Short Circuit 306: Widespread Super Cheap Surveillance

Sat, Jan 13, 2024 3:27PM 43:09

SUMMARY KEYWORDS

Morgan v. Tincher, United States v. Motley

SPEAKERS

Will Aronin, Anthony Sanders, Jeff Rowes

A Anthony Sanders 00:24

"I hear the train a comin'. It's rollin' 'round the bend. And I ain't seen the sunshine since I don't know when. I'm stuck in Folsom Prison, and time keeps draggin' on. But that train keeps rollin' on down to San Antone. When I was just a baby, my mama told me, 'Son, always be a good boy, don't ever play with guns.' But I shot a man in Reno just to watch him die. When I hear that whistle blow, I hang my head and cry." Well, we're going to talk this week about a man who did something bad in Reno and is now in prison. But instead of killing a man to just watch him die, he sold several dozen prescriptions for oxycodone. And we'll discuss that and more this week 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 Thursday, January 11, 2024. I have a couple great guests, that regular listeners will be very familiar with, to talk about that opinion from the 9th Circuit and another opinion from the 4th Circuit that has to do with trials and tribulations at trials. But first, I have a special announcement I'd like to make. It is a repeat of what we said a couple times in the last couple months, which is that we are hiring at the Institute for Justice our clerks for the summer, summer 2024. They are the Dave Kennedy Summer Fellows. We pay them; please apply! The deadline is coming up in a couple of weeks. We hire on a rolling basis, so the sooner is the better. But if you have not applied yet, but you'd like to, now's your last chance. Click the link in the show notes, or go to our careers page at ij.org. And we'd love to see your application. We are also, I should say, hiring attorneys, so if you are an attorney, post law school, you're interested in fighting for liberty, then please check us out (also including an attorney position at the Center for Judicial Engagement itself). So today, a couple old friends. We have Jeff Rowes, who a little later in the show is going to talk about that man in Reno. Jeff, welcome back.

J Jeff Rowes 02:53

Thanks, Anthony. Great to be here.

A Anthony Sanders 02:55

And we have Will Aronin. Now, Will is a rarity at IJ. He's someone who actually knows something about trials. I shouldn't say that. Jeff knows a lot about trials also, as do many other attorneys, but I don't. And so I'm curious to learn from him about this case from the 4th Circuit about a case that went to trial, a lawsuit against a police officer, a civil rights lawsuit, and there is some hanky panky with the discovery. And this is a rare case, I think, where the police officer did not get away with that hanky panky. So we'll take it away: 4th Circuit, discovery abuse, how do trials work?

W Will Aronin 03:37

Thank you so much for having me. But more important than what this court decided, your Johnny Cash is amazing. I did not see that coming.

A Anthony Sanders 03:45

Well, I think half the listeners actually made it through.

W Will Aronin 03:49

Yeah, no one's listening anymore.

A Anthony Sanders 03:51

So I appreciate those, and I appreciate your lies, too. Thank you.

W Will Aronin 03:55

You're welcome. Thank you for recognizing what it was.

A Anthony Sanders 03:58

But I thought your idea ... So in the green room, you brought up a song by the Grateful Dead that could have worked too.

W Will Aronin 04:05

Yeah, and I'm not going to subject our listeners to me singing it, but Friend of the Devil could have worked just as well as there. Alright, so my case was *Morgan v. Tincher*. Hopefully I'm pronouncing that right. It's out of the 4th Circuit and came out about a week ago, January 3. Like you said, this case is about whether you can get a new trial when opposing counsel just fails to turn over really important discovery material. And spoiler alert, the 4th Circuit said in

