RECENT CASES

CRIMINAL PROCEDURE — FOURTH AMENDMENT — SIXTH CIRCUIT HOLDS THAT "PINGING" A TARGET'S CELL PHONE TO OBTAIN GPS DATA IS NOT A SEARCH SUBJECT TO THE WARRANT REQUIREMENT. — *United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012), *reh'g and reh'g en banc denied*, No. 09-6497 (6th Cir. Sept. 26, 2012).

In *United States v. Jones*,[1] the Supreme Court faced the question of whether the Fourth Amendment applies to global positioning system (GPS) tracking of criminal suspects. While the Court unanimously held that the tracking required a warrant, the Justices split 5–4 over the rationale: Justice Scalia's majority opinion based the decision on the physical trespass of placing the GPS tracker on the suspect's car,[2] while Justice Alito's concurrence applied the "reasonable expectation of privacy" test derived from *Katz v. United States*.[3] Recently, in *United States v. Skinner*,[4] the Sixth Circuit held that using the GPS capabilities of a target's cell phone to track his location did not constitute a Fourth Amendment search, hinging the decision on the lack of a reasonable expectation of privacy under the *Katz* test.[5] By not engaging with the actual process by which police "ping" cell phones for GPS data, however, the Sixth Circuit missed a chance to decide the case more narrowly. Because pinging is an active process that could be considered an electronic trespass, the court could have selected an approach that under *Jones* might have forestalled its *Katz* analysis entirely and allowed Congress to set the standards in this evolving area of law and technology.

In early 2006, law enforcement agents in Tennessee arrested Christopher Shearer, a member of a marijuana-trafficking conspiracy run by James Michael West.[6] Once Shearer agreed to become a criminal informant for the Drug Enforcement Administration (DEA), agents discovered that West was using disposable cell phones, registered under false names and purchased by another conspirator, to coordinate ship-

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[1] 132 S. Ct. 945 (2012).

[2] *See id.* at 949.

[3] *See id.* at 959–60 (Alito, J., concurring in the judgment) (citing Katz v. United States, 389 U.S. 347 (1967)). The *Katz* test asks first whether the defendant had a subjective expectation of privacy, and second whether society accepts that expectation as "reasonable." *See Katz*, 389 U.S. at 361 (Harlan, J., concurring); *see also* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 39–40 (9th ed. 2010).

[4] 690 F.3d 772 (6th Cir. 2012) , *reh'g and reh'g en banc denied*, No. 09-6497 (6th Cir. Sept. 26, 2012).

[5] *See id.* at 777.

[6] *Id.* at 775.

ments of marijuana from Arizona to Tennessee by a courier unknown to the informant.[7] After obtaining the number of the courier's disposable cell phone and a description of the vehicles accompanying one of the shipments, the DEA agents procured a court order (but not a search warrant) to obtain GPS coordinates from the courier's phone via a ping, or signal requesting those coordinates, sent by the phone company to the phone.[8] Using the data received in response to the ping, the agents followed the courier's movement and realized that he was going to stop overnight in Texas.[9] The agents alerted colleagues who were near the rest stop where the courier had stopped for the night; those colleagues then arrested the courier and identified him as Melvin Skinner.[10] Skinner was indicted for conspiracy to distribute more than 1000 kilograms of marijuana.[11]

Before trial, Skinner sought to suppress the evidence and statements that grew out of the search sparked by the pinging of the phone.[12] Judge Phillips of the Eastern District of Tennessee adopted the recommendation of Magistrate Judge Guyton, who began his analysis by stating that cell-site data is "[s]imply data sent from a cellular phone tower to the cellular provider's computers."[13] Because "neither party argued or briefed the issue of whether a search actually occurred," the court assumed that a search had taken place.[14] The magistrate judge recommended that Skinner's motion be rejected on two grounds: first, because Skinner lacked standing to challenge the search,[15] and second, because he lacked a reasonable expectation of privacy under the *Katz* test.[16] Following the district court's adoption

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[7] *Id.*

[8] United States v. Skinner, No. 3:06-CR-100, 2007 WL 1556596, at *3–4 & n.9 (E.D. Tenn. May 24, 2007).

