

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

THAM BUI, PETITIONER,

VS.

CALIFORNIA, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

SIXTH DISTRICT APPELLATE PROGRAM

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QUESTIONS PRESENTED

Did petitioner have a reasonable expectation of privacy in the contemporaneous Global Positioning System coordinates transmitted by the petitioner's cell phone to the telephone carrier?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. The parties to the proceeding below were the petitioner, Tham Bui, and respondent the People of the State of California, represented by the Office of the Attorney General, by Deputy Attorney General Bruce Ortega.

RELATED CASES

Petitioner was convicted on January 12, 2017 in the California Superior Court in the County of Santa Clara, *People v. Bui*, No. C1502175.

The California Court of Appeal affirmed on March 25, 2019 in an unpublished opinion. *People v. Bui*, Mar. 25, 2019, H044430, 2019 Cal. App. Unpub. LEXIS 2031 (2019).

The California Supreme Court denied review in an unpublished decision on July 10, 2019, *People v. Bui*, S255461, 2019 Cal. LEXIS 5037 (2019). No petition for rehearing was filed.

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The unpublished opinion of the California Court of Appeal, the highest state court to review the merits after judgment, appears at Appendix A to the petition and can be found at *People v. Bui*, 2019 Cal. App. Unpub. LEXIS 2031 (2019).

GROUND FOR JURISDICTION

The date the California Court of Appeal decided the case was March 25, 2019. A timely petition for review was denied by the California Supreme Court on July 10, 2019, and a copy of the order appears at Appendix C. *People v. Bui*, 2019 Cal. LEXIS 5037 (2019). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution:

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.

The Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROCEDURAL CHRONOLOGY

An information was filed on May 19, 2016 concerning four incidents.

As to a burglary incident, it alleged Bui committed conspiracy to commit murder, Cal. Pen. Code §§ 182(a)(1), 187(a), residential burglary with an occupant present, §§ 459, 460(a), 667.5(c)(21), and assault with a deadly weapon, § 245(a)(1). As to a residential arson, he was accused of residential arson with use of an accelerant, §§ 451(b), 451.1(a)(5), and residential burglary with an occupant present. As to an arson of a car, he was charged with arson of property, § 451(d). As to an acid attack, he was charged with aggravated mayhem, § 205, and throwing a caustic chemical to injure, § 244.

It was also alleged he suffered two prior “strike” convictions, §§ 667(b)-(i), 1170.12, two prior serious felony convictions, § 667(a), a prior violent felony conviction, § 667.5(a), and two prior prison commitments, § 667.5(b). 1CT 23-32.¹

Bui moved to suppress evidence seized as a result of the police using his cell phone relaying real-time GPS coordinates to the telephone company.

¹In California appellate practice, the clerk’s transcript includes the documents in the court file. The transcript of the hearings is called the Reporter’s Transcript. References to CT refers to the clerk’s transcript and RT to the reporter’s transcript.

2CT 343-349. Once the police located him from the GPS data relayed through the phone carrier, his cell phone was seized, as well as a car he was using and the property within it. The car was traced to the registered owner, who had not reported it stolen. He said he and Bui used the car in the vehicle arson. Bui argued he had a reasonable expectation of privacy in the cell phone's real-time GPS data under the Fourth Amendment and there were not exigent circumstances to justify dispensing with a warrant. 7RT 484-489. The court denied the motion, finding there were not exigent circumstances but he did not have a reasonable expectation of privacy in the GPS data from his cell phone. 7RT 602, 10RT 963-964.

A jury convicted Bui of the counts concerning the first three incidents but acquitted him of the charges concerning the acid attack. The court found the prior convictions to be true. 2CT 457-459.

On January 12, 2017, the court sentenced Bui to serve 155 years to life consecutive to 48 years. App. B; 2CT 566-569, 570-572.

A notice of appeal was filed on January 13, 2017. 2CT 573. The court of appeal affirmed on March 25, 2019 but made some minor modifications to the sentence, which became 125 years to life consecutive to 41 years. App. A at p. 66. The California Supreme Court denied review on July 10, 2019. App.

C.

STATEMENT OF EVIDENCE

1. Residential burglary

Robert Styre broke into the home of C.N. in the morning of November 17, 2013 and beat her with a metal bat before he was subdued by her adult son; Styre was arrested. 4RT 214-217, 8RT 664-665. Styre's mother reported that he left her home earlier that morning with a person named Bui, and at one point she identified petitioner to be Bui. 4RT 192, 194, 5RT 340-341; but see 4RT 202 (not identifying Bui in court). Later that day, Bui returned to Styre's mother with Styre's wallet and cell phone. 4RT 197. After Syre was convicted of his crimes, he wrote to his mother stating he was paid to attack C.N. 2CT 296.