certain circumstances, you can, which is a very good thing. This case, as you said, was a 1983 case. It was a lawsuit against a cop, an officer, for excessive force, and the allegations were really, really serious. So the allegation was this cop cuffed the plaintiff in the station house and then beat him with a metal pipe. And as a result, he suffered head wounds, a broken arm, and a kidney injury. So if this is true, it is extremely serious. So like you said, it's about discovery, and as you would expect, the plaintiff's attorney basically asks for any other instances where this officer has been accused of excessive force. And there's some issues with timing. It's not too important in this case, at least I don't think so, but the officer's attorney responds that there was one other person who has accused this cop of excessive force. It turns out about three weeks before the trial, after the case had been pending for a while, not just was it an accusation, but the other person actually filed a lawsuit. And Morgan's attorney, the guy who got his arm broken, learned about it about three weeks before, and he was actually allowed to cross examine the cop about it at the trial, which is what really matters. In cross, the cop is asked, and he straight up denies any other lawsuits or allegations. He said this is the only one. And it turns out that that was just not true. So after the plaintiff rested, so after Morgan stopped and said I'm done, it's now the cop's turn to put on their case. It actually turned out he learned that there was another lawsuit that was filed against the cop about a couple of months before the trial started. And actually, it was worse because it was the same defense attorney who was repping the cop in the current trial and in the other undisclosed lawsuit that was brought, so there's no question that the defense attorney knew it. In the defense attorney's defense, she argued that it was an oversight, and I'm not going to get into intent on this case.

J Jeff Rowes 06:32

Well, and it matters that the other lawsuit also was the exact same thing: cuffing the guy and beating him up. Under the circumstances, it wasn't as though it was factually unrelated.

W Will Aronin 06:42

Yeah, it was really similar, which has its own interesting part. But we can come to that in a little bit. So the important part is this is all actually happening at trial. So it was now the cop's turn to go. But the plaintiff learned that there was another lawsuit out there. And the plaintiff files a motion, as he should, to recall the cop, basically say it's still my turn; I want to bring the cop back on the stand and ask him about this other lawsuit and why he didn't tell the jury about it. The judge chews the defense counsel out and says like, you're not going to like what happens, but ultimately says, "We're not going to stop this trial," and just doesn't rule on it. So the trial continues, and the jury comes back and rules for the cop, and Morgan loses. And I want to actually take a second on this. I just love trials. And this is kind of a big deal. So we can argue about whether two excessive force lawsuits against a cop, whether or not that should sway a jury, but it very well may or may not be enough. The cop can still argue, look, it's just two people who are unhappy being arrested. But what almost certainly would have swayed the jury was once the cop got on the stand and like testified, told the jury, nope, that's the only one, and it turns out a day or so later, the cop has to come back and say, yeah, I lied, or I forgot about this one, or oops, it was an oversight. Once a juror thinks that a witness has lied to them, it's basically the kiss of death. So had the judge ruled right away and recalled the cop, you can't know what would have happened, but there's a very, very strong chance that it would have turned out the other way. Because now it's not just were you accused twice? Now, it's were you

accused twice, and did you lie to me, the jury, about it? But that didn't happen. In reality, Morgan lost this trial, so his lawyer filed a motion for relief from judgment. For our, let's say, geekier lawyers out there, it's Federal Civil Procedure 60(b)(3).

A Anthony Sanders 08:39

We love our geeky lawyers.

W Will Aronin 08:41

I mean, that's all IJ is about. Let's be honest. So the motion was saying that he's entitled to a new trial based on "fraud, misrepresentation, or misconduct by opposing counsel." So he files the motion, and nothing happens. It takes about a year, so a year after the trial had finished, before the judge denied that motion. And I think this is the money line from the judge's ruling, which was, "Morgan did not suffer any real prejudice because he had not demonstrated that the evidence of the other excessive force lawsuit would have changed the jury's verdict." So I may be reading too much into this, but it's something I've observed like a lot in my career. And I read this or I hear this as the judge sat through the full trial. He heard evidence about the other lawsuit. Now, remember, there's three. There's Morgan's lawsuit, which is the case there, there's the lawsuit that Morgan knows about, and then there's the lawsuit that Morgan learned about later, right? So not only did the judge let Morgan put in evidence about the other lawsuit, he actually let Morgan call the other complainant, the other plaintiff, as a witness. So that's pretty broad and allowed in quite a bit of evidence. So the judge heard all this, he let it go to the jury, and he just did not believe that one more lawsuit would be enough to change, would be enough to warrant starting over and doing an entirely new trial, which is why he said like we're not going to stop this trial. And that's what I read as what happened in this motion. But generally, motions for new trial, they can be tough. And it's largely because of finality. You know, cases take a long time, and sometimes, they just need to end. So ultimately, the court rules that there's no new trial, and Morgan takes it to the 4th Circuit. And I thought the 4th Circuit handled the finality issue really, really well. And I just want to quote them. It said that, "Although we acknowledge the importance of finality of judgments, the fairness and integrity of the fact-finding process is of greater concern. And a party's failure to produce the requested documents so favorable to another party impedes that process and requires redress in the form of a new trial." So in other words, like fairness is more important than just being done. And I think they really weighed that factor and got it right. So I already gave the spoiler. I said that the 4th Circuit said there was a new trial, but there were a few factors that they considered. The first was was there misconduct? And it doesn't matter about intent, they said. And yes, we know there were definitely some discovery violations. Then it was was this a meritorious claim, and was the plaintiff unable to fully present this case? And then they sort of weighed the finality versus the fairness. And, to me, the biggest thing was that the court actually said that, "It had little trouble balancing and deciding what to do," because not only did the officer's failure to produce evidence of the other lawsuit make it so that Morgan couldn't fully present a case, he actually said that the misconduct may have led to the presentation of false testimony as well, which is what we talked about. So in other words, the discovery violation basically empowered the cop to potentially get on the stand and lie about one excessive force violation, which just made it all the more egregious. So ultimately, Morgan gets another trial, gets to start all over again, keep this case going longer, which is expensive and difficult. So it's not really being made fully whole, but at least he gets another shot at the apple. I will say, I don't want to

