from government intrusion. However, that freedom from intrusion is not what he enjoyed, as the government used its cell site simulator to invade that space and search for a cell phone and remove information from the cell phone.

That intrusion was not reasonable because the government had not obtained a probable cause warrant. His situation is similar to that of Kyllo where Kyllo's home was effectively searched without a probable cause warrant through use of thermal imaging. The evidence seized and the statements made are fruit of the poisonous tree. See Wong Sun v. United States, 371 U.S. 471 (1963).

Conclusion

Use of a cell site simulator to search a residence was a search requiring a probable cause warrant. No such warrant was obtained, and consequently the search was in violation of the

Fourth Amendment. The fruits of the search, which are the Sanchez-Jara's location and ultimately his statements and the physical evidence seized, should be suppressed.

II. Even if a probable cause warrant had been obtained for use of a cell site simulator, use of the device would have resulted in a general search barred by the Fourth Amendment.

Even if a probable cause warrant had been obtained for use of a the cell site simulator, use of the device would have resulted in a general search barred by the Fourth Amendment.

The general search

The Fourth Amendment was designed to end general searches.

The Fourth Amendment limitation states:

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Fourth Amendment, U.S. Const. amend. IV.

The Amendment originated in the American colonial experience, and the colonists' opposition to "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed". Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978). The "Fourth Amendment's commands grew *** out of the colonists' experience with the writs of assistance ...[that] granted sweeping power to customs officials... to search at large for smuggled goods". Marshall v. Barlow's, Inc., 306 U.S.

at 311.

The Fourth Amendment protects the right of people to be secure in their person, houses papers, and effects, against unreasonable searches and seizures. The basic purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." Carpenter v. United States, 585 U.S.____, slip op. at 4.

The Fourth Amendment was a response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Riley v. California, 134 S.Ct. at 2494.

Here, the "Warrant and Order" was a general warrant. By its nature, use of the cell site simulator cannot meet the particularity requirement of the Fourth Amendment. To satisfy the particularity requirement, when a search involves multiple separate residences, the warrant must specify the precise unit that is the subject of the search. United States v. White, 416 F.3d 634, 637 (7th Cir. 2005). Probable cause must be shown to search each residence, and a warrant to search an entire building with multiple separate units is void. United States v. Hinton, 219 F.2d 324, 326 (7th Cir. 1955).

While the government argues that it had a warrant, what it had was a general warrant, not a probable cause warrant, and what the

government did was a general search. The Fourth Amendment bars such activity. The statements made by and the evidence seized from Sanchez-Jara are fruit of the poisonous tree. See Wong Sun v. United States, 371 U.S. 471 (1963).

Conclusion

The search was a general search, with the warrant lacking in particularity, and in violation of the Fourth Amendment. The fruits of the search, which are the defendant's statements and the physical evidence seized, should be suppressed.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant a writ of certiorari to review the decision below.

Respectfully submitted,

FEDERAL DEFENDER PANEL
ATTORNEY PROGRAM
John F. Murphy
Executive Director

Dated: August 9, 2018

s/John T. Kennedy
John T. Kennedy
Panel Attorney, Federal
Defender Program
820 Davis Street, Suite 434
Evanston, Il 60201
(847) 425-1115
Email: kennedy3317@aol.com
Counsel for Juan Manuel
Sanchez-Jara

