Short Circuit 299 | The Gambler

Mon, Nov 27, 2023 3:32PM 58:53

SUMMARY KEYWORDS

National Press Photographers v. McCraw, U.S. v. McCall, Long Lake Township v. Maxon, et al.

SPEAKERS

Anthony Sanders, Mike Greenberg, Jared McClain

Anthony Sanders 00:24

"So I handed him my bottle, and he drank down my last swallow. Then he bummed a cigarette and asked me for a light. And the night got deathly quiet. And his face lost all expression, said, 'If you're going to play the game, boy, you got to learn to play it right. You got to know when to hold'em, know when to fold them, know when to walk away, and know when to run.'" You never make phone calls to unknown persons when you're sitting at the table. You never step out to take care of something, and then have armed associates shoot two of the poker players and escape with all the cash and the cell phones. Well, we're going to learn today about a fella who did not take that advice from Kenny Rogers, especially the last part that I added in. And we'll also discuss his iCloud account and something about drones today on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Friday, November 17, 2023. Now, we'll get to two of my colleagues in a little bit who will discuss this case that I alluded to from the 11th Circuit, and also a case about drones from the 5th Circuit. And we'll also get a little bit of an action update on a drones case that we discussed a long time ago on this podcast. But first, before all that fun stuff, we have to get to business. Now, as most of our listeners know, Short Circuit is connected to the Institute for Justice, which is a nationwide nonprofit law firm. Now, notice I said "nonprofit." We do not make money. That's not our mission. And we do not have an incredibly huge trust fund that we can draw from to fund all our activities. No. We depend on the goodwill of people like yourself in order to have us fund these dozens of lawyers who file all these lawsuits to protect constitutional rights across the country. And a little tiny bit of that goes towards making Short Circuit. So if you are feeling giving, and the season that is upcoming is the season where people are hopefully more giving, please feel free to click the link in the show notes or just go to it directly: ij.org/donate. Giving Tuesday is coming up, this is the last show before Giving Tuesday, which is the day that a lot of people decide that the year is getting close to an end and maybe it's time to give a little bit. So if you feel so inclined, you can give on Giving Tuesday to the Institute for Justice. You can do that before then. You can even do it after then. But whenever you do it, we would be greatly appreciative of your help for our quest in fighting for liberty and justice. And speaking of liberty and justice, no one comes to mind more than my two colleagues with me today: Mike Greenberg and Jared McClain. Welcome to both of you.

J

Jared McClain 03:31

Anthony.

M

Mike Greenberg 03:32

Thanks for having us, Anthony.

A

Anthony Sanders 03:33

Now, we're gonna start with Mike. And he's got a case of his own to talk a little bit about, and then we're gonna go to a case from the 5th Circuit. So almost three years ago now, we did a podcast where we kind of broke from our usual format of federal courts of appeals cases. And we talked about this case at the Michigan Court of Appeals, so state intermediate court, because it was a really interesting case about a city using drones to spy on people without any kind of judicial authorization. We thought this was kind of funny, so Josh Windham, our colleague, talked about it, and then one thing led to another. Now, these people are our clients, and Mike just argued for them at the Michigan Supreme Court. So tell us a little bit about these folks, for those listeners who didn't hear the show two and a half years ago, and how your argument went.

M

Mike Greenberg 04:39

Yeah. Thanks, Anthony. So we represent Todd and Heather Maxon who live up in rural Long Lake Township, Michigan, on a five acre lot, and Mr. Maxon is a bit of a hobbyist. He likes to tinker with cars and things like that in his backyard, and his township, their zoning enforcement office, doesn't seem to like that very much and thinks that it's some violation of the zoning code. But the problem is that the Maxons' backyard is fully shielded from public view from the street, and the neighbors don't complain. So how did the zoning office manage to get any evidence of this? They hired a drone operator to fly all around the Maxons' backyard and record high definition video of everything that they saw on three different occasions over the course of many months. And they never got a warrant to do so. And as Josh and Anthony discussed several years ago, the Maxons argued that violated their Fourth Amendment rights. And we eventually took that over and argued at the Michigan Supreme Court about a month ago that this brand new technology has a unique capability of violating people's Fourth Amendment rights when it's used to surveil them on their private property. You were right, Anthony, to flag this as a case of unique public fascination and importance a couple of years ago. The Michigan Supreme Court, they hear, you know, several dozen cases every year. But once or twice every year, they take the show on the road, and they hear a case not in the Supreme Court building, but at a high school or some local public building to showcase what the appellate process is like for the public. And they apparently intentionally try to take cases that they think the public will have some kind of fascination with. And this was the one that they chose for 2023. So it was definitely a fun argument, arguing it at a high school in Flint, Michigan, with an audience of about 1,000 high school students.

Anthony Sanders 06:43

Wow. I didn't realize it was that big of an audience.

