No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2018

WILLIAM PAUL COX, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

ANTHONY R. GALLAGHER
Federal Defender
*MICHAEL DONAHOE
Deputy Federal Defender
Federal Defenders of Montana
50 West 14th Street, Suite 1
Helena, MT 59601
Telephone: (406) 449-8381
*Counsel of Record

SUBMITTED: June 4, 2019

QUESTION PRESENTED

WHETHER PETITIONER, AN ARRESTED AND PREVIOUSLY CONVICTED FELON, HAD AN ENFORCEABLE CLAIM UNDER THE STORED COMMUNICATIONS ACT FOR SUPPRESSION OF PHONE CALLS HE MADE FROM THE COUNTY JAIL WHERE THE CONTENT OF ONE OR MORE OF THOSE CALLS WAS THE ONLY PROOF SUFFICIENT TO CONVICT PETITIONER ON HIS GUILTY PLEA FOR VIOLATING 18 U.S.C. §922(g)(1), THE FELON IN POSSESSION STATUTE.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

Cases

United States Constitution

Federal Rules of Criminal Procedure

Other

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM PAUL COX, JR.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, William Paul Cox, Jr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

1. The memorandum disposition of the Ninth Circuit Court of Appeals styled as *United States v. William Paul Cox, Jr.*, No. 18-30104 (9th Cir. 2019) is unreported. A copy of it is attached in the Addendum to this petition at pages 1-2.

2. The district court written decisions by both the magistrate judge and the Article III judge are in the Addendum at pages 3-28.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's memorandum disposition was filed on March 6, 2019 (Addendum at pages 1-2). Petitioner did not file a petition for rehearing. This Court's jurisdiction arises under 28 U.S.C. §1254(1). Petitioner's petition is timely because it was placed in the United States mail, first class postage pre-paid, on June 4, 2019 and filed with the Court electronically within the 90 days for filing under the Rules of this Court (*see* Rule 13, ¶1).

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves both the due process clause and search and seizure clause of the United States Constitution, which provide:

Fifth Amendment Due Process Clause

> No person shall be held to answer for a capital, or otherwise infamous crime . . . without due process of law . . . .

Fourth Amendment Search and Seizure Clause

> 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.

FEDERAL STATUTORY PROVISION INVOLVED

This petition involves 18 U.S.C. §922(g)(1) as well as the Stored Communications Act, *see* 18 U.S.C. §2701, et. seq., and in particular the following provisions:

18 U.S.C. §922(g)(1)

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year. . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce any firearm or ammunition. . . .

18 U.S.C. §2703(a)

(a) Contents of Wire or Electronic Communications in Electronic Storage.—

A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President) by a court of competent jurisdiction. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

18 U.S.C. §2703(d)

(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 records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

18 U.S.C. §2703(e)

(e) No Cause of Action Against a Provider Disclosing Information Under This Chapter.—

No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.

18 U.S.C. §2707(a)

(a) Cause of Action.—

Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

18 U.S.C. §2708

> The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter.

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

This Petition also involves Rule 41 Fed. R. Crim. P. which is set forth in the Addendum to this Petition at pages 33-39.

STATEMENT OF THE CASE

1. Petitioner, a convicted felon, was investigated for theft by Montana authorities. While subject to this investigation a neighbor called police and reported that Petitioner was putting items in a Chevy Suburban, *that he did not own*, parked near his residence.[1] Subsequently, with probable cause to arrest him, Petitioner was taken into custody and booked into the local jail. While on the booking floor Petitioner made a phone call on a jail phone as well as other calls while incarcerated at the jail.

2. In using the jail phone Petitioner was exposed to signs near it stating that the call would be subject to recording and monitoring (Addendum at pages 33-34). Likewise, before he reached the party he was calling, Petitioner was exposed

[1] It bears immediate emphasis that the Ninth Circuit errs in its decision by finding that the Chevy Suburban was "his [Petitioner's] car". Addendum at page 2. The Chevy Suburban did not belong to Petitioner and that fact was made clear to both the district court and the Ninth Circuit.

to verbal, recorded admonitions that the calls would be recorded and perhaps monitored.