[9] *Id.* at *4 & n.10.

[10] *Id.* at *4–6.

[11] *Id.* at *1; *see also* 21 U.S.C. § 841(a)(1) (2006) (distribution of a controlled substance).

[12] *Skinner*, 2007 WL 1556596, at *1. Skinner argued, among other things, that the GPS data was obtained pursuant to a warrantless search, that there was no applicable good faith exception to the exclusionary rule, and that all evidence against him should be suppressed as fruits of an illegal search. *See id.* at *13.

[13] *Id.* (alteration in original) (quoting United States v. Forest, 355 F.3d 942, 949 (6th Cir. 2004)) (internal quotation marks omitted). Notably, the cell-site data at issue in *Forest* is distinct from the GPS data actually used to track Skinner; while cell-site data relies on regular communications between a phone and nearby towers, GPS systems run independently and do not normally communicate any information.

[14] *Id.* at *14.

[15] *See id.* at *14–15. The magistrate found that Skinner lacked standing because Skinner had not purchased the phone and it was not registered in his name. *Id.*

[16] *See id.* at *16–17. In reaching this finding, the magistrate noted both that cell phones are subject to tracking in a variety of circumstances and that this particular phone was used on public thoroughfares, registered under a false name, and employed solely for illegal activities. *See id.*

of the magistrate's recommendation, Skinner went to trial and was convicted.[17]

The Sixth Circuit affirmed.[18] Writing for the panel, Judge Rogers[19] held that "[t]here is no Fourth Amendment violation because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone."[20] He added that "[i]f a tool used to transport contraband gives off a signal . . . certainly the police can track the signal."[21] Looking to *United States v. Knotts*,[22] the panel found that the location data could have also been obtained via mere visual surveillance.[23]

The panel distinguished the instant case from *Jones* on two grounds. First, while "[t]he majority in *Jones* based its decision on the . . . 'physical[] occup[ation of] private property for the purpose of obtaining information' . . . [t]hat did not occur in this case,"[24] thus making *Jones* inapplicable. Second, the surveillance in *Skinner* lasted only three days, and thus was not so comprehensive as to be unreasonable.[25] The panel relied partially on *Jones*'s discussion of *United States v. Karo*,[26] a case in which the government used a beeper installed in a can of ether to track the defendant.[27] Unlike in *Jones*, the device in *Karo* had been installed with the consent of a government informant before the barrel was transferred to the defendant, so no trespass (and thus no search) occurred.[28] Analogizing to this fact, the *Skinner* panel stated that "the Government never had physical contact

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[17] *Skinner*, 690 F.3d at 777.

[18] *Id.*

[19] Judge Rogers's opinion was joined in full by Judge Clay and in part by Judge Donald.

[20] *Skinner*, 690 F.3d at 777.

[21] *Id.*

[22] 460 U.S. 276 (1983). In *Knotts*, the Supreme Court held that the police had not engaged in a Fourth Amendment search when they tracked the defendant by means of a chloroform barrel containing a hidden radio beeper because the beeper simply conveyed information that could be obtained by observing the defendant on public roads. *See id.* at 277, 285.

[23] *See Skinner*, 690 F.3d at 777–78. The panel also relied on *United States v. Forest*, 355 F.3d 942 (6th Cir. 2004), in which DEA agents used cell-site data (rather than GPS data) to track a suspect after they had lost visual contact during a pursuit. *See Skinner*, 690 F.3d at 778–79. The *Forest* panel rejected the defendant's motion to suppress, holding that "the cell-site data is simply a proxy for [his] visually observable location." *Forest*, 355 F.3d at 951. Skinner tried to distinguish these cases by arguing that the agents in his case had not made visual contact prior to using the GPS data — and had in fact relied on the data to learn his identity — but the court rejected this contention, saying that the *possibility* of his being seen by the public sufficed. *See Skinner*, 690 F.3d at 779.

