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McGEE MOOT COURT COMPETITION

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Students will assume the role of counsel in the criminal case of *Nez v. McGee*, a 2023 decision of the United States District Court for the State of McGee. This matter is an interlocutory appeal by the Plaintiff Cheyenne Nez, who seeks reversal of the trial court's order denying suppression of all evidence acquired through a geofencing warrant in Cheyenne Nez's criminal case.

## Issues

The issues on appeal are:

- 1) Under the fact pattern and context of this case did the information gained from Google implicate the Fourth Amendment?
- 2) If the cell location data in this case implicated the Fourth Amendment, did the geofencing warrant in this matter violate the Fourth Amendment's probable cause requirement?
- 3) Are officers who seek geo-fencing warrants still protected by the good-faith exception due to the novel nature of geo-fencing warrants?

Each team must argue all three issues. Briefing and arguments must be limited to these three issues. The parties should not argue other issues outside the identified issues.

This case was filed in the federal district of McGee, which is part of the fictional Fourteenth Circuit. Therefore, decisions of the United States Supreme Court are binding precedent, while decisions from other federal courts and state courts are merely persuasive.

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## Procedural History

In *State v. Nez*, Cheyenne Nez was charged with simple battery, disorderly conduct, and aggravated assault with bodily fluids after an incident that occurred during an anti-police protest. Nez was charged because of data that was collected through two geofencing warrants served on Google -- the second warrant being the legally operative document at issue in this matter. Nez filed a motion to suppress all evidence obtained through the geofencing warrant, which was denied based on the good-faith exception, and this interlocutory appeal follows. The granting of arguments on interlocutory appeal is not a contested issue for purposes of this competition, but rather the merit of the suppression issues only.

## Factual Background

On August 22, 2023, this matter came before the Court at a hearing on the defense's pretrial motions. The following facts were established through stipulation and testimony. On January 14, 2023, Cheyenne Nez rode in a van with four other individuals to a political event being held at the federal courthouse in Tulsa, McGee. Evidence uncovered over the course of the investigation showed that this event was planned over several weeks, and Defendant Nez was involved in several of the planning meetings, including an in-person planning meeting on January 13, at a private residence in Tulsa. There were civil rights advocates from a coalition of roughly a dozen groups coming to attend the protest. They had named their coalition "Family Values" and were loosely using the slogan, "Our families deserve to survive your police." The protest was in response to the police shooting of a young black man on December 3, 2022, and rumors that, after the local District Attorney's Office had declined to press charges a month ago, the

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United States Attorney's Office was going to announce that the Department of Justice was not going to seek federal charges.

Activists began gathering at the courthouse on January 14 at 9:00 a.m., in anticipation of an 11:00 a.m. press conference. Activists set up tents and a small stage in a public square in front of the courthouse; they also set wooden barricades with political slogans written on them. When courthouse security moved the barricades, activists did not protest. By all accounts, the crowd was subdued and allowed people to enter and leave the courthouse with minimal badgering and no physical interference. At 11:00 am, the gathering, which had swelled to around 75 people, received the text of the press release that was happening in real time. As the message circulated through the crowd, various chants started up including:

“We are here,

We are queer,

You should be in fear.”

“Hey, hey, ho, ho,

These racists cops have got to go.”

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“We drove all night,

We know what’s right,

We brought our girls,

We came to fight.”

As the crowd and the chants gained momentum, some counter protesters began to gather around the protestors; some of the counter protesters began yelling: “do the crime, do the time” and “blue lives matter.” The United States Marshals working security at the courthouse, along with several city police, became aware of the confrontation and began to herd the protesters off the front walk and back into the small square to the west side of the front entrance.

As the police line formed, a protester, using a gallon bucket, sprayed the police officers with a red liquid that subsequent investigation determined to be pig's blood and saliva acquired from numerous protesters who had spit in the bucket. Later, as the protester was attempting to spray the police a second time, the bucket flew out of their hand and hit a counter protester in the nose knocking them to the ground and causing significant abrasions. Body-camera footage at the time shows Defendant yelling “hit ‘em, hit back!” And it appears she joined a sing-song chant of “AYYYYYCAB, AYYYYYCAB, AYYYYY CAB” a phrase coined by anti-police activists meaning “All Cops Are Bast\*\*ds.”