just keep talking because I feel like I've been talking a lot, but there was one other thing that was interesting to me, which is I'm an evidence guy. And I'm just amazed that like the 404(b) analysis was passed over so much on this one, but I figured ...

A Anthony Sanders 12:24

Tell us what 404(b) is.

W Will Aronin 12:26

So 404(b) is Federal Rule of Evidence 404, prior bad acts. So generally, the rule is you're not supposed to be allowed to admit other bad acts in order to prove what's called propensity or character evidence. The idea that because you did something bad in the past, you're more likely to have done this thing as well. You're not supposed to be able to admit this, and I guess I'll throw my priors out there. My background is as a criminal defense attorney, so I really always argued to keep 404(b) out or at least to get it in for the rats. But there are exceptions to 404(b), and it's basically you can't use it for propensity, but you can use it for motive, opportunity, absence of mistake, but it's really supposed to, at least in my reading of it, be pretty narrow.

A Anthony Sanders 13:13

What I remember from evidence class is that the distinction often is just bad acts versus habit. That's a way sometimes to get it in.

W Will Aronin 13:23

So habits are a different rule. You're allowed to get in habits, like I always put on my seatbelt, therefore I am likely to have done it before. But bad acts is like I beat this person; I beat this other, unrelated person. Therefore, I have the character to beat people, so it's more likely that I beat the other guy. I was surprised that actually there was no analysis in the district court ruling. I went to the docket, I went to the 404(b) notices, and the objections on both sides. So Morgan just said like this is more likely to make ... This proves that the officer did not make a mistake and then just kind of moved on. The vast majority of the briefing was just about whether or not this was, in fact, a discovery violation. And I was just surprised how everyone moved past that so quickly because, to me, it's a pretty big deal. Like was I really arguing that like taking the metal pipe and breaking my arm was an accident? Usually, if I, if the defendant, like argues that it's an accident, then you can say, well, here's another instance where you did something very similar. That proves that it's not. So I was surprised how easy it was. And I went back, and I did a little bit of research and realized that the 4th Circuit actually has a really broad view of 404(b). And they characterize it as an inclusionary rule, which is the opposite of how I've ever viewed it. And it permits the introduction of all relevant acts, except things that literally only prove character. So I was surprised, but the lawyers did the right thing. That's just what the law in their circuit is.