Mike Greenberg 06:47

It was a little intimidating. I was just about as intimidated by the audience as by the justices themselves, including the fact that we got to do a Q & A with the high schoolers after the fact. We're cautiously optimistic about how the argument itself went, but it was a very fun experience. And both you and, I think, the court were right to flag how drones and constitutional rights are going to intersect right now and for years to come.

Anthony Sanders 07:17

Now, down in Texas, it seems like we kind of have the flip side of your case where we have the government kind of not using drones, but on the side of the people who I guess don't want drones looking at them and then how that relates perhaps to the First Amendment. So tell us that kind of "through the looking glass" way of thinking about the situation.

Mike Greenberg 07:48

Yeah. In both cases, there's an issue of how do drones affect our right to privacy, more or less. And so this is *National Press Photographers Association v. McCraw*. As you said, it's from the 5th Circuit, and it's a unanimous opinion by Judge Willett. And as we've said, it concerns drones, which can be used for all sorts of fun or productive uses. They can be used to deliver packages, they can be used to do mapping of property, and all sorts of fun things. And they can be used for photojournalism, as the plaintiffs here, the National Press Photographers Association, point out. They can also be used for much creepier things, as our work with drones and the Fourth Amendment have argued and as this opinion will ultimately point out. So as you previewed, Anthony, Texas, like many states, has enacted some regulations on where and how people can fly drones. And there's two categories of restrictions that Texas has enacted here that are relevant. The court labels them the surveillance regulations and the no fly regulations. And the no fly provisions are pretty simple. You're not allowed to fly a drone over or close enough to interfere with prisons or large sports venues or what the statute labels "critical infrastructure facilities," like airports or oil refineries and other sensitive places like that. There's also the surveillance regulations, which prohibit using a drone to "capture an image of an individual or privately owned real property with the intent to conduct surveillance on the individual or property captured in the image." So as you were saying, this is exactly the flip side of what the government was doing in our drones case up in Michigan. Texas has all sorts of exceptions to that general rule that I'll get into in a little bit. It doesn't apply, of course, if the person who would be surveilled gives their consent. It doesn't apply if you're surveilling public property rather than private property. It doesn't apply if the drone is low enough (eight feet or less) such that it's equivalent to a person just kind of holding a camera over their head, which I found a little funny. It also doesn't apply to law enforcement or the military or to academics, which is a curious exception that I thought the statute has as well. But none of those exceptions fit what our plaintiffs in this case, some journalists and the National Press Photographers Association, want to do, which is provide aerial imagery for journalism purposes. And because violations of those provisions come with some criminal penalties, they brought a

federal lawsuit to get out in front of any prosecution for violating those restrictions. The plaintiffs claim they have a First Amendment right to capture and disseminate images from drones the statute prohibits. They also brought a claim that the restrictions were preempted by federal FAA regulations. They won on their constitutional claims in the lower court, they lost on the preemption claims, and then both sides appealed. So that's where we are now with the 5th Circuit. And as is always the case in federal courts dealing with civil rights claims, there's a procedural morass to get through it first. The government defendants naturally contest standing. They say that we've never enforced these provisions against these plaintiffs, so there's no injury here. The 5th Circuit pretty quickly agrees that that isn't how First Amendment standing works. Rather, it's about whether you're chilled from doing what you say that you want to do. And the plaintiffs here are sufficiently chilled from what they say is their speech because they want to collect images from drones, and they're not allowed to. They even point to particular instances where local law enforcement have told them, hey, you're not allowed to do that. And the 5th Circuit says that's plenty enough to confer a real injury, especially where the officials aren't disclaiming their authority to enforce the letter of the law against them. But while they might have standing, there's one more procedural issue that the 5th Circuit addresses, and that's ex parte young. Normally, you can't sue a state itself because the state has sovereign immunity, but if you're looking for injunctive relief, as a plaintiffs here are from the operation of the statute, you can get around that by suing the officials tasked with enforcing the law that you're looking to enjoin. And that's the ex parte young exception. It's usually pretty straightforward, and it's glorious for civil rights plaintiffs like us. But the 5th Circuit seems to apply that exception a little more strictly than some people might be used to. They require not just that you sue the official who is tasked with enforcing the law, but that that official has a demonstrated willingness to do so. And that's where the apparent fact that the defendants that the plaintiff sued haven't enforced these drone restrictions comes into play, or at least they haven't enforced them commonly enough. The two statewide officials that the plaintiff sued, the court says, don't have the demonstrated willingness to enforce the law, so ex parte young doesn't apply to them. It turns out the plaintiffs are going to be alright, because they also sued a local prosecutor. And local prosecutors don't have sovereign immunity, so we don't even have to get into this issue. But it's a curious little detour that the 5th Circuit has that civil rights plaintiffs in other circuits may not have to contend with as forcefully as they would in the 5th Circuit.

A

Anthony Sanders 13:41

Another reminder to just sue everyone. I think this case proves that rule.