[24] *Skinner*, 690 F.3d at 780 (quoting United States v. Jones, 132 S. Ct. 945, 949 (2012)).

[25] *See id.* This contention addressed a concern raised by Justice Alito's *Jones* concurrence. *See Jones*, 132 S. Ct. at 961 (Alito, J., concurring in the judgment).

[26] 468 U.S. 705 (1984).

[27] *Id.* at 708–09.

[28] *See id.* at 711–13.

with Skinner's cell phone; he obtained it, GPS technology and all, and could not object to its presence."[29] Taking all of this into account, the Sixth Circuit held that Skinner had no reasonable expectation of privacy in the GPS data and suppression was thus unwarranted.[30]

Judge Donald concurred in part and concurred in the judgment. While she joined the portions of Judge Rogers's opinion not related to the Fourth Amendment, she wrote that "acquisition of this [GPS] information constitutes a search within the meaning of the Fourth Amendment, and, consequently, the officers were required to either obtain a warrant supported by probable cause or establish the applicability of an exception to the warrant requirement."[31] She disagreed with the majority that the illegal nature of Skinner's actions should inform the inquiry into whether society would recognize an expectation of privacy as legitimate — instead, "the question is simply whether society is prepared to recognize a legitimate expectation of privacy in the GPS data emitted from any cell phone."[32] Ultimately, however, Judge Donald concurred in the judgment because she believed that the DEA agents' good faith reliance on the ping court order militated against exclusion of the evidence on which Skinner's conviction was based.[33]

Although most commentary on *Skinner* has focused on the court's ruling that Americans cannot reasonably expect privacy in cell phone GPS coordinates,[34] another aspect worthy of analysis is the court's failure to resolve the case on narrower grounds. By engaging more directly with the mechanics of pinging, the court could have evaluated whether this process constitutes an electronic form of trespass. Had the court done so, it could have decided the case on *Jones*'s trespass rationale and avoided the tangled "reasonable expectation of privacy" doctrine entirely.[35] *Jones* took an uncommon approach in light of a complicated Fourth Amendment jurisprudence that had been centered

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[29] *Skinner*, 690 F.3d at 781.

[30] *See id.* The panel rejected Skinner's other arguments on appeal, holding that evidence of Skinner's transportation of drug receipts was sufficient to support a money laundering conviction and that, because Skinner's services as courier were critical to the operation's success, the trial court did not clearly err in refusing to apply mitigating factors to his sentence. *Id.* at 781–84.

[31] *Id.* at 784 (Donald, J., concurring in part and concurring in the judgment).

[32] *Id.* at 786.

[33] *Id.* at 786–88. Specifically, she pointed to the fact that the officers did not clearly engage in misconduct and "almost certainly" had probable cause for the search — and thus could have obtained a search warrant had they applied for one. *See id.* at 787–88.

[34] *See, e.g.*, Julian Sanchez, *Skinning the Fourth Amendment: The Sixth Circuit's Awful GPS Tracking Decision*, CATO @ LIBERTY (Aug. 15, 2012, 1:03 PM), http://www.cato-at-liberty.org/skinning-the-fourth-amendment-the-sixth-circuits-awful-gps-tracking-decision.