J Jeff Rowes 14:52

Yeah, I thought that there were two interesting takeaways from this case. One is Rule 60 is a Hail Mary pass that is often thrown and rarely caught. You know, once a trial is over, a trial is over. Judges don't want to redo them. And the standard on appeal is abuse of discretion, so it's not enough even to show that the judge made a mistake. The question is, did the judge make an egregious mistake because there's just no way we can let it stand. And it is very rare to get something reversed on the abuse of discretion standard. And so, you know, take heart those who experience material errors at trial. Maybe you can actually get it overturned. I think the other thing that's interesting here is the kind of thing that's going on and that there may be a cultural shift, even in courts that are traditionally conservative, like the 4th Circuit. And that's to say that, you know, in the way that Tincher, the officer here, is alleged to have behaved is the way action hero cops behaved in movies in the 70s and 80s. You know, you get the guy in the room, you tell your partner to go grab a cup of coffee, and then when they're out, you start laying into the guy. But when those kinds of people exist in the real world, they're sociopaths, right? We actually ... We don't tolerate that anymore in a way we might have tolerated it, even until fairly recently. And the court is just saying, look, the 4th Circuit is saying we're just not going to pretend when there are, you know, serial allegations of someone being handcuffed and beaten behind closed doors in a station. We're not just going to go for the usual he said, she said anymore and just keep letting the cops off. And so that might signal a deeper cultural shift in courts' willingness to believe the police when they just shrug their shoulders and say this is all made up. And all of these medical records, you know, the guy tripped and fell going down the stairs kind of thing.

W Will Aronin 16:49

Yeah. Can I just touch on that? Because, first of all, I agree with absolutely everything you said. But I was at least a little frustrated with just the idea that this is how we deal with this type of allegation. And just like does Morgan get paid for it? So these are extraordinarily serious allegations, so either this cop took a metal pipe and beat a handcuffed man in the head and broke his bones and injured his kidneys, or he didn't. And I don't know if that turns on whether or not there's another lawsuit. But that seems like something we should absolutely be seriously investigating and find out if it's true because honestly, to be fair, sometimes criminal defendants are not always credible in their allegations, so this may not have happened. But I don't know that this is the way we should be figuring it out. And if he, in fact, is beating handcuffed men with metal pipes, like he needs to go to jail. That's just beyond abhorrent.

J Jeff Rowes 17:41

Yeah. And, you know, frankly, these things should start too with ... I mean, he's just blatantly, he's blatantly perjuring himself in court saying that he doesn't have a lawsuit. And you don't forget when you've been sued for police brutality as a cop, right? And so it's just perjury on perjury on perjury. And that seems like that would be a good place for a DA to begin once in a while.

W Will Aronin 18:00

I would be really happy to see more perjury prosecutions just all around. Lying in court has to

be a bigger deal than like it ends up being in the real world.

A Anthony Sanders 18:10

And in that way, this case is evidence of what we've talked about on the show before that, of the various ways you could get justice for the bad acts of a public official (you could prosecute them, you could, if they're prosecutor, maybe you could have them disbarred, you could have other sanctions), about the only one that really there's a motive for it to work is a civil lawsuit from the victim, which has happened here. And we don't know; maybe this cop was reprimanded in some way, but as we know, that often does not happen. And so it seems like three times the charm with different lawsuits against this cop and put it over the edge for the 4th Circuit judges that there has to be something a little more here. Yeah, that you get another bite at the apple. One question I had, Will, and this is my trial naivety, is the plaintiff's attorney filed this Rule 60(b)(3) motion, which as Jeff says, is a little bit of a Hail Mary. But I know that when a trial is over, standard practice if you lose is to file a motion for a new trial, which you like know is going to be denied, but you have to do it to preserve your rights for appeal or like something along those lines. But you have to do it. But yet this attorney here, the court points out, doesn't file. This is the only motion that they file. And that could be then appealed, I guess. And then months go by, and the time limit for filing a notice for appeal from the actual trial goes past, so the only way to appeal it is when the court finally got around to ruling on this motion, which then is appealed. So this is a bit wonky, but is that a weird, kind of risky, technical move for the lawyer to make? Or does the lawyer not appeal the trial earlier because that's going to divest the court from ruling on this motion in the first place, which it's taken forever to rule on. And so it's kind of like you have to pick one or different paths.

W Will Aronin 20:29

Yeah, I have to be honest, I was a little confused by the decision too. It feels weird because, so my recollection, I didn't re-look at it for this podcast, but I've seen it many times. It's just my recollection is the motion for new trial may extend the appeal deadline, but like there's a limit to how long the judge can sit on it before you otherwise just have to file the appeal. Like it doesn't just extend it until the judge rules, so I was a little surprised that there was an appeal. Go ahead, Jeff.