3. After connecting with the party he was calling Petitioner told that party that inside the Chevy Suburban there was a speaker box with a bag in it and inside the bag was a "boom-boom" that needed to remain there. "Boom-boom" meaning a firearm according to the government.

4. After Petitioner placed his "boom-boom" phone call law enforcement visited the website of the jail's commercial phone service provider, Securus. Armed with a password, but no warrant, law enforcement located and listened to several of Petitioner's jail phone calls stored in a digital database, including the "boom-boom" call. Subsequently law enforcement requested, and a Montana State Court issued, a search warrant for the Chevy Suburban based on the "boom-boom" phone call. (Addendum at pages 24-25). The ensuing search of the Suburban revealed a Hi-Point 40 S & W Caliber pistol; however, the firearm described in the search warrant application was a .45 caliber Taurus pistol.

5. After he was indicted for being a felon in possession of a firearm under 18 U.S.C. §922(g)(1) Petitioner moved to suppress the "boom-boom" phone call, inasmuch as he was not the owner of the Suburban and the only evidence the government had that Petitioner "possessed" a firearm was the "boom-boom" phone

call itself. After hearing and briefing, the motion was denied. (Addendum at pages 35-41). Petitioner then pled guilty under a plea agreement, reserving his right to appeal the negative, dispositive suppression ruling to the Ninth Circuit.

THE MAGISTRATE JUDGE'S DECISION

Relevant to Petitioner's petition here the magistrate judge found that the Stored Communications Act did not apply in Petitioner's case because the Lewis and Clark County Detention Center (*aka* the jail) was the "user" of Securus, the electronic communications service:

> Section 2703(a) does not apply in this case because the Lewis and Clark Detention Center is the user of the electronic communication service. The Detention Center has a contract with Securus Technologies ("Securus"), a private, contract- based provider that serves correctional facilities in both the United States and Canada. (Doc. 39 at 6). Robert Kinyon, a detective with the Lewis and Clark County Sheriff's office, testified that the criminal investigations bureau has a specific "log-in" which allows them to listen to any telephone call from the Detention Center. (Hr'g Tr. at 15:12-21). The Detention Center and the Lewis and Clark County Sheriff's Office are authorized by Securus to engage in use of the electronic communication service. As such, § 2703(a), which prevents unlawful government intrusion into a provider's stored communications, does not apply in this case. Put another way, the government need not "require" Securus to disclose its stored communications if it has access to them *as the user of Securus' services*.
>
> Addendum at page 17
> (emphasis added).

Furthermore, the magistrate judge found that even assuming State authorities did violate the SCA by failing to comply with 18 U.S.C. §2703(a) suppression of the

"boom-boom" phone call could not be a remedy by operation of 18 U.S.C. §2708, which in full provides:

> The remedies and sanctions described in this chapter [18 USCS §§ 2701 et seq.] are the only judicial remedies and sanctions for nonconstitutional violations of this chapter [18 USCS §§ 2701 et seq.].
>
> 18 U.S.C. §2708.

THE DISTRICT COURT ARTICLE III JUDGE'S DECISION

Following the lead of the magistrate judge the district court judge held that since the jail had a contract with Securus "[t]he Stored Communications Act simply [did] not apply to [Petitioner's] circumstances" (Addendum at page 27). Also, like the magistrate judge, the Article III judge held *arguendo* that even if the Stored Communications Act did apply, §2708 and the Ninth Circuit's decision in *United States v. Smith*, 155 F.3d 1051, 1056 (9th Cir. 1998) placed a total embargo on suppression as a remedy. (Addendum at page 27).

THE NINTH CIRCUIT DECISION

In a terse unpublished disposition the Ninth Circuit holds that the Stored Communications Act does apply but that under 18 U.S.C. §2708, and its decision in *Smith*, *supra*, the remedy of suppression is not available for a violation of 18 U.S.C. §2703(a).

REASONS FOR GRANTING THE WRIT

The Court should grant the petition and issue the writ to review the lower court decisions in this case because those decisions decide, erroneously, important questions of federal law that have not been but should be decided by this Court. Moreover the lower court rulings also conflict with the relevant decision of this Court.