[35] *Jones* was handed down four days after oral argument in *Skinner*, so some might argue that the Sixth Circuit had no occasion to consider the issues discussed here. Given the clearly foundational nature of *Jones*, however, the *Skinner* court could — and perhaps should — have asked the parties to submit additional briefing with respect to any possible effect of the holding in *Jones*.

on privacy for decades.[36] Rather than diving into the thorny question of privacy interests in GPS coordinates, the majority held narrowly that the physical attachment of a tracker to the defendant's car was a trespass. They further argued that the physical occupation of private property by the government would have qualified as a search subject to the warrant requirement at the time the Fourth Amendment was ratified.[37]

The applicability of the *Jones* framework to *Skinner* hinges on whether GPS pinging can be considered a trespass. Throughout its opinion, the Sixth Circuit was ambiguous about how pinging works: the panel largely wrote as though police passively receive GPS data,[38] but on a few occasions they wrote as if pinging were a more active process.[39] The court's analogies, however — a dog picking up a suspect's scent and police following license plate numbers[40] — strongly suggest that it believed pinging to be the passive reading of signals emitted by a GPS-capable phone for all to see. Were this accurate, the court's use of the *Katz* test would have been appropriate, as no trespass would have occurred. Pinging, however, is not the passive process the Sixth Circuit assumed it to be. GPS-capable phones do not normally record location data; when asked by the government to obtain these records, cell service providers send a signal to — or ping — the phone, ordering it to transmit its location without alerting its user.[41] In short, pinging is active, outside interference with and control over a phone's function without the owner's consent. To revise one of the Sixth Circuit's analogies, it was as if the police could somehow remotely force an otherwise odorless suspect to create a scent for the dogs to follow.

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[36] *See* Erica Goldberg, Commentary, *How* United States v. Jones *Can Restore Our Faith in the Fourth Amendment*, 110 MICH. L. REV. FIRST IMPRESSIONS 62, 62 (2012).

[37] *See* United States v. Jones, 132 S. Ct. 945, 949 (2012).

[38] *See, e.g.*, *Skinner*, 690 F.3d at 774 ("The government used data emanating from Melvin Skinner's . . . phone . . . ."); *id.* at 777 ("Skinner did not have a reasonable expectation of privacy in the data *given off* by his voluntarily procured pay-as-you-go cell phone." (emphasis added)).

[39] *See, e.g.*, *id.* at 776 ("By continuously 'pinging' the . . . phone, authorities learned that [Skinner] . . . was traveling on Interstate 40 across Texas.").

[40] *See id.* at 777.

[41] *See In re* Application of the U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel., 849 F. Supp. 2d 526, 531, 538 n.6 (D. Md. 2011); *see also* Jennifer Granick, *Updated: Sixth Circuit Cell Tracking Case Travels Down the Wrong Road*, STANFORD CENTER FOR INTERNET & SOC'Y (Aug. 14, 2012, 9:24 PM), http://cyberlaw.stanford.edu/blog/2012/08/updated-sixth-circuit-cell-tracking-case-travels-down-wrong-road; Orin Kerr, *Looking into the Record of* United States v. Skinner*, the Sixth Circuit Phone Location Case*, VOLOKH CONSPIRACY (Aug. 17, 2012, 2:53 AM), http://www.volokh.com/2012/08/17/looking-into-the-record-of-united-states-v-skinner-the-sixth-circuit-phone-location-case; *Locating Mobile Phones Through Pinging and Triangulation*, PURSUIT MAG., http://pursuitmag.com/locating-mobile-phones-through-pinging-and-triangulation (last visited Dec. 1, 2012).

Several courts (and commentators[42]) have recognized that electronic interference may be a trespass to chattels. The *Restatement (Second) of Torts* defines a trespass to chattels to include "using or intermeddling with a chattel in the possession of another."[43] The comments ground this requirement in physical contact,[44] but courts have found in electronic contexts that such contact is not necessary if some harm can be proved.[45] In *CompuServe Inc. v. Cyber Promotions, Inc.*,[46] a federal district court noted that "[t]respass to chattels has evolved from its original common law application . . . to include the unauthorized use of personal property."[47] Citing cases that had deemed electronic signals to be sufficiently physically tangible,[48] the court held that bulk spam emails sent to the plaintiff's servers caused sufficient harm (in the form of decreased bandwidth and goodwill toward the plaintiff's company) to sustain an action for trespass to chattels.[49] In a later case, the same district court found that the decrease in a server's value as a safe location for files following the defendant's unauthorized access was also sufficient.[50] Similarly, the Second Circuit enjoined a company from installing automatic software updates that, if allowed, could crash plaintiff's computers.[51] Likewise, a federal district court in Illinois held that a defendant's unauthorized spyware installation on the plaintiff's computer created harms such as depleted memory, increased energy and bandwidth usage, elevated internet use charges, domination of on-screen pixels, and increased user frustration, thus supporting a cause of action for trespass to chattels.[52]