2. Residential arson

Bui had been C.N.'s boyfriend. He was arrested about a month later on an unrelated matter, and he was in jail from November 22, 2013 to November 25, 2014. 8RT 671, 9RT 928-929. C.N. picked Bui up from the jail when he was released, and their relationship resumed for a couple of days. 8RT 677-678. She then ended the relationship, which upset Bui. 8RT 679.

A few weeks later, C.N.'s house burned down. 8RT 681. She said she spent the night before with another man in Gilroy. 8RT 681. She told no one where she was. 8RT 682. She returned home the next morning at about 7:30

or 7:45 to see her house burning. 8RT 682. Her adult son said he was sleeping when he heard what sounded like a water heater explosion. (5RT 292.) There was a lot of smoke and flames. 5RT 292. He jumped out of the second story window. 5RT 292. According to investigators, the fire was caused by arson. 6RT 384-386.

San Jose Police Officer Lauren Erickson said she was speaking to C.N. at about 1 p.m. the day of the fire, 7RT 561, which was on December 29, 2014, 7RT 560. During the discussion, C.N. received a text message from a certain phone number about sleeping with a man in Gilroy. 7RT 561-564, 8RT 682. San Jose Police Officer John Figone believed the number belonged to Bui. 7RT 581; see also 8RT 631.

3. Car arson

a. Trial testimony

C.N. moved to a new home. 8RT 687. In the early morning of January 14, 2015 at 2 a.m., she heard an explosion. 8RT 690. Her Lexus was on fire. 8RT 6910-691. A surveillance video from an apartment complex showed a Volkswagen Beetle arrive at 1 a.m. 5RT 309, 316. Two men got out of the car and went to C.N.'s SUV, and the SUV was then on fire. 5RT 318. Investigators determined the cause of the fire was arson. 6RT 391.

Erickson investigated the car fire on January 14, 2015. 7RT 570. She wanted to find Bui, so she decided to “ping” his cell phone. 7RT 571. She received his GPS coordinates. 7RT 572. She found Bui in the Beetle, and he was arrested. 7RT 573. When Bui was arrested, he was asked if he needed any of his belongings in the Beetle, which led to the officers seizing a cell phone. 7RT 576-577.

The Beetle was impounded. 7RT 583-584. The police found in the car a blue hooded jacket, 7RT 585, and a red gas can, 7RT 587, which connected him to both arsons.

The cell phone found in the Beetle was inspected. 8RT 620. There was a note on the phone on January 4, 2015 at 12:09 p.m. Pacific Time, “text Monday go finish the job a must.” 8RT 622-623. January 5 was a Monday. 9RT 931. There was also a web search from the cell phone for a San Jose car fire. 8RT 624.

The police traced the Beetle to Thanh Nguyen, who owned it. He testified he was homeless. 6RT 411. He hung out with Bui for about a week. 6RT 406-407. He said Bui drove Nguyen’s Beetle with Nguyen and a person named Hai to a Lexus SUV. 6RT 416-418. They had a liter of gasoline in a milk carton, and they lit the car on fire. 6RT 421-422. They left the scene, and later Bui drove the Beetle off without Nguyen. 6RT 405, 406, 410.

b. Motion to suppress evidence

Before the testimony at trial, the court held a hearing to suppress evidence outside the presence of the jury. Officer Figone investigated both fires. 6RT 440. His shift started at 7 a.m. 6RT 440. C.N. called him the morning on January 14, 2015, and she expressed concern for her safety. 6RT 440-442, 450. He met C.N. that afternoon, and she appeared to be afraid and anxious. 6RT 442, 450. She told him a call was made to the office where she worked that the caller was looking for the owner of the Lexus. 6RT 443. A short time later, a Vietnamese male went there looking for the owner of the Lexis and left a note how to reach him. 6RT 444. Figone referred C.N. to a victim services organization for a safe place to go. 6RT 444-445. Erickson said it was her understanding a safe place was found. 6RT 464.

Figone went to C.N.'s place of work, and employees there confirmed a man, not Bui, came that morning looking for the owner of the Lexis. 6RT 451. Figone went to the scene of the car fire and then returned to his office. 6RT 452.