Petitioner was arrested on April 3, 2016, by State authorities and taken to jail. It was a Sunday so he had not seen a judicial officer, been advised of his rights or been admonished of his right to counsel whether retained or appointed. In the process of booking into the jail, Petitioner was advised his phone calls would be recorded and possibly subject to monitoring. However, there was no advice in the various notices exactly who was going to record the calls and/or who might monitor them.

On April 4th, the very next day after Petitioner's arrest and incarceration, law enforcement working Petitioner's case visited the website of the vendor (Securus) that recorded Petitioner's phone calls. Armed only with a password a law enforcement officer listened to Petitioner's April 3rd call, which had been digitally recorded and stored. In that call, according to the government, Petitioner spoke in code suggesting Petitioner's knowledge of the existence of a gun and possibly drugs in a Chevrolet Suburban that Petitioner did not own. After listening to the call law enforcement sought and obtained a search warrant recounting in the warrant's

supporting affidavit the content of Petitioner's recorded "boom-boom" call on April 3rd. (Addendum at page 31).

Without legitimate consent or appropriate waiver on Petitioner's part the government claims it had an absolute right to access Petitioner's stored electronic communications. This argument promotes both bad law and bad policy. Arresting citizens for crime is an unfortunate commonplace. However until such citizen(s) are convicted by a jury or voluntarily plead guilty they are presumed innocent. The presumption of innocence is a presumption of law sufficient to acquit the accused. *Coffin v. United States*, 156 U.S. 432, 460-461 (1895). Wherefore, absent proper procedure and fair play law enforcement ought not be allowed to arrest a citizen, equip him with a phone, electronically bank calls that he pays for and on flimsy warnings convict him in court on the basis of such recordings. This is unfair and unconstitutional. *Cf. Massiah v. United States*, 377 U.S. 201 (1964) (holding that Sixth Amendment violated by law enforcement's surreptitious monitoring of defendant's meeting with co-defendant but reserving the Fourth Amendment issue for another day).

In 1986, Congress enacted the Electronic Communications Privacy Act (ECPA) intending to afford privacy protection to electronic communications. Title I amended the Wiretap Act, which previously addressed only wire and oral communications in order to include and "address[] the interception of . . . . electronic

communications." S. Rep. No. 99-541 at p. 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557. Title II of the ECPA created the SCA wherein Congress intended to "address[] access to stored wire and electronic communications and transactional records." *Id.* Moreover, courts have struggled to interpret the law in this area since the intersection of the Wiretap Act (18 U.S.C. §§2510-2520) and the SCA (18 U.S.C. §§2701-2710) "is a complex, often convoluted, area of the law" *United States v. Smith*, 155 F.3d 1051, 1055 (9th Cir. 1998).

The SCA prohibits any person or entity, which provides an electronic communication service or a remote computing service from disclosing the content of a communication while in electronic storage. 18 U.S.C. §2702. Where, as here, the communications have been in storage 180 days or less disclosure is authorized ". . . . *only* pursuant to a warrant" 18 U.S.C. §2703(a) (emphasis added). For communications in electronic storage for less than 180 days such can be disclosed ". . . *only* if the government entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication . . . . *are relevant and material to an ongoing criminal investigation*" 18 U.S.C. §2703(d) (emphasis added).

Although the Ninth Circuit *apparently* recognized that these statutory provisions are applicable to Petitioner's case and were clearly violated, it nonetheless held that Petitioner has no right of suppression by operation of 18 U.S.C.

§2708 and *United States v. Smith*, 155 F.3d, 1051 (9th Cir. 1998), which holds that §2708 prohibits suppression as a remedy. (Addendum at page 2).

The *Smith* decision does not control the outcome here because the exclusive remedies language in §2708 is confined to "nonconstitutional violations". Constitutional violations are not the same as nonconstitutional ones. Constitutional violations traditionally involve errors implicating specific provisions of the Bill of Rights, including the Fourth Amendment protection against unreasonable search and seizure *United States v. Valle-Valdez*, 554 F.2d 911 (9th Cir. 1977) (distinguishing by contrast constitutional versus nonconstitutional error); *see also United States v. Lane*, 474 U.S. 438, 446 n.9 (1986) (stating that the test for "constitutional errors is considerably more onerous than the standard for nonconstitutional errors").