M

Mike Greenberg 13:46

Sue everyone, and let the court figure it out, as the 5th Circuit did here. Yes, exactly. So then the court gets into the merits. And all throughout the merits of the First Amendment claim, the court is stressing that this is a facial First Amendment challenge, not an as applied challenge to a particular type of person or to a particular type of property or capturing images of that type of person or that type of property. And so that's important to keep in mind as we go through the merits here. The court starts with the no flying over critical facilities restriction. And it pretty quickly dispatches with that challenge because the court says there's nothing inherently expressive about merely flying the drone. And that's all that the no fly provisions restrict. The restriction isn't triggered by taking any photograph or any video. It's only about where you're

flying. The plaintiffs point out that not being able to fly in the area that is prohibited to fly in necessarily prohibits their speech in that area. But the court says that that kind of downstream effect isn't enough to trigger the First Amendment because the restriction isn't triggered by what you're trying to convey and so no dice on that claim. The court then moves on to the surveillance restrictions, which are a little more challenging. Those restrictions prohibit using a drone to capture an image of private people or private property without their consent, intending to conduct surveillance on them or their property. And the court first has to grapple with whether this is restricting expression at all. That is whether the act of recording from the drone, rather than the resulting news footage or the resulting photographs, is itself speech, which is a little bit of a challenging inquiry of exactly where the line of the act of creating speech and speech intersect. Thankfully, there's lots of cases involving this issue. Listeners might be familiar with cases from circuits around the country involving recording the police or involving animal rights activists kind of recording the conditions of certain agricultural facilities. All of those cases, or most of those cases, seem to reach the same conclusion that the act of creating the speech is protected by the First Amendment, much the same as the resulting speech itself. The court goes through those cases, and it concludes that the act of the drone or a drone recording private people or private property is entitled to some First Amendment protection, just like the resulting photograph or video is. But then there's the question of how much protection. The court goes with intermediate scrutiny rather than strict scrutiny because it says the Texas restriction doesn't turn on the content of the speech, just the method by which the speech was created. And so a lower form of scrutiny rather than strict scrutiny, the court says, is appropriate. Government can pass intermediate scrutiny if the regulation is narrowly tailored to achieve a substantial government interest, and the court concludes that protecting the privacy rights of private people and their private property is a substantial interest. And the court says that this regulation is narrowly tailored to achieve that interest because it only prohibits surveillance of private property, not public property. And two, it prohibits only drone footage that couldn't otherwise be taken. So it doesn't prohibit drone footage from very low altitudes that could also be taken from a person at eye level, or even just holding a camera high above their head. I found it interesting that the court really doesn't get into the exceptions for other kinds of people that are allowed to do the exact same thing: the military or academics and so on. It doesn't say how that fits into narrow tailoring at all, but it plowed on through and said that this facial challenge is narrowly tailored to achieve the substantial interest in privacy all the same. And then it finally moves on to the preemption claims. Those are also disposed of pretty quickly. The plaintiffs claim that the FAA alone can regulate how and when and where drones may fly. But the FAA itself, just on the eve of oral argument in this case, came out with a fact sheet that said effectively that these kinds of privacy and critical infrastructure-protecting rules that states are enacting are not the sort of thing that the feds are trying to preempt. And so that's that. There's no First Amendment problem, facially speaking, with prohibiting drones from recording private people or private property. And the FAA is not the sole arbiter of what regulations there are on drones, so the district court was reversed. These plaintiffs are unfortunately out of luck in their desire to gather news through drone photography and videography.

A Anthony Sanders 19:13

Jared, have you ever used a drone gathering news?

J Jared McClain 19:17

I've stood there while our video team has used a drone to make case videos, but they don't let me get the joysticks.

A

Anthony Sanders 19:25

Gosh, I guess we have to be careful about making videos in Texas going forward.

J

Jared McClain 19:30

Yeah. I mean, we are academics.

A

Anthony Sanders 19:34

That's true.

M

Mike Greenberg 19:37

Yeah. There's probably one of the several dozen exceptions that we can hopefully find a way to shoehorn ourselves into. The court over and over again is stressing the facial nature of this challenge, and it stands to reason that perhaps a more narrowly tailored as applied challenge might succeed here. But I'm sympathetic to the fact that they brought these broader claims because you can imagine that for journalists trying to craft an affirmative as applied challenge, rather than just invoking it as a defense to prosecution on the back end, can be pretty hard. If you want to do aerial photography to say show the damage after a major storm or after a major fire or something like that, and you think that's newsworthy, the newsworthiness of that event is going to be over long before the federal courts can come and adjudicate your rights. So it seems like they maybe necessarily had to try for this broader facial relief and just say, yeah, any journalism activities through drones should be protected. But the problem is there's a lot of baby in that bathwater also.