These cases all echo the facts of *Skinner*: authorities sent unwanted signals that forced the defendant's phone to do something out of the ordinary; this interference led to impairment of the phone's value in several ways, including the use of more battery power and a decrease

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[42] *See generally* Steven Kam, Note, Intel Corp. v. Hamidi*: Trespass to Chattels and a Doctrine of Cyber-Nuisance*, 19 BERKELEY TECH. L.J. 427 (2004); John D. Saba, Jr., Comment, *Internet Property Rights: E-Trespass*, 33 ST. MARY'S L.J. 367 (2002).

[43] RESTATEMENT (SECOND) OF TORTS § 217 (1965).

[44] *Id.* cmt. e. *But see id.* § 218 cmt. h (stating that there may be cases in which "the intermeddling is actionable even though the physical condition of the chattel is not impaired").

[45] This requirement is from section 218(b) of the RESTATEMENT (SECOND) OF TORTS, which permits trespass liability if "the chattel is impaired as to its condition, quality, or value."

[46] 962 F. Supp. 1015 (S.D. Ohio 1997).

[47] *Id.* at 1020.

[48] *Id.* at 1021 (citing Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996); State v. McGraw, 480 N.E.2d 552, 554 (Ind. 1985)).

[49] *Id.* at 1022–23; *see also* Am. Online, Inc. v. IMS, 24 F. Supp. 2d 548, 550–51 (E.D. Va. 1998) (similar holding based on similar facts).

[50] Jedson Eng'g, Inc. v. Spirit Constr. Servs., Inc., 720 F. Supp. 2d 904, 926–27 (S.D. Ohio 2010).

[51] Register.com, Inc., v. Verio, Inc., 356 F.3d 393, 404–05 (2d Cir. 2004).

[52] Sotelo v. DirectRevenue, LLC, 384 F. Supp. 2d 1219, 1230–31 (N.D. Ill. 2005).

in the disposable phone's intended ability to confer greater privacy on the user.[53] While acceptance of electronic trespass to chattels is certainly not unanimous,[54] these decisions — and multiple commentators' speculation regarding their applicability to cell phone GPS tracking[55] — provide a broad enough foundation that the Sixth Circuit could have opted to focus on the narrow trespass doctrine rather than on the broad doctrine of privacy.

While *Jones* lays the groundwork regarding trespassory Fourth Amendment violations, the case offers ambiguous guidance on this doctrine's specific applicability to cell phone GPS data. Justice Alito's concurrence explicitly raised the relevant question: "Would the sending of a radio signal to activate [a GPS] system constitute a trespass to chattels?"[56] He also noted that lower courts have found electronic signals sufficient contact to support trespass, and he asked whether "these recent decisions represent a change in the law or simply the application of the old tort to new situations."[57] Responding to this question, Justice Scalia's majority opinion summarily stated that "[s]ituations involving merely the transmission of electronic signals *without trespass* would remain subject to *Katz* analysis."[58] This dictum may seem to suggest that electronic interference is not a trespass cognizable under the Fourth Amendment, but it in fact leaves open the possibility that certain transmissions of electronic signals *do* amount to constitutional trespass.[59] Because it did not squarely address the issue, however, *Jones* certainly does not *foreclose* analysis of the intersection of electronic interference and trespass doctrine.