Figone later learned C.N. received a text asking something to the effect of why were "the pigs" bothering "my family." 6RT 445, 446; see also 465. Figone believed this showed the suspect knew the police were investigating

the incident.² 6RT 446. Figone relayed the information to Erickson, who contacted the cell phone provider (AT&T) for the number believed to be Bui's. 6RT 448, 453. Figone described his supervisor being concerned for C.N.'s safety and demanding frequent updates that day. 6RT 453-454.

Erickson had not been involved in the investigation on January 14 until about 4 or 5 p.m. Erickson had spoken with C.N. and had learned of the text concerning her being in Gilroy. 6RT 456-457. C.N. did not recognize the telephone number when the text was sent. 6RT 456. Erickson acknowledged there were no texts that were considered to be threatening. 6RT 465.

Erickson asked AT&T for the current GPS coordinates of the cell phone. 6RT 457, 458-459, 467. She could not say this was the number that sent the text message about the "pigs." 6RT 467. She thought the phone was being used by Bui, but she knew he frequently changed phones. 6RT 468. She relayed "very generally" the information she received from Figone, and swore there was an actual threat to life in a five minute conversation. 6RT 458.

Erickson acknowledged that a written request normally must be made in order to obtain someone's cell phone data. But she employed a special procedure to obtain current GPS data without a written request or a warrant based on exigent circumstances. 6RT 466, 468. She never used this procedure

²Figone testified C.N. also received the text concerning her being in Gilroy 6RT 447, but he was not aware of that text on January 14. 6RT 454.

before. 6RT 468. She did not seek a warrant because it was evening, and there was a belief based on the events of the last couple of weeks, the events of the day, and the text messages that Bui needed to be in custody. 6RT 466. She acknowledged there was a judge available to issue a warrant, even at night. 6RT 468.

When Erickson spoke with a person at AT&T, she provided Figone's email address, and AT&T sent the GPS coordinates by email every 15 minutes of the cell phone. Someone else learned Bui took the Beetle, though it was not officially reported stolen. 6RT 462. Figone spoke to Bui's probation officer in San Bernardino County, who said would prepare a warrant for his arrest for absconding. 6RT 455.

From the GPS data, the police were able to find it in about an hour and a half with him in possession of the Beetle. 6RT 459-460. The car was parked in a public place. 6RT 460. Figone said Bui was arrested at around 8 or 9 p.m. on the warrant. 6RT 454-455.

Officer Dale said he and other officers arrested Bui around 8:15 p.m. on January 14, 2015. 6RT 470. Dale asked Bui if he wanted his cell phone, 6RT 472, and if there was anything he needed from the car, and Bui asked for his cell phone, 6RT 470-471. Bui described it as a flip phone, which Dale found in the car. 6RT 471. Dale also found an iPhone, which Bui said was not

his. 6RT 471.

4. Acid attack

In March 2016, C.N. was working at the front desk of a doctor's office. 8RT 692-693. A white woman entered the lobby area of the office, asked for her, and splashed acid onto C.N.'s face, on top of her head, and on her chest. The woman who threw the acid was never found. 7RT 579-580.

Bui was in custody during the attack. Bui did make some calls from the jail using another inmate's identification number. 7RT 522. When Bui had been in prison, officials intercepted a letter from him telling the recipient to no longer accept collect calls from a certain cell phone. 8RT 551. It thus appeared that he was part of a group passing cell phones from one inmate to another, though possessing cell phones were against prison rules. 8RT 551. He was found not guilty of the charges concerning this incident.

REASONS FOR GRANTING CERTIORARI

The trial court found there were not exigent circumstances to justify failing to seek a warrant to obtain the current GPS date from Bui's cell phone. 10RT 964. It denied his motion to suppress evidence on the ground that there was not a reasonable expectation of privacy. 7RT 602, 10RT 963. The California Court of Appeal acknowledged that this Court held in *Carpenter v. United States*, __ U.S. __, 138 S.Ct. 2206, 2220 (2018) that a person has a

reasonable expectation in cell tower location information collected over several days which can be used to determine where a person had been during the time period. App. A at 30-33. The Court of Appeal, however, noted *Carpenter* did not deal with real-time location data. App. A at 33. It decided that brief use of contemporaneous GPS data to locate a person did not constitute a search. App. A at 39-40.

