
The 'Eyes' Have It at the U.S. Supreme Court

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Editor's note: The U.S. Supreme Court decision in *United States v. Jones* was issued after the deadline for this article's submission. For more on that case, **click here.**

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Reasonable Expectation of Privacy?

For nearly half a century, the Supreme Court has interpreted the "reasonableness" requirement of the Fourth Amendment through the prism of our citizenry's "reasonable expectation of privacy." This standard has been criticized as both over- and under-inclusive.

Originalists, like Justice Antonin Scalia, believe that the focus on current reasonableness is misplaced; rather, they say, the inquiry should concern the reasonableness of a particular search (or its closest analogue) at the time of the Constitution's ratification. Privacy advocates, on the other hand, worry that the standard provides an insufficient bulwark in an age of increasing proliferation of Internet connectivity and surveillance cameras. As of yet, however, no other standard has won majority-approval at the court, and so

the "reasonable expectation" standard limps along, bruised but not battered.

The standard got another test this term in the case of *United States v. Jones* . In *Jones* , a narcotics defendant challenged the admission of evidence at his trial obtained from a GPS device installed on his car (and monitored for nearly 30 days) without his knowledge by law enforcement officers. This case was only before the court because several government actors failed to act in a timely fashion.

As a big-picture matter, the rapidly expanding use of new technology by law enforcement officers is probably better suited to regulation by legislatures, but Congress failed to provide any guidance in this area. Moreover, the justices' debate over whether a warrant should be required to use GPS technology obscures a critical fact in the *Jones* case: Law enforcement officers did obtain a warrant. The problem, however, is that they waited 11 days to install the GPS device on the defendant's car — one day beyond the 10 days within which the warrant permitted installation. This late action rendered their actions warrantless and allowed this case to reach the Supreme Court.

The law enforcement officers did, however, attempt to conform their actions to the most relevant Supreme Court decisions on point. In two decisions — *United States v. Karo* (1984) and *United States v. Knotts* (1983) — the court clarified that use of a beeper to track an automobile or its contents on public roads did not violate the Fourth Amendment, but that use of the technology to provide information from inside a private garage crossed the constitutional line. This public/private distinction was further emphasized in *Kyllo v. United States* (2001), in which the court held that the Fourth Amendment barred use of thermal-imaging technology from a public street to gain information about activities within a home. Based on these decisions, in the *Jones* case, the government introduced at trial only GPS data obtained while the defendant traveled on public roads.

This restraint was not enough to placate the D.C. Circuit, and it was not enough to satisfy the Supreme Court — the justices affirmed the D.C. Circuit's decision Monday. In essence, the court found itself confronted by two uncomfortable choices. On one hand, the court was being asked to hold that nothing occurring in public is subject to Fourth Amendment protection; in this world, the government would be able to install GPS devices on anyone's car (including a Supreme Court justice's) without notice or probable cause and continue monitoring that data for an unlimited duration. The justices may have not been willing to foreclose a role for the courts to review excessive, Big Brother tactics in this regard.

On the other hand, efforts to impose constitutional limits on GPS technology lack clear boundaries or limiting principles. For example, the defendant in *Jones* asked the Supreme Court to find a constitutional violation because the 30-day monitoring of his travel on public roads exceeded a "reasonable expectation" of what law enforcement officers would monitor. This so-called standard would require cops, prosecutors and judges to engage in a complex calculus of personnel requirements, budgetary limits and even some assessment of law enforcement officers' abilities to maintain surveillance without detection. Good luck to the Philadelphia Police Department as they try to apply that standard. Justice Sonia Sotomayor — one of the "liberal" justices — exclaimed at oral argument after the defendant offered his proposed constitutional standard to apply to this and future cases: "What an unworkable rule tethered to no principle!"

Eyewitness Testimony

Two of the court's criminal-law decisions this term involved eyewitness testimony. Studies have cited flawed eyewitness identifications as a major cause of wrongful convictions; according to the Innocence Project, eyewitness testimony misidentification has played a role in a whopping 75 percent of convictions later overturned by DNA testing. The growing acknowledgment of the inherent limitations of eyewitness evidence was most prominently reflected in the 2011 decision of the New Jersey Supreme Court that prescribed special jury instructions and judicial gate-keeping hearings because of the "troubling lack of reliability in eyewitness identifications."

Against this backdrop, a writ of certiorari was granted in *Perry v. New Hampshire* , a case asking the justices to require judicial hearings to test the reliability of eyewitness testimony before any such evidence may be admitted at trial regardless of whether the defendant alleged any improper suggestive activity by

law enforcement officers.

At a superficial level, court-watchers might have recently thought they discerned a glimmer of support for the sweeping remedy sought in *Perry* . The court reversed the murder conviction of a Louisiana man based on the state's failure to comply with its obligations under *Brady v. Maryland* and disclose to the defense evidence to undermine the main witness's eyewitness identification of the defendant. In that case, *Smith v. Cain* , the state's witness told the jury that he had "no doubt" that the defendant was the gunman with whom he stood "face to face" on the night of the murder. His unequivocal trial testimony was contradicted, however, by his statements to police officers on the night of the murder, when he complained that he "could not ID anyone because [he] couldn't see faces" and that he "would not know them if [he] saw them." The state's attempt to justify its failure to disclose these statements drew a frosty response from the justices at oral argument, including the withering query from Justice Elena Kagan whether the state had ever considered confessing error in this case. The justices reversed the conviction in an 8-1 opinion that emphasized the materiality of the eyewitness testimony in this case.

The justices' disgust in the *Smith* case did not get refracted into a sweeping expansion of the Due Process Clause in *Perry* . In that case, the state persuasively demonstrated to the court both that (1) there was no principled limitation for using the Due Process Clause to require special evidentiary hearings for one species of evidence (eyewitness testimony) as opposed to others, and (2) all prior cases held to violate a defendant's right to a fair trial involved corrupting action by law enforcement officers. At oral argument, the justices expressed their concern about both of those points, and Justice Anthony Kennedy best expressed the justices' reservations when he suggested that the defendant's proposed rule would invade the province of the jury.

In its Jan. 11 decision — an 8-1 opinion authored by Justice Ruth Bader Ginsburg from which only Sotomayor dissented — the court emphasized that, absent a suggestion of improper suggestion by police officers, the reliability of eyewitness testimony must be evaluated by juries, not judges. Ginsburg wrote: "The fallibility of eyewitness evidence does not ... warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." The goal of the court's prior holdings requiring exclusion of evidence procured by suggestive police officers was to deter police misconduct; in cases without such improper persuasion, the court held, there was nothing to deter.

Legislatures Can Act

Simply because the Constitution does not require a remedy does not mean that Congress or state legislatures cannot bestow that remedy on its citizens. Even if the justices ultimately refuse to expand the Constitution to grant relief to the criminal defendants in the cases described herein, the battleground on these issues may simply shift to legislatures — which is probably where the battles should have started rather than ended. •

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