J Jeff Rowes 21:00

Yeah, so it does. I mean, in the civil context, if you file a motion for a new trial, or you file a Rule 59 motion for relief from a particular order, something like that, that would ordinarily stay the time for appeal. But I kind of thought what might be going on here as a practical matter, to be honest, is the trial ruling comes down, sort of a done deal, the judge forgets about it, this guy files the Rule 60(b) thing, which then sits on the docket. Finally, a clerk gets around to looking at it like six months later, and then the clerk writes a draft opinion that goes to the judge. And the judge is like, wait, what? This is for that trial we did like last summer, and now this guy wants to do it all again and everything like that. No, no, we're not doing that. And that's kind of like ... You know, I'm not saying that the judge is slacking exactly, but I'm saying that all of the incentives at that point (by the time the judge gets around to looking at this civil motion, half a year, at least, after the trial is over), all of the incentives are just like we've

moved on, you know. We're not reopening that. Trial is a big deal for a court. It's takes a lot of time. So I feel like that was just sort of an element like this is a done deal. Let's not look too hard at this. And certainly, the judge wouldn't have expected the 4th Circuit to overrule something under an abuse of discretion standard.

A Anthony Sanders 22:14

So another standard, one we talk about a lot on Short Circuit, is unreasonableness and unreasonableness under the Fourth Amendment and the right to be free from unreasonable searches and seizures, and they have warrants and all that good stuff. So we're now looking at this man in Reno who had some information in a vast government database that allowed the police to indict him and his co-conspirators. So Jeff, we have a little bit of, you know, normal crime here. We have a little bit of what you viewers of Better Call Saul will probably know about, about selling oxycodone, but then we also have a vast government database. So put it all together for us.

J Jeff Rowes 23:02

Sure, sure. So, you know, y'all might think that all the police in Reno, based on Reno 911! are bumbling nincompoops. But it turns out that they are not, at least when it comes to cracking opioid rings. And so we had a Californian named Motley, and he would drive into Nevada and had a corrupt doctor in Reno who would write him prescriptions. And then he would also write prescriptions for other people, which Motley would then sell to those people. And the nutshell is that Nevada, like every other state, has a database that tracks opioid prescriptions and looks for patterns, either how much you're prescribing or how often you're prescribing. And that database allows police officers to take a peek at it without a warrant. So what happens to good old Motley? First of all, he's personally being prescribed three or four times the absolute medical limit on the amount of opioids that should be prescribed for anyone. So the police notice this, and they go to a judge and say, hey, we want to put a GPS tracker on this guy's car. We have confidential informants that are talking to us, but we can only have those informants ask so many questions of Motley before he's going to start getting suspicious, so they want to follow him around with a GPS tracker. They get a couple of those. Things are looking good. They're getting good evidence, and so they eventually go and get a wiretap on Motley's cellphone. Long story short, he's in the slammer now. And the argument he makes at his criminal trial is, hey, the initial search of the opioid database was without a warrant. And then all of the warrant searches that came (the GPS tracking device and the wiretap), those were all the result of this initial warrantless search. And then he argues that I have a Fourth Amendment right to privacy in my opioid prescriptions in this government database, and they needed to get a warrant for that. And the 9th Circuit says, nice try, forget it. And the reason why it says that is in this country, we regulate opioids really, really heavily. We scrutinize and regulate their prescription and distribution. And so what you need for a Fourth Amendment right is you need a subjective expectation of privacy, and then we as society have to deem that expectation objectively reasonable. And so the court says in a universe in which we are regulating opioids into the ground, no one has an objectively reasonable expectation of privacy in the prescription of opioids. Now, you might say, well, wait a second. What about my medical records in general? And the 9th Circuit distinguishes that. It says, you know, opioids kind of are a special thing; we're super regulating that. We're not quite super regulating everything else, so maybe you still have Fourth Amendment rights for your medical records in general. I think

that there's sort of two big takeaways for me for this. Number one is what isn't heavily regulated, right? So like, if one day the police decide to walk into a hospital and say, hey, I want to see my buddy Will Aronin's medical records from his recent hospitalization.

W Will Aronin 26:26

Those are private; I have a reasonable expectation of privacy.