A

Anthony Sanders 20:55

Yeah. I seem to follow a lot of what the court was doing here. I mean, I quibble with the ex parte young stuff, as you were talking about. I mean, that seems like they're doing standing with another name. Like they already did standing. We'll do standing again and call it sovereign immunity, but it really doesn't have much to do with sovereign immunity. In my mind, it just has to do with enforcement, and that's standing. But that's a whole other conversation. But when they get to intermediate scrutiny, fine. It's real scrutiny, as we like to say at IJ. Intermediate scrutiny is not rational basis. So okay, it's something. Keep going with that. We could argue about whether it should be beefier scrutiny than that, but then they get to how it just fails. And it is a little bit ipse dixit it seems at the end of the opinion, and it's all fine. And there's all kinds of, you know, quirks in the law that just don't make sense. Like, you know, say if the law said, you can't use a drone higher than the highest point on the property you're on. So say you're in a house, and you look out the top window, your drone can go up that high, and I'm just making this up. But for the sake of argument, that kind of makes sense in that your

neighbors kind of have an expectation that you could almost say as part of their property rights to not be spied on by something that's below the level of like a normal helicopter or plane in their backyard. And so a drone hovering up above the neighboring property is just something that we can regulate. I could go for that. But this seems completely untied from anything like that. And the exceptions for professors are weird too. So I mean, I don't want to say like, you can't have anything like this type of law because to some extent, it seems like it's tied to just a trespass law, like a beefier trespass law. But it applies to drones that are completely above someone else's property, and that's where it seems to get weird. And it seems like the court just doesn't take any nuance on, you know, what that might be and whether it's within, as they say, the plainly legitimate sweep of this area of regulation.

J

Jared McClain 23:34

Most of this opinion, you just talked about the ipse dixit, he spends a lot of time setting up the tiers of scrutiny and engaging with the parties' arguments on the tiers of scrutiny. And it's almost like once he decides he's at intermediate, he doesn't really have to engage as fully with the exceptions and all the other problems and nuances with the statute. But he also, on the flip side of that, spends a lot of time talking about how this is a facial challenge, but he really then sort of treats it like that hybrid facially as applied because he's looking at this through the lens of journalism and those First Amendment protected rights. A lot of other courts would treat this facial challenge more harshly, I think, under *Los Angeles v. Patel*, where it's almost like rational basis. Can you think of one category that this law could apply to constitutionally, and if it can, your facial challenge rules. And here, he is giving these journalists that like, okay, I'll sort of do a facial as applied to journalists and see how it goes, but I'm going to only give you intermediate, and then once we get the intermediate, I'm not really going to engage with the exceptions or where we go from there.

M

Mike Greenberg 24:50

Yeah, I thought that was the kind of most breezy, drive-by part of the opinions. I think everyone at IJ agrees that drones have this kind of unique ability to violate privacy rights, and the issue with the intermediate scrutiny analysis is, well, why doesn't the same reasoning therefore apply to professors doing exactly the same thing?

A

Anthony Sanders 25:19

Professors are never creepy. I think that's why.

M

Mike Greenberg 25:22

Yeah, I'll just contract with an academic to do the exact same thing that I would otherwise do that is totally prohibited. That didn't seem to make a whole ton of sense for me. But on the other hand, I think that states need to have something resembling this kind of presumption that surveillance of private spaces using a drone is at least kind of presumptively prohibited because, otherwise, the Fourth Amendment case law allows law enforcement to do what any member of the public can do without a warrant. And so if we want to be protected from zoning

enforcement officers or any member of the government just kind of sneaking around our backyard using a drone in our backyard that we're otherwise trying to keep private, it needs to be that no other member of the public can be able to do the exact same thing. And yeah, I think you're right, Anthony, also to allude that this is kind of a quasi trespass analysis going on here. When the court is analyzing the no fly restrictions, you know, you can't fly over petroleum plants or prisons or things like that, it's saying that there's no First Amendment interest in creating images or videos over those facilities. But in doing so, the court is kind of analogizing to this case where the Supreme Court said, sure you have a First Amendment right to petition the president, but that doesn't mean you can just waltz into the White House and speak to him there. I think what the court is really trying to get at is something like that that says, sure, there's a First Amendment right to take photographs of certain places in a vacuum, but not in non-public fora. And prisons or these critical infrastructure facilities are not public fora. In order to do what the plaintiffs here are trying to do, you'd have to effectively be trespassing on those non-public places where First Amendment rights are not maximally protected the way that they are in public places. So it seems like there's a flavor of that kind of trespass going on or trespass analysis going on without the court as much saying so.