This case concerns the question left open in *Carpenter*, 138 S.Ct. 2206, whether there is a reasonable expectation of privacy in real-time GPS data conveyed by an individual's cell phone to the telephone carrier. In *Carpenter*, this Court held a person has a reasonable expectation of privacy in the historical cell tower coordinates transmitted by his cell phone to the telephone carrier. "Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.' " *Id.*, at 2217 (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)). "These location records 'hold for many Americans the 'privacies of life.' ' " *Id.* (quoting *Riley v. California*, 573 U.S. 373, 403 (2014)). A "cell phone – almost a 'feature of human anatomy,' . . . tracks

nearly exactly the movements of its owners.” *Id.*, at 2218. “And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and effective compared to traditional investigative tools. With the click of a button, the Government can access each carrier’s deep repository of historical location information at practically no expense.” *Id.*, at 2217-2218. “Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.” *Id.*, at 2218.

Carpenter concerned historical cell tower data that could be used to track a person’s whereabouts over a period of days or even years. *Jones*, 565 U.S. 400 concerned a GPS tracker on a car. Police officers walked onto the defendant’s driveway and attached a GPS monitor to his car. *Id.*, at 403. The holding of this Court was that “the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’” *Id.* at 404. The Court’s conclusion rested on the officer’s entry on private property to install the GPS monitor. *Id.*, at 404-408. But a majority of the Court was alarmed at the intrusiveness of a GPS monitor.

Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, wrote in a concurring opinion, “[r]ecent years have seen the emergence of many new

devices that permit the monitoring of a person's movements.” *Jones*, 565 U.S. at 428 (Alito, J., concurring). “Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users” *Id.* They seemed inclined to say there would not be a reasonable expectation of privacy in short-term monitoring, but there would be in long-term monitoring. *Id.* at 430.

There are reasons to be concerned about historical cell tower data. “The retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person’s movements were limited by a dearth of records and the frailties of recollection. With access to [cell tower data], the Government can now travel back in time to retrace a person’s whereabouts” *Carpenter*, 136 S.Ct. at 2218.

But there are reasons to be more concerned about real-time GPS data. Cell tower “data is less precise than GPS information.” *Carpenter*, 136 S.Ct. at 2218. A fifth justice concurring in *Jones*, 565 U.S. 400, Justice Sotomayor, saw problems with even short-term GPS monitoring. “In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* [v. *United States*, 398 U.S. 347 (1967)] analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a

person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.* at 415 (Sotomayor, J concurring). "The government can store such records and efficiently mine them for information years into the future. [Citation.] And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.' " *Id.* at 415-416. Justice Sotomayor's concurring opinion was cited in the majority opinions of *Riley*, 573 U.S. at 396 and *Carpenter*, 138 S.Ct. at 2217.

Sotomayor in *Jones*, 565 U.S. 400 noted an additional problem, which was echoed by the majority's finding that there was an illegal search because the police intruded on Jones's possessory interest by walking on his driveway. She observed, "[t]he Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection." *Id.* at 413, italics deleted (Sotomayor, J., concurring). The same problems occurred here. The police usurped Bui's cell phone for purpose of conducting surveillance on him, "thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection." *Id.* The trespassory

intrusion on to Bui's cell phone to obtain his GPS coordinates might have been short-term, but it was without judicial oversight and resulted in recording his every move in violation of a reasonable person's expectation of privacy.

The justification of permitting access of information in the cases concerning a pen register and the like was that the suspect voluntarily provided the information to the third party. *See, e.g., Smith v. Maryland* 442 U.S. 735, 743-744 (1979). But there was no evidence Bui voluntarily disclosed his location to the cell phone company. There was no evidence he even used his cell phone when he was being surveilled. Many people are unaware that the coordinates are being monitored by the cell phone company automatically without their consent or knowledge. And even those who are aware would expect the information not be shared to law enforcement, at least not without a lawful warrant or true exigent circumstances.

Cell phone data is qualitatively different because virtually everything someone does is recorded by the cell phone. While it has always been possible for a police officer to follow someone around, practical limitations provided reasonable protections. With cell phones automatically collecting and transmitting the data, often without the person's knowledge or assent, practical limitations protecting people's privacy would be eliminated. If the Fourth Amendment permits the government to access without cause anyone's

contemporaneous cell phone data possessed by the phone carrier, the Fourth Amendment would cease to function.

A person has a reasonable expectation of privacy that his or her cell phone would not be commandeered by law enforcement to conduct surreptitious surveillance.

CONCLUSION

For the foregoing reasons, Mr. Bui respectfully requests this Court to grant writ of certiorari.

DATED: August 27th, 2019

Respectfully submitted,
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