J Jeff Rowes 26:29

Right. And we're not going to bother with a warrant. Why? Well, we regulate the practice of medicine heavily, don't we? We regulate the distribution of drugs, including prescription drugs that are not controlled substances. We heavily regulate nursing, we heavily regulate hospitals, we heavily regulate everything. So under the same rationale, maybe you don't have an objectively reasonable expectation of privacy in your medical records, or frankly, anything else, right? We heavily regulate the rental market, so one of the things IJ does is we contest on Fourth Amendment grounds just general, warrantless searches of apartments or searches of apartments that don't need individualized probable cause. And so if you live in a universe in which everything is heavily regulated, and your Fourth Amendment doctrine depends on whether something is heavily regulated, then it means the police can probably search just about anything without a warrant. And that leads me to my second takeaway, which I think is generally applicable in the Fourth Amendment context, which is that there's not a strong underlying principle. We say things like objectively reasonable expectation of privacy, but there isn't very much behind that. What we see in practice is you have privacy up until the point that the government has the financial resources and the technology to engage in surveillance. And so as the surveillance state expands, your expectation of privacy correspondingly diminishes. So you would have had lots of privacy in your prescriptions in 1950 because there was just no way for the government to keep track of what doctors were doing. But in a world of essentially costless electronic storage, the government can engage in widespread, super cheap surveillance. And we can expect with AI and the ability of the government to aggregate information like on a daily basis now ... I suppose the government could have AI bots scraping the entire internet and databases, like the drug databases, to constantly generate names popping up, a sort of *Minority Report* style. This person may not have committed a crime yet, but this person is really likely to commit a crime. And we're entering a world in which the courts might be saying, oh, yeah, the AI bots that are scraping all of these databases, public and private, even if they're not readily accessible by the public, are not actually searches, and you have no expectation of privacy in kind of anything you do anymore. And so that's one thing that I think those of us that care about privacy should be concerned about pegging our Fourth Amendment rights just to an objectively reasonable expectation of privacy in a world in which the surveillance state is growing exponentially.

W Will Aronin 29:24

It really frustrated me because it feels like the analysis, just the order of operations and the way the court evaluates this, is entirely backwards. So shouldn't the question be like, was there an expectation of privacy in either your medications, your medical records, however you want to frame it, I don't know, before the government created a database? Not whether or not like

the existence of this database means that it's no longer private. So in other words, it's like, why is it that if the government just violates the Fourth Amendment on a huge scale without any individualized probable cause, then it's "pervasive regulations," and therefore it's pervasively regulated. There's no Fourth Amendment. It reminds me of another IJ case, it's U.S. Private Vaults, where the FBI basically searched this security box company and said there was some suspicion against the company, but then used it to just seize and search and then eventually try to forfeit all of the individual boxes. And the question that the courts are evaluating is whether or not there was an expectation of privacy that the owners had in security boxes, but like, would that be different if the government just had decided to create this huge database of all security deposit boxes in the country? And then the idea is, well, we've created an enormous database. Everyone should know that you no longer have any expectation of privacy in your security deposit boxes. It just feels like the question is just being asked in the entirely wrong way.

J Jeff Rowes 29:51

Right. And what we might say to ourselves, at least in the context of the private vaults, is that, you know, tie our Fourth Amendment rights back to people and property so that when you rent a security deposit box from U.S. Private Vaults, that's just private property. That's a contract between two people. That contract requires the safety deposit box to be kept private, and that's just it. And so it's private for the purposes of the Fourth Amendment. You don't ask this metaphysical question about whether or not "society" is willing to recognize that as objectively reasonable because, you know, now that the government has the capacity to create databases about everything, that just means that we don't have Fourth Amendment rights in hardly anything. Oh, I'm sorry, go ahead.

W Will Aronin 31:43

No, I was gonna say maybe we should be considering whether or not we create the databases and whether it's unconstitutional to do that in the first instance.

J Jeff Rowes 31:51

Yeah, and I think to the, you know, to the concurrence's credit, that, you know, the concurrence says we don't need to reach this. There are other ways to resolve this. This is actually a weighty question, and we should avoid it until we have to. In other words, whether or not you need a warrant to search one of these drug databases is the weighty question. On the other hand, the concurrence says, you know, we can use either the good faith exception to the Fourth Amendment, which means that if an officer is acting pursuant to a statute, and the statute is facially valid, it's not just obviously, clearly unconstitutional, then the search is legitimate. And you know, which is fine, that's an existing doctrine. But it also illustrates the larger point to anyone who's studied this area of the law, which is that Fourth Amendment jurisprudence is just a roadmap for violating the Fourth Amendment. There's essentially nothing that violates the Fourth Amendment anymore, maybe absent like completely ransacking somebody's bedroom in the middle of the night or something like that. But it's hard.