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[53] Skinner's arrest and incarceration may also have been a harm, but not one that satisfies the requirement that there be impairment of the value of the chattel itself. The point here is not to identify the precise harm, but simply to argue that the Sixth Circuit could have engaged with this doctrine more fully.

[54] *Cf., e.g.*, United States v. Sereme, No. 2:11-CR-97-FtM-29SPC, 2012 WL 1757702, at *10 (M.D. Fla. Mar. 27, 2012) (finding that tracking a suspect via his cell phone was not a search, but not clarifying whether the tracking was done with cell-site or GPS data).

[55] *See* Brian Davis, Note, *Prying Eyes: How Government Access to Third-Party Tracking Data May Be Impacted by* United States v. Jones, 46 NEW ENG. L. REV. 843, 866 (2012) ("When the government obtains cell-site data from third-party providers, it essentially trespasses upon the GPS or cell-site data function in the cell phone user's device and monitors the user's every move."); Goldberg, *supra* note 36, at 68 (2012) ("Justice Scalia's rationale, if updated to consider electronic penetration a form of trespass, would permit the labeling of more intrusions as searches, whether they look like traditional trespasses or modern-day, electronic trespasses.").

[56] United States v. Jones, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring in the judgment).

[57] *Id.*

[58] *Id.* at 953 (majority opinion) (emphasis added and omitted).

[59] Justice Sotomayor, who also joined the majority, wrote in her concurrence that "[i]n cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance." *Id.* at 955 (Sotomayor, J., concurring). Like Justice Scalia's language, this statement leaves uncertain whether electronic signals can themselves be considered trespassory.

This lack of clarity counsels in favor of analyzing the rationale behind the *Jones* majority's opinion. Rather than issuing its holding based on the specific factual predicate and whether it would have been a search at the time of the Founding — an approach that would prove fatal to an electronic trespass argument in *Skinner* — the Court instead looked generally at whether this kind of cause of action historically would have given rise to a Fourth Amendment violation.[60] Given this rationale, it is possible to imagine that the Founders — and by extension, Justice Scalia — would recognize as a Fourth Amendment violation a new factual predicate like GPS pinging that represents the evolution of a traditional tort capable of spawning a constitutional violation.[61] Accordingly, the philosophy underlying the *Jones* majority did not require courts to ignore questions of electronic trespass as the Sixth Circuit did in *Skinner*.

A narrow trespassory approach was not only possible but preferable, for a reason suggested by Justice Alito's *Jones* concurrence. In noting concerns about the application of the *Katz* test to wiretapping, Justice Alito referred approvingly to Congress's decision to intervene and regulate that practice statutorily.[62] As Justice Alito implied, police use of GPS tracking likewise cries out for statutory regulation and the democratic legitimacy it carries. Congress may be more likely to legislate freely against the backdrop of modern mores if courts abstain from using more cumbersome doctrine to define the level of privacy individuals are entitled to expect in their GPS coordinates. By sidestepping the issue, the Sixth Circuit might have encouraged Congress to step in and address it.

Ultimately, the Supreme Court and fellow lower courts laid out a path that the Sixth Circuit chose not to follow. While *Jones* opened the door to the idea that an electronic trespass may be sufficient to trigger the protections of the Fourth Amendment, the *Skinner* panel did not consider that GPS cell phone pinging may constitute just such a trespass. Consequently, the court bypassed an important and emerging area of doctrine, moving instead to the use of a broader and more fraught inquiry that may not have been needed at all.

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[60] *See id.* at 953 (majority opinion) ("The concurrence begins by accusing us of applying '18th-century tort law.' That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted." (citation omitted)).

[61] *Cf. generally* Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085 (2012) (discussing various ways in which modern developments affect inquiries into the Founders' intent).

[62] *Jones*, 132 S. Ct. at 962–63 (Alito, J., concurring in the judgment).