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Despite the defiant chanting, Defendant appeared to comply with instructions from the police and allowed herself to be directed back into the public square. But after the counter-protester was struck with the bucket, the police put on gas masks, raised their riot shields, and pressed forward aggressively. The protesters, in seeming coordination, turned the signs they were holding upside down and began to strike officers with the wooden 2X2 posts to which the signs were attached. Defendant was shoved with a riot shield and, apparently in response, swung the sign on a wooden stake that she was carrying, striking two officers repeatedly. She then reached out and tripped a police officer, who fell onto the concrete suffering several abrasions and a contusion to his forehead. Defendant then fled the scene.

On January 18, the Federal Bureau of Investigation (FBI) sought a geofencing warrant for a three-hour window and a 150-yard radius of the courthouse. (See attached Ex. A). The undersigned agent has been granted geofencing warrants on four distinct occasions in past cases, all with similar or larger temporal and geographic parameters. The agent who submitted the search warrants did not seek legal counsel related to these geofence warrants but has consulted with the United States Attorney's Office on prior cases.

The officers also sought a search warrant for the house where the January 13, planning meeting was held and a geofencing warrant for a 150-yard radius of the home, with a three-hour window on either side of the meeting time. A judicial officer granted those warrants on January 18, and they were served on Google promptly.

Documents submitted with the search warrant to Google indicated that the police expected Google to do the following:

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First, Google would search for “location history” data, for those time frames, dates, and locations, identifying the Google-connected devices that traversed the time, date, and geographic parameters of the geofences. This search by Google would generate “location points,” which would consist of an identification of (a) the devices that were in the two physical locations during the specified date and time ranges, and (b) the devices that generated “location points” *outside* the search parameters but within a “margin of error” that “would permit the device to be located within” the search parameters, as the January 18 Application described this “margin of error.”

Second, for each of the Google-connected devices identified from the foregoing two sets of “location points,” Google would produce to the government anonymized information specifying the unique device identifier, timestamp, location coordinates, “display radius,” and “data source,” to the extent this information is available.

After Google submitted this information to the government, the government would review the anonymized information and would communicate to Google the mobile device identifiers (from the anonymized information) seeking the identifying subscriber information for the Google accounts associated with each of those specified mobile devices, identified at the government's discretion.

On April 5, 2024, Google submitted the device information for 137 cell phones located within the two requested radii, and a list of 18 devices that had been at both locations. Police requested identifying subscriber information from Google for those 18 devices.

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Police then sought, and obtained, a search warrant for Nez's cell phone provider Verizon Wireless for a 48-hour window around the time of the protest. Verizon provided the police with extensive text message records from Defendant.

The records the State would seek to admit at a trial of this matter are as follows:

- Location data that places Nez within the geofence of the planning meeting from 10:04-12:35 on January 13 and within the courthouse Geofence from 8:47-11:12 on January 14.
- Text messages indicating that the protest had been planned at length and that Nez was aware of multiple individuals' willingness to be arrested, although Nez had not communicated such a desire.
- The following exchange from the morning of January 14:
  - 7:15 a.m. Defendant Nez: "Cannot wait for the cops to get doused in pig's blood."
  - 515-111-2222: "Not sure we got enough to really douse them."
  - Defendant Nez: "I am sure I can add a little something to the mix."
  - 9:20 a.m. Defendant Nez: "A little pig's blood, a little of my spit, we will show them."

Based on the information obtained via the geofencing warrants, a grand jury returned an indictment against Defendant Nez on three counts of Simple Battery, one count of Disorderly Conduct and two felony counts of Assault with Bodily Fluids.