In §2708 Congress carefully chose to confine the Chapter's judicial remedies to "nonconstitutional" violations. Under the maxim *expressio unis est exclusio alterius* §2708 was never intended to eliminate suppression as a remedy for a constitutional violation by a government actor. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)) ("[the] interpretive canon, expressio unius est exclusio alterius [means that] expressing one item of [an] associated group or series excludes another left unmentioned.") Therefore, in this case *expressio unius est exclusio alterius* as between constitutional versus nonconstitutional violations under §2708.

Suppression is a remedy for a constitutional violation, which is the situation we have here.

Congress has determined under the SCA that once electronic communications are recorded and stored they deserve protection under both the rubric of personal property and the rubric of privacy. Moreover, there is no categorical exception in the SCA for those in arrestee status. Furthermore simply warning an arrestee that his jail calls will be recorded and monitored fails to convey in a meaningful way that the arrestee is waiving all of the protections that the SCA affords. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) (government bears "the burden of proving that the consent was, in fact, freely and voluntarily given").

Consider it this way, 18 U.S.C. §2703 expressly provides how government investigators can access stored electronic communications. Thus the warnings typically furnished arrestees concerning jail phone privileges actually include the judicial protections set forth in §2703. In other words the fact that the calls are to be recorded and monitored at a later time does not remove the judicial protections furnished under §2703 *vis-à-vis* government actors. Therefore, the arrestee's phone calls may be accessed, so long as there is an articulated factual basis and a judicial order. This actually achieves harmony between such typical warnings and the law because the warnings embrace the judicial oversight required for stored communications under §2703 and the SCA. Furthermore, the warnings at issue in

this case did not state that law enforcement was the recorder and/or monitor of the calls, which was impossible, since Securus was the electronic services provider, not the jail.

Also insofar as Fourth Amendment rights are concerned it should be stressed even when no privacy right is implicated a trespass or interference with property rights can nevertheless implicate the Fourth Amendment. *See Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013) (trespassing at the curtilage of a home to allow a police dog to execute detection maneuvers was a search regardless whether there existed a separate expectation of privacy or not); *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (fixing a GPS device on defendant's car was both a trespass and a search).

Thus relevant here is the fact that the SCA "protects individuals' privacy *and proprietary interests*." *Theofel v. Farey-Jones*, 359 F.3d 1066, 1072 (9th Cir. 2004) (emphasis added). Put another way:

> "The [SCA] reflects Congress's judgment that users have a legitimate interest in the confidentiality of communications in electronic storage at a communications facility. Just as trespass protects those who rent space from a commercial storage facility to hold sensitive documents . . ."
>
> *Id.*

Moreover, regardless whether there is no expectation of privacy in jail calls as the Ninth Circuit's *Smith* decision holds, the SCA and the Fourth Amendment contain freestanding protections intended to guard against unreasonable interference

with these property interests. *Lavan v City of Los Angeles*, 693 F.3d 1022, 1029 (9th Cir. 2012). Furthermore, both Ninth Circuit and this Court have clearly articulated the rule that the Fourth Amendment protects both possessory and liberty interests, even when privacy rights are not implicated. *Lavan*, *supra*, 693 F.3d at 1028, *citing Soldal v. Cook County*, 506 U.S. 56, 63-64 & n.8 (1992).

Under the SCA Petitioner was "user" of an electronic communications system that generated electronic storage of the phone calls he placed from the jail, not the jail itself as the magistrate judge and the district judge erroneously held. And under the Ninth Circuit Court's decision in *Theofel*, *supra*, 359 F.3d 1066, both Petitioner's property and privacy interest were protected by the Fourth Amendment and the SCA.

Under the SCA digitally recorded phone calls gain additional privacy protection under 18 U.S.C. §2703(a). For communications stored for 180 days or less (which is the situation here) the SCA requires that the government secure a warrant using the procedures set forth in Rule 41 of the Federal Rules of Criminal Procedure, which in pertinent part provides:

(e) Issuing the Warrant.