W Will Aronin 32:46

Unless there's exigent circumstances.

J Jeff Rowes 32:48

Yeah, that's the thing. There's virtually always an exception that applies now. So the Fourth Amendment is sort of Swiss cheese. And the size of the holes are growing, and the size of the cheese is diminished.

A Anthony Sanders 33:00

The concurrence basically says why can't we sweep this under the rug like we normally do? Like why are you guys going there?

W Will Aronin 33:06

Yeah. I feel like we should talk about the concurrence for one more second. So I obviously think that the majority opinion is wrong. I do think there is a Fourth Amendment right in your medical records, and we should be considering it. I think that's pretty obvious. But I don't like the idea of the concurrence just saying, well, let's not decide it because all that means is the government completely gets to keep doing it because "they have a good faith exception" to follow the statute, and it's just going to keep happening. And what that means is the law remains unsettled. And it actually is harder to challenge. I'd almost rather the court answer a question and be wrong about it so that like we can know what the law is and potentially get the Supreme Court to consider it or at least like create a circuit split, than to just keep this on the well, we're not deciding today, but at least it's good faith. That's one of the things that has screwed up qualified immunity so badly.

J Jeff Rowes 33:56

And you know, one of the dilemmas in these kinds of cases is that the purpose of enforcing the Fourth Amendment isn't so much to protect Motley. In this case, he was clearly guilty of what he was doing. But we want to protect the Fourth Amendment to disincentivize warrantless searches of ordinary people like us, frankly. And just that there's this idea that there's this database that's full of information that we would ordinarily consider private, and we just want it to remain private. If the government is going to create it, it at least has to keep this information private. But the problem is that our protections for the rest of us depend on Motley himself being able to vindicate them, and he's a scumbag. And so this is why you see our Fourth Amendment protections are just constantly eroded because the, you know, specific question in this case is what do we want to do with Motley? Well, we want to throw him in jail, which is why the concurrence also says, look, even if we kick out the medical stuff, there was so much information from the confidential informants, that the warrants were valid. The error is harmless. That kind of thing.

A Anthony Sanders 35:00

And of course, the irony of that is that if someone who legitimately was getting oxycodone or whatever the controlled substance is and just didn't want their information in the database or wanted it protected from the police or whatever because they just valued their privacy, and they filed a lawsuit there, it's going to be said, well, it's not right, or there's no standing or whatever the excuse that the court is going to come up with. So that case would never even happen and never get to the merits for other reasons. I also found it really weird that this court did not bring up a couple big subjects that are kind of lurking in the background and are never named, and I think they're not named because they would provide a lot of problems for it. One is the closely regulated industry exception, which I'm sure you guys know about. But for our listeners, it is an exception to the Fourth Amendment, one of these holes in the Swiss cheese Jeff was talking about, where you can search a business if you're the government. So a regulatory regime, like the health inspectors or safety inspectors, can search a business without a warrant if it is a "closely regulated industry," and this has been, over the years, things like auto parts dealers, tobacco or alcohol type of businesses. And the thing that happened is in the lower courts, this kept expanding and expanding and expanding. So like everything was a closely regulated business. So the Supreme Court a few years ago, in a hotel inspection case called *Patel* said, look, hotels are normal. They're everywhere. We're not going to say they're a closely regulated business just because there are, of course, regulations about hotels. That never comes up; the doctrine never comes up. *Patel* never comes up here, and yet, what they're really saying is oxycodone is heavily regulated. Therefore, different rules apply. The other thing is the third-party doctrine never comes up. This is third-party information, right? So Motley's info is going to the doctor or the drugstore, however it is, which then goes to the database. And that's through a third party. And usually these types of regimes are hard to challenge because, you know, you could argue that the info at that point is the drugstore's; it is not Motley's. Although Motley, you know, is making this argument, and the court never really gets to it, about whose exactly the info is. But I see that as a big issue that the court probably could have swept under the rug otherwise, except that there's this case from a few years ago, *Carpenter*, and this is the geolocation cellphone case, some of the listeners might remember, where the court started saying, you know, it's a new age, we need to look at this differently, and there are some limits on this third-party exception to the Fourth Amendment. The court doesn't deal with that at all. So there's these two huge issues in the background that it just kind of gets around by saying this, like, you know, a database has been here a long time now, and it's drugs.