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Defendant has filed a motion seeking to suppress all evidence obtained pursuant to the geofencing warrants served on Google and to suppress the cellphone data- phone calls and text messages, because she contends that the search warrants lacked probable cause because they are overly broad. The State argues that the warrants were a precaution but not strictly necessary because these were not searches that implicate the Fourth Amendment, but even if they did, they have the requisite specificity under the law. The State argues that, moreover, the officers were acting in good faith due to the novel nature of the developing science of geofence warrants, and any error the court finds does not warrant exclusion of any evidence.

## Standard of Review

The legal questions presented in this case will be reviewed de novo. While students are expected to acknowledge and understand the de novo standard of review, the focus of their briefing and arguments should be on the substantive issues at hand.

## Summary of Arguments

### Initial Background on Geofencing Warrants

Geofencing warrants are a tool used by law enforcement to collect historical data about the location of cellular devices. This data is collected through applications on individuals' cellphones, and the applications collect the data at a high level of granularity. Geofencing

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warrants, unlike warrants targeted at a specific individual, work backwards to learn identity from the location of a device rather than to investigate an individual based on specific information about them. See, United States v. Rhine, 652 F. Supp. 3d 38, 66 (D.D.C. 2023). The agent seeking geofencing information will provide the recipient of the warrant with a location radius and a timeframe and ask for information related to all the devices within that radius during that period. Once this initial information is provided in an anonymized format the law enforcement agent will request additional deanonymizing data related to specific devices that they believe may have relevance to their investigation. Google has been the primary recipient of geofencing warrants because Google has obtained location data from users who have opted into allowing their phone to transmit this information to google. See, NOTE: Against Geofences, 74 Stan. L. Rev. 385 (2022). The constitutionality of these warrants has been hotly contested in both federal and state court. The three issues addressed below are the most common.

**1) Was the Fourth Amendment implicated by the search in this matter?**

The heart of the issue for the first question is the analysis under Katz of a reasonable expectation of privacy. In determining whether an expectation of privacy is reasonable the

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Supreme Court has adopted the Harlan concurrence in Katz: “there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” Katz, at 361.

Because location data conveys so much information about an individual’s movement courts have looked to questions of the length of time for data requested to determine whether the amount of information conveyed under that specific time frame makes it the type of data that raises reasonable privacy concerns. The second part of the argument surrounds whether the individual opted into the third party sharing of her data such that any privacy claims she makes are unreasonable.

Defendant is likely to argue that the lower court was correct in its conclusion that the data requested here is similar to cell-tower location data in that it conveys the same level of particularized information about private areas of life and that the shorter time frame for data requested here is less relevant because location data tracks movement more precisely than cell-tower location data. Defendant will likely argue that the third-party doctrine does not apply because of how unclear the location sharing waivers are, how little the actual user knows about what is being shared and how the sharing agreement lasts in perpetuity involving third parties the user did not contemplate.

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The State is likely to point to the ways different applications prompt the user to share location data with each use, such that the user is constantly reminded that her location is being tracked, and shared and known by others.

### **Important Cases**

Carpenter v. United States, 585 U.S. 296, 303 (2018)

The Supreme Court held that the Government's acquisition of the Defendant's cell-site records was a search under the Fourth Amendment because the cell-site records obtained implicated a reasonable expectation of privacy consistent with *Katz*- based on a historical analysis of what information people have tried to keep private. The Court found that the sharing of this location information with your cell provider did not undermine the reasonable expectation of privacy because of the specificity of the information sought/acquired. The Court found that it was not merely a question of whether the data sought had been provided to a third party, but the nature of the records itself.

Because the government did not seek a warrant the records were suppressed as in violation of the Fourth Amendment.

United States v. Graham, 824 F.3d 421, 427 (4th Cir. 2016)

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The Fourth Amendment does not protect information voluntarily disclosed to a third party because even a subjective expectation of privacy in such information is “not one that society is prepared to recognize as ‘reasonable.’”

United States v. Jones, 565 U.S. 400, 450 (2012).

“[I]n cases involving even short-term monitoring, some unique attributes of GPS surveillance . . . will require particular attention.”