(2) *Contents of Warrant*

> (A) Warrant to Search for and Seize a Person or Property. Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge tow home it must be returned. The warrant must command the officer to:

> (i) execute the warrant within a specified time no longer than 14 days;
>
> (ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes executing at another time; and
>
> (iii) return the warrant to the magistrate judge designated in the warrant.
>
> (B) Warrant Seeking Electronically Stored Information. A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.
>
> Rule 41(e)(2)(A) & (B) Fed. R. Crim. P. (Addendum at page 37-38).

Considering that warrants required under §2703(a) must comply with Rule 41 Fed. R. Crim. P. (or a similar state procedure) several things are evident.

First, by requiring compliance with Rule 41 Congress intends to protect stored communication behind a firewall of probable cause and judicial review. *See* Rule 41(d)(1) Fed. R. Crim. P. (Addendum at page 35). Without question, these are two of the most important boundaries historically imposed by the Fourth Amendment.

Relatedly the positive law set forth by Congress in the SCA provides a firmer basis for judicial decision-making than the guesswork involved in trying to fathom what society is or is not willing to recognize as an appropriate "expectation of

privacy." Justice Gorsuch addresses this point at length in his *dissenting* opinion in *Carpenter v. United States*, 138 S. Ct. 2206, 2261-72 (2018):

> Third, positive law may help provide detailed guidance on evolving technologies without resort to judicial intuition. State (or sometimes federal) law often creates rights in both tangible and intangible things. See Ruckelshaus v. Monsanto Co., 467 U. S. 986, 1001, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984). In the context of the Takings Clause we often ask whether those state-created rights are sufficient to make something someone's property for constitutional purposes. See id., at 1001-1003, 104 S. Ct. 2862, 81 L. Ed. 2d 815; Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 590-595, 55 S. Ct. 854, 79 L. Ed. 1593 (1935). A similar inquiry may be appropriate for the Fourth Amendment. Both the States and federal government are actively legislating in the area of third party data storage and the rights users enjoy. See, e.g., Stored Communications Act, 18 U. S. C. §2701 et seq.; Tex. Prop. Code Ann. §111.004(12) (West 2017) (defining "[p]roperty" to include "property held in any digital or electronic medium"). State courts are busy expounding common law property principles in this area as well. E.g., Ajemian v. Yahoo!, Inc., 478 Mass. 169, 170, 84 N. E. 3d 766, 768 (2017) (e-mail account is a "form of property often referred to as a 'digital asset'"); Eysoldt v. ProScan Imaging, 194 Ohio App. 3d 630, 638, 2011-Ohio-2359, 957 N. E. 2d 780, 786 (2011) (permitting action for conversion of web account as intangible property).If state legislators or state courts say that a digital record has the attributes that normally make something property, that may supply a sounder basis for judicial decisionmaking than judicial guesswork about societal expectations.
>
> *United States v. Carpenter, Gorsuch, J. dissenting*, 138 S. Ct. 2206, 2270 (2018) (emphasis added).

As this quote suggests, and the legislative history seems to bear out, 18 U.S.C. §2703 was patterned after Congress' understanding of the Fourth Amendment. *See* for example, H.R. Rep. No. 99-647 at 19 where it states that "Additional legal

protection is necessary to ensure continued vitality of the Fourth Amendment." *Also see Id.* 67-68. Thus even if the *recording* of Petitioner's phone calls falls within some sort of "consent" exception (a point we do not concede) a warrant was nevertheless required in order for law enforcement to access those *stored phone calls* as part of law enforcement's investigation of Petitioner's alleged criminal activities. *See e.g.* 18 U.S.C. §2703(d) "contents of a [stored] wire or electronic communication . . . [must be] relevant and material to an ongoing criminal investigation" (*see supra*, at page 3).

CONCLUSION

WHEREFORE, the Court should grant this petition and set the case down for full briefing and oral argument.

Respectfully submitted this 4th day of June, 2019.

MICHAEL DONAHOE
Deputy Federal Defender
Counsel of Record