J Jeff Rowes 38:23

Well, that's, you know, that's probably part of the concurrence's idea that this is something that should be discussed because, after all, I mean, you know, under the third-party doctrine, it's a little bit weird for the government to say, okay, Jeff, I'm gonna write a statute that every secret that Anthony tells you, you are required by law to tell it to Will. And then the government goes and says to Will, here's a law that says you are required to tell me everything Jeff tells you. And then when the government learns all of your secrets, Anthony, and you say, hey, that was a warrantless search, the government says, oh no, that was a third-party doctrine. We just ordered all this information to be disclosed to third parties. You know, I'm always interested in these cases, not just for the specific legal doctrines that are ins and outs, but for what they tell us about our legal culture and the direction of our constitutional law. And every time I do a Fourth Amendment case like this, I feel like saying, as perhaps a grouchy Gen Xer who's not on social media, that, you know, we should be wrapping the knuckles of everybody who posts every stray thought, every image of themselves from every possible angle in every state of

dress or undress, every morsel of food they eat, to the internet because our conception of individual privacy is rapidly diminishing, and the courts are interested in that for Fourth Amendment purposes. If society itself doesn't seem to recognize any sense of personal privacy when it comes to databases and electronic information, then the courts are likely to say why should we either?

W **Will Aronin** 39:58

And that is a real problem under current Fourth Amendment doctrine where we look at is it an expectation of privacy? And you're right that if we went to this other model, you can argue whether it's the good, old-fashioned model, or it's just the model that we should have for the Fourth Amendment of more of a property rights view, then we don't have to worry so much about what everyone else is doing on social media. But under current doctrine, it definitely has an impact. I mean, you talked about health records, Will, and that's very scary that other health records could be found out. But I think the ultimate issue here that people have not discussed very much is tax returns. And the, you know, only reason the government cannot look at your tax returns without a warrant is because there is a federal statute that forbids them from that. It is not because of our understanding of the Fourth Amendment. If that statute somehow went away, and they did, you know, state or federal or whatever wanted to just go look at your tax returns, state or federal tax returns, I don't see how it's different in this case. It's heavily regulated; everyone has to file one.

W **Will Aronin** 40:25

The third-party doctrine has completely just eaten up the Fourth Amendment.

J **Jeff Rowes** 41:12

I think it's also true that, you know, I had the same thought about HIPAA and that our medical privacy, our expectations of medical privacy, are also defined by statutes. And I don't know HIPAA well enough to know what it says about what law enforcement can do. But it seems to me that if, you know, Congress decided to modify it or just started to write something into HIPAA that said, oh, by the way, none of this counts if you're law enforcement, I think the Supreme Court would, or the federal courts would, say oh, that's pretty significant to us about whether or not Fourth Amendment protections apply.

W **Will Aronin** 41:43

And at what point does just the existence of HIPAA ... Like if you ask everybody, they're gonna say, oh, yeah, my medical records are HIPAA protected, and the court will just say, well, that's a subjective belief. Well, at what point is the fact that everyone believes this thing, make it reasonable? Like if everyone thinks HIPAA protects it, why is it that the government would be like, oh, no, we quietly actually have been aggregating all this, so you don't have an expectation.

A Anthony Sanders 42:06

One of the first things I ever did as a practicing attorney was I wrote a detailed memo on HIPAA privacy protections, and there was something about a court order in it to being an exception. But that was a long time ago, and therefore, I will not pontificate about it today. But I remember it's very complicated.

J Jeff Rowes 42:25

Yes, I'm sure.

A Anthony Sanders 42:28

Not what you might call a reasonable expectation of privacy. So thank you, gentlemen, both for this tour de force of the Fourth Amendment and trials today. Everyone, please remember that if you want to apply for one of our clerkships, you should do it ASAP if you're a current law student. Otherwise, we will be back next week with more cases from the federal courts of appeals. But in the meantime, I want everyone to get engaged.