A

Anthony Sanders 27:51

Yeah, especially like the sporting arenas. So that, of course, is journalistic interest. But it's also a place where you have lots of people walking around, you maybe have stuff that is in the air, and maybe there's helicopters or Blue Angels or whatever it is at a sporting event, and you have microphones on cables. You could see how normal trespass law maybe isn't enough. There needs to be a little bit more. It's an okay public policy choice to have a little bit more of a penalty if you're going to trespass with a drone on that airspace, than other kinds of trespass. And, you know, before airplanes, the old maxim was you own your property up to the sky from your backyard or wherever. That changed when it came to airspace. And now that you can put a drone up 80 feet above your backyard and see all your neighbors, maybe that is an okay change to property law. But it seems like it's not a nuanced change or it wasn't reasoned enough, especially when it comes to the Fourth Amendment. So this is an area that Mike's case and this case show is going to continue developing. It is a very interesting area we will continue talking about on Short Circuit. Another interesting area is your iCloud account and all the aspects of your life that you put on your iCloud account or other accounts that may be connected to your personal data. Jared, we had a fella who was blameless about what was on his iCloud account it seems, but kind of opened the door to that by not behaving as a gambler should.

J

Jared McClain 29:52

Yeah, that's right. This is a case called *United States v. McCall* out of the 11th Circuit. It came out at the end of October of this year. The panel was Brasher, Branch, and Rosenbaum. This case is about a guy named McCall who was at a poker game in someone's apartment. He was losing a bunch of money and became more and more agitated as he kept losing his bets. At the poker table, he's taking out a cell phone and texting people, and then starts calling people. Then he eventually steps outside and says he has to take care of something. A few minutes later, there's a knock at the door. When the people in the apartment opened the door to let McCall back in, they're met by two guys wielding guns who ordered everyone to get on the ground, took all the players' cash, robbed them, and took their cell phones. A couple of days

later, police arrest McCall for armed robbery and attempted felony murder, which, I mean, felony murder is bad enough as a policy, but attempted felony murder is a little bit of a joke that I did not know existed. So police got a warrant for McCall's iPhone based on probable cause to believe that he used his phone to contact the unidentified armed suspects. Basically, the problem here is that they know he was in touch with these people, but they don't know who they were. They were wearing masks. So they get a warrant for his cell phone, but they don't have his password, so the cell phone is mostly useless to the police. The officers though were able to get the name from McCall's iCloud account off of his phone without being able to get into it. And so they went back and got a search warrant for McCall's iCloud account. And here's where things start to get messy for the cops. The officers acknowledged that the most recent backup of McCall's cell phone occurred 12 hours before the poker game. So there was nothing on his phone, nothing in his iCloud account that would be accessible to the police within the 12 hours leading up or during or after the poker game. But based on the officers' training and experience, the catch-all term that helps officers generate probable cause when they lack any, the officers said that crimes are often planned in advance. And under that theory (I guess McCall intentionally lost all his bets at the poker game and got himself mad and engaged in this pre-planned crime of passion), the detectives apply for this warrant. And they asked to look at seven different categories of data from his iCloud account: everything from his photos to his internet searches to his Notes app to his Find My Phone app to his iTunes account, which I found the most perplexing of how that fit in here.

M

Mike Greenberg 33:06

What if he was listening to a podcast from Spotify instead?

J

Jared McClain 33:12

Right? Yeah, he and his friends put out, recorded a little song I guess about the crime beforehand and had it stored in his iTunes account. And so the judge issues the warrant here and orders a two-step process. The first step acknowledges that Apple has no reasonable means to distinguish evidence of crimes, and so the court ordered Apple to provide the entirety of the account. And the second step ordered the police to search for evidence of the specified crimes in those seven broad categories of data. So Apple produced his entire trove of iCloud data, which, in this case, only happened to be two and a half months of data leading up to the robbery up to that 12 hours beforehand. And so they look through basically everything that's touched this guy's phone for the last two and a half months, and they found photos of McCall from a month prior posing with a gun. And because he was a felon, that is felon in possession, and they referred the photos to the feds to charge McCall with a federal crime for felon in possession. And McCall moves to suppress before his trial in federal court, and the detective acknowledged that the warrant could not possibly reveal the calls or messages that McCall sent or received during the game because there was nothing in the 12 hours leading up to it. But the officer explained again how, based on his training and experience, crimes are often planned in advance, making it a distinct possibility that McCall communicated with the gunmen more than 12 hours before his game to pre-plan this crime. He also explained that people often store their iPhone passcode in their Notes app or their photographs, so he needed to look through all of that stuff. And then the officer testified that he had no reason to believe that there was not probable cause because although he seeks to educate his officers on technology, it's constantly changing, and they're doing the best they can. And so the district court court denied the motion