Matter of Search of Info. Stored at Premises Controlled by Google, 481 F. Supp. 3d 730, 737 (N.D. Ill. 2020)

The court denied the geofencing warrant application because the officers did not provide a justification for the geographic or temporal scope of their request, nor explain why they were not limiting the number of uninvolved people whose information may be deanonymized.

United States v. Chatrie, 590 F. Supp. 3d 901, 908 (E.D. Va. 2020)

Held that a geofence warrant was overbroad because it "contain[ed] no language objectively identifying which accounts for which officers would obtain further identifying information" and did not "provide objective guardrails by which officers could determine which accounts would be subject to further scrutiny."

2) Were the warrants in this case supported by probable cause?

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The primary questions here are whether the warrants were particularized enough about what specific evidence of a crime was being sought, and whether the warrants granted too broad discretion to law enforcement for what they might seize.

Defendant is likely to point to the broad net thrown over every individual in this public place whose information was turned over to the police and argue that there was not particularized suspicion for the search of each individual meaning that the officers sought an overly broad warrant that searched people for whom there was no suspicion.

The State will likely argue that it sought general public information about devices being present in two locations, and that it did not seek deanonymized data until the confirmation of the devices being in each location at the relevant times created suspicion. Only then did it get any person-specific information that could raise privacy concerns.

## Important Cases

See the prior reference to: In re Search of Information Stored at Premises Controlled by Google, 481 F. Supp. 3d 730 (N.D. Ill. 2020)

United States v. Davis, 109 F.4th 1320, 1332 (11th Cir. 2024).

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Held that a geofence warrant for Davis' girlfriends' cell phone did not create standing for Davis to challenge when he did not have exclusive control of the phone. The court assumes arguendo that there is a privacy interest cognizable under the Fourth Amendment at play here.

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- 3) Are officers who seek geo-fencing warrants still protected by the good-faith exception due to the novel nature of geo-fencing warrants?

This may be the most interesting question in this argument because the law is developing so rapidly-- since this problem was first drafted, there have been case law developments.

The case both sides are likely to spend the most time discussing is Chartrie:

In Chartrie the court found that the good-faith exception applied to its analysis for two primary reasons: (1) the applying officer was relying in good faith on prior similar warrants he had been granted, and legal counsel; and (2) the novel legal complexities surrounding geo-fence warrants are such that police officers could not be expected to have meaningful familiarity with them. Chartrie, 590 F. Supp. 3d at 938.

The State will argue that the FBI Agents who submitted this search warrant did so in reliance on prior geofencing warrants that they had been granted and that the developments in the law have been so rapid that they could not be seen to attempting to flout the law, and as such the exclusionary rule is not the appropriate response to any deficiencies.

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The Defense will likely argue that there have been recent developments that clarified the law. They are handicapped by the fact some of those developments in the law are after these warrants were sought and as such do not undermine the State's good faith claims.

## Important Cases

United States v. McLamb, 880 F.3d 685, (4th Cir. 2018).

Held that the good-faith exception (which makes exclusion inappropriate) applies when there is little deterrence created by suppressing evidence because of an innocent error in a warrant application- here an unintentional ambiguity in the warrant application.

[C]ourts generally decline to hold a warrant facially deficient where the legality of an investigative technique is unclear, and law enforcement seeks advice from counsel before applying for the warrant."

United States v. Matthews, 12 F.4th 647, (7th Cir. 2021)

In Matthews, the 7th Circuit held that consultation with counsel before the warrant application was evidence law enforcement was acting in good faith, i.e., "consultation [with Government

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attorneys prior to seeking a warrant] is a relevant consideration in determining whether the warrant was facially deficient.”

## Recent Legal Developments:

In *United States v. Smith*, No. 23-60321 the Fifth Circuit took a much harder line stance than previous courts and found that when an individual has a reasonable expectation of privacy surrounding data, such that the Fourth Amendment is implicated than the geographical location and the temporal scope are irrelevant, if there is a reasonable expectation of privacy, taking location data for any time or area is a search. The court went on to say, when it is a search, it violates the Fourth Amendment because the area searched covers your movement so closely it cannot be particularized enough to justify the intrusion.