to suppress the warrant, and even though she determined that the warrant lacked sufficient particularity, the trial judge determined that the good faith exception applied because this is clearly an evolving area of the law. So McCall entered a conditional guilty plea to 27 months in prison and filed his appeal to the 11th Circuit. On appeal in the 11th Circuit, McCall raised three arguments for why the officers were objectively unreasonable in relying on the warrant that they got. First, he said the iCloud affidavit was lacking in probable cause because the officer knew that there was no data for the 12 hours leading up to the robbery. Second, he says the warrant was facially deficient because it requested all his data unbounded by subject matter or date, so no reasonable officer could have believed that this warrant satisfied the Fourth Amendment's particularity requirement. And third, he says the officers should have known from the surrounding circumstances that the warrant was unconstitutional. The 11th Circuit and opinion by Judge Brasher, much like the district court, began by noting that technology moves quickly and the law moves slowly. So the combination of those two things can leave police with little insight on how to investigate an iCloud account. So you already know where this is going. On the first argument that McCall raised that there wasn't probable cause, the court here assumed without deciding that there wasn't probable cause because it determined that the good faith exception would apply either way. The court says that it won't suppress incriminating evidence when there's even a hint of why the police believed that they would be able to uncover it with the warrant, which is truly an incredible standard. The court then says that there was an obvious link between the crime and the cell phone, which I think we can all agree because McCall became increasingly agitated and started texting frantically as his losses mounted during the poker game. But this wasn't a warrant for the cell phone, so to take the next step, the court says because the phone was linked to the crime, that seems to make the iCloud account linked as well. Even though the iCloud account had zero evidence from within 12 hours of the crime, the court says the account is still linked because the cop said so based on his training and experience. Again, when I said these were magic words, I wasn't kidding. What was the training? The officer doesn't say. What experience that the officer has, he also doesn't say. What made him believe that someone who became agitated and organized a robbery in the midst of a poker game while they're losing money planned that crime more than 12 hours prior? The officer never says. The boilerplate cop speak is enough. So the court says it's not unreasonable to believe that McCall had a pre-existing relationship with the people who committed this crime. And again, that's completely true. I think we could all agree. But what's the import about that? What's the import of that? How are the police going to have any idea which contacts in his phone were the ones who came to this apartment? Did they offer any evidence suggesting that he'd done this before, that he committed similar crimes with these people? Was there any evidence where he had a relationship with these guys from? It's just a pure fishing expedition. Like sure, these are his contacts, but when the police get his phone and look through his contact list, how are they supposed to discern which ones were the ones who did the crime? They never say in the warrant application. And McCall gets at this. He says okay, even if you want to try to say that maybe there were texts or phone calls between him and the gunmen for more than 12 hours before, how on earth does that get you a warrant for everything else on my phone? And the court says you might have pictures of men with masks and guns on your phone. And let's play that out for a second. For this scenario to be true, it means that more than 12 hours before the crime, he was photographing his boys wearing masks and guns on his phone. And police were going to be able to tell that those guys with masks and guns were the same ones who were at poke game. Even granting that like one guy with a mask is on his phone, and it's the same guy who came to the apartment, they're wearing masks. So what information does it reveal to the police if they're able to see this photograph with a mask? They still don't know who the guy is.

M

Mike Greenberg 40:44

I'm rapidly deleting every Halloween picture ever.

J

Jared McClain 40:47

Yeah. And then they say okay, in addition to maybe he's got photos of guys with masks and guns, maybe he also had been sending text messages to his co-conspirators more than 12 hours beforehand and then took screenshots of those text messages and stored them with his photos. But they already have access to the text messages.

A

Anthony Sanders 41:19

I don't see why text messages isn't all they need. That should have been the whole ballgame.

J

Jared McClain 41:27

No, they need to know what he's listening to on iTunes. And so the court goes on to defend the scope of the search by relying on a case in which they approved a search of someone's Facebook account because they could tell from their Facebook page that they had probable cause based on their Facebook page that they were linked to some crime. But when you're talking about a Facebook account, there's their user data. Most of it's public facing, and other than that, maybe there's some direct messages. And by contrast, here, we're talking about every single thing that's ever been on this guy's cell phone. It's just completely different in scope. And so that's all the court has to say about probable cause. It was satisfied that the cops here were trying their best, so the good faith exception applies, and we're not going to determine that there was a lack of probable cause. And just to put a pin in there, reading this, I had to remind myself many times that I was not reading a qualified immunity opinion because there was so much assuming without deciding. Like, we're not actually going to establish any law here.

A

Anthony Sanders 42:43

They're like siblings basically, the qualified immunity and the good faith exception, in my mind.

J

Jared McClain 42:50

Right. The cops couldn't know any better, but we're not going to create any law now to make sure that they know better next time. So the court then moves on to particularity, which the district court had found was insufficient in the warrant application. The government concedes that the warrant application did not have sufficient particularity. But again, the court just assumes without deciding, and it goes on to say it's unclear how you could be particular about an iCloud search. So again, we're not off to a great start. It says, generally, there's two ways to particularize the search of data: You could talk about the subject matter, the category of data, or you could talk about a time span. On the first point, the court says that people can store

communications in any type of file. You can take screenshots of text messages, like there's a lot of crossover between types of data. So the court concludes that a subject matter limitation couldn't be so broad as to be meaningless and sort of waves away the idea that cops should even limit an iCloud search based on subject matter. And it says, look at this case by example. There were seven categories of data search tier, and they were so broad as to encompass everything on his phone. Rather than seeing that as a problem, the court says we should just throw out considering subject matter stuff altogether when we're talking about particularity. I know we're dealing with technology here, and courts like to throw up their hands and say, this is new technology. How are we supposed to apply the Constitution to it? But if police have probable cause to search one container in your car or house, they can't then go search another container. If police have probable cause to search for a rifle in your house, they can't look through your calendar and your checkbook and your paper files. It's not that difficult to apply the same principles here. The court just decides it's not going to. And since the court threw out the usefulness of subject matter based searches, it decides that temporal limits are the preferred and basically only method of making a search for iCloud data particularized. The court, to its credit, recognizes that searching someone's iCloud account without any temporal limit is akin to a general warrant. That was, I think, the only time in this opinion that I was nodding along. The court says that, in the mine run of cases, we think a time-based limitation will be both practical and protective of privacy interests. The court though says that the good faith exception applies because Apple only turned over two and a half months of data, and any temporal limitation that satisfied the particularity requirement likely would have covered two and a half months of data. Two points on this. First, the two and a half months of data was just a happy accident because that's all Apple did. It's not that the officers here were acting in good faith and only asked for two and a half months. If Apple had had five years of data, it would have turned over all of that. And the second point, again, we're talking about a heat of the moment crime here. There's zero indication it was pre-planned. And even if it was planned, there's no evidence that it was planned months in advance. So I'm not sure how you get to two and a half months of data, but the court says that that would be particular and satisfy the warrant requirement. The court then circles back and hits on the seven categories of data and says they're somehow specifically tailored to this case. Again, that's iTunes data, Find my Phone data, stuff that has absolutely nothing to do with anything. And the court concludes the detective reasonably could have believed that the seven categories of iCloud information fell within the practical margin of flexibility for this broad investigative task, especially given the close connection between the cell phone used to commit the crime and the iCloud account. And so all that's left is the third argument on objective unreasonableness, which was always going to be a loser. The court says that the detectives here took some steps to figure out how they should tailor this search. They talked to some people, and then they just chose not to tailor it anyway because, as they testified, all of their warrants for iCloud data look just like this. And because all of their standard police practices are equally bad and unconstitutional, no reasonable officer would have believed that this search was unreasonable. And then, at the end of the opinion, Judge Rosenbaum issues a brief concurrence to just sort of take issue with the majority here artificially determining beforehand that, on the one hand, including a time period is enough to satisfy the particularity requirement. And she says that that shouldn't automatically relieve a warrant from otherwise having to particularly describe the things to be searched. The warrant should also describe the categories of evidence such as photos, communications, records, and it should identify what subject matter they pertain to. The warrant should specify any other characteristics that are possible to identify and describe in those circumstances. She says that in only rare circumstances will time frame alone suffice, which I agree with. But that's where we are. I think the frustrating thing for me is one, like we talked about with qualified immunity, we're just not going to hold the cops to account. We're not going to make them follow the law. And we're going to say technology is hard, as if any

criminal defendant could make the same argument. I just think that the court could have done a little more work here. There was a decision from the Eastern District of Virginia in March 2022. It was called *United States v. Chatrie*, and it was a warrant to Google for like geofence data based on a crime, and it was similarly broad. And the court in that case said it was difficult to overstate the breadth of this warrant and went through and got amicus briefs from Google and figured out how the technology worked and applied the Fourth Amendment to the new technology. There's just really no excuse to me why in decisions like the one we just talked about, the courts don't feel the need to engage with the technology and force the police to do so as well.

A Anthony Sanders 50:00

And the thing that you forget after going through the opinion is that actually the Fourth Amendment was violated here. It just doesn't apply in this case. And God knows if in the next case in the 11th Circuit, this ruling is going to apply. I mean, it's not even the same rules as qualified immunity in that way. So, you know, are the cops going to change their practices because of this?

J Jared McClain 50:27

Right. And you can read the opinion as sort of creating like, it's hard to look at this crime and not think of it as a heat of the moment crime. And the court says, all you need is a temporal limit, and two and a half months would satisfy that. So moving forward, any time there's any crime, courts can issue warrants for two and a half months of data for everything on your iCloud account now within the 11th Circuit.

A Anthony Sanders 50:58

Mike, do you have an iCloud account?

M Mike Greenberg 51:00

I think I do. But I think I have more than two and a half months worth of data on it, so I gotta get to deleting stuff. I think the good faith exception is just generally incoherent. The court here is taking the Supreme Court's guidance and says that the good faith exception is limited to situations in which the threat of its application can deter future violations. Fair enough. But then it says that good faith mistakes can't be deterred, and that makes no sense. Maybe good faith mistakes aren't like blameworthy or, you know, we don't want to give an officer the death penalty for committing a good faith Fourth Amendment violation. But an officer can absolutely use the memory of evidence being suppressed in case A to ensure that that particular mistake doesn't happen again in cases B through Z, whether the mistake in case A was in good faith or not. Now, instead of the officer having to worry about cases B through Z, the court in this case is just assuming without deciding anything, as Jared's been getting at, there's no guidance for officers, for litigants, for future district courts, anything. And people often describe the

exclusionary rule as a get out of jail free card for people who are dangerous or something like that. The court here is treating it as a get out of jail free card for officers that can just be used in perpetuity now.

A

Anthony Sanders 52:38

One other aspect of this, it's so beyond the Fourth Amendment that it just seems odd to me, is it shows kind of the imbalance between our priorities in federal law enforcement and local law enforcement. This man did something seriously wrong and should be prosecuted for the attempted felony murder, call it whatever you will. And yet, we're in here about how he had a gun. He was holding a gun a month before this happened because he's a convicted felon. Maybe you did more digging than I did, Jared, but I looked at the response brief in the 11th Circuit to see if the government brought up how is he being prosecuted in state court for these much more egregious crimes, and I can't tell if he was. I mean, if they got his iCloud account, even his texts, they must have figured out something about these associates. And yet we're here on this federal charge, which is really tangential for the reason why he should be put away.

J

Jared McClain 53:49

Yeah, I didn't see anything about them uncovering anything actually having to do with the crime. And I think that if they did, it would have made it into this opinion, as opposed to a rationalization for why this? And like, yeah, we talk about holding this guy accountable. He did something wrong here, and there should be a state court prosecution for it. But the good faith exception to the exclusionary rule is just like a policy choice that allows the government to err on the side of violating our rights. And when you think about how they've made this policy choice to apply the exclusionary rule only in unusual cases where you can show the officers weren't acting in good faith, alongside the other policy choice that grants officers qualified immunity unless the law was clearly established, and there's no remedy left. So it's like okay, if you can't get it on the criminal side, and you can't get it on the civil side, if we're talking about incentives here, what incentive is there for the cops to follow the law anymore? And all we need is a hint that they thought that they might have been doing something correctly. And that's enough to let them off the hook. The double standard is breathtaking.

M

Mike Greenberg 55:15

Both qualified immunity and the exclusionary rule exceptions seem to presume that government investigators are the most incompetent nincompoops on the face of the earth. And I want to give them more credit than that, and I hope the courts do as well going forward in refining these doctrines. I'm not gonna hold my breath though.

J

Jared McClain 55:38

One last point is this opinion came out three years after the illegal search of his iCloud account. And we're talking about how quickly technology moves and how slow the law moves. That's a pretty big gap. We're giving cops time to continue to act in good faith while they violate our

rights until an appellate court finally says how the law applies. And here, we've only assumed without deciding.

A

Anthony Sanders 56:03

So one final point, which is completely separate from everything we just talked about, but I thought of it when Jared was talking because he read the sentence, "But in the mine run of cases, we think a time-based limitation will be both practical and protective of privacy interests." I am fixated on the class of phrases like "mine run" for some odd reason. So there is "run of the mill," which is what I grew up always using about ordinary stuff, but then there is this phrase "mine run," which is often used in legal opinions, I've noticed. And I think it's because they get tired of saying "run of the mill." So instead, they use "mine run," and then occasionally, you also see "kiln run," which I have no idea as to where it comes from, other than it sounds kind of down home, I guess?

J

Jared McClain 56:53

For baking pottery?

A

Anthony Sanders 56:55

Yeah, kiln run. But anyway, are you gentlemen familiar with this or know why mine run is a thing?

J

Jared McClain 57:04

I remember hearing a similar conversation to this one, and the outcome was, I think, that some of these terms don't even mean what they're being used to mean, that like they just sound like "run of the mill." So they're all being plugged in; they're synonymous with it. And they all mean slightly different things or completely different things. One judge says it, so then another judge picks up a new neat alternative. And now, I don't know.

A

Anthony Sanders 57:37

Do you have a mine run opinion on this, Mike?

M

Mike Greenberg 57:41

The only thing that springs to mind, as you know, is just the ever present race for people to condense legal writing from if you can use three words instead of four, do that. You know, judges are not bound by appellate briefing word counts, but maybe they're sensitive to it as well. I don't know.

A

Anthony Sanders 58:01

That's a good bet. Yeah. Run of the mill, mine run. You lose two words there. So I could see myself trying to squeeze that into a brief.

J

Jared McClain 58:10

We could just start going with "mill run."

A

Anthony Sanders 58:16

That's an alternative. That's true. Well, we never have mill run, mine run, kiln run, run of the mill episodes. So thank you, gentlemen, for coming on this special episode. Thank you all for listening. We will be back next week with more exciting cases from the federal courts of appeals. But until that time, I'd ask that everyone get engaged.