No. 20-21

IN THE

Supreme Court of the United States

ALEX JOYNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DIXIE CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the use of facial recognition software on closed-circuit television footage without a warrant constitutes an unconstitutional search under the Fourth Amendment to the United States Constitution.

2. If so, whether evidence obtained on the basis of a positive identification from the warrantless use of facial recognition software is admissible.

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INTRODUCTION

Following a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted on one count of interference with federally protected activities, in violation of 18 U.S.C. 245(b)(1)(E), one count of hate crime acts resulting in death, in violation of 18 U.S.C. 249(a)(1), and one count of kidnapping, in violation of 18 U.S.C. 1201. The district court sentenced petitioner to twenty-five years' imprisonment without possibility of parole. The court of appeals subsequently summarily affirmed all convictions.

A. Factual Background

On August 22, 2019, the body of Alejandro Gomez-Chase, a Latino immigrant worker in Greenwood County, Chesapeake, was found in neighboring unincorporated Burke County, Dixie by Dixie State Police after he was reported missing by family members. At the time of his abduction, he was preparing to leave his home to attend a federally-funded vocational training program in the county seat of Greenwood. The body showed tell-tale signs of forcible abduction and physical abuse, while evidence secured on site hinted at a hate-motivated homicide.

Subsequently, the Federal Bureau of Investigation took primary jurisdiction of the crime scene. During the initial stages of the investigation, federal law enforcement officers obtained footage from two roadside closed-circuit television (CCTV) cameras and the body-worn camera of a local police officer which are believed to show the suspect of the crime.

Over the course of the investigation, law enforcement received word of ClearPoint Face Scanner, a software package that compares images submitted by law enforcement to a large database of public-domain and other digitally accessd photographs of individuals throughout the United States. Investigators retained the services of ClearPoint Technologies and submitted the previously obtained video stills of the suspect to the Face Scanner software, which returned a positive identification for Mr. Alex Joyner based on a 2012 Houston mugshot and a photograph on a public Rotary Club website.

Investigators then visited Mr. Joyner at his home and executed a search warrant for his motor vehicle, a 2009 Toyota Camry. In the vehicle, forensic specialists found trace amounts of Mr. Gomez-Chase's blood. Consequently, a search warrant for Mr. Joyner's mobile phone yielded geolocation data that showed that his locations over the course of the night of Mr. Gomez-Chase's abduction and murder were consistent with that of the hitherto unidentified suspect.

Subsequently, Mr. Joyner was arrested by the FBI and read his *Miranda* rights, which he waived. He then proceeded to confess to the abduction and homicide of Mr. Gomez-Chase, both orally and in writing. During the subsequent interrogation, Mr. Joyner further confessed that he was motivated by racial animus towards "these damn radical Mexicans" after reading a letter to the editor in the local newspaper, the Index-Journal, written by Mr. Gomez-Chase, which supported then-President ZeroOverZero101's cessation of all immigration enforcement activities and called for the abolition of U.S. Immigration and Customs Enforcement (ICE).

B. Proceeding Below

Following indictment by a federal grand jury, petitioner was tried in the United States District Court for the Southern District of Georgia on one count of interference with federally protected activities, in violation of 18 U.S.C. 245(b)(1)(E), one count of hate crime acts resulting in death, in violation of 18 U.S.C. 249(a)(1), and one count of kidnapping, in violation of 18 U.S.C. 1201. After the conclusion of the government's case, petitioner moved for a judgment of acquittal on the basis that the use of facial recognition technology constituted an unconstitutional search that poisoned subsequently obtained evidence. The district court denied petitioner's motion.

The jury found petitioner guilty on all three counts. The district court sentenced petitioner to twenty-five years' imprisonment without possibility of parole. Petitioner appealed to the United States Court of Appeals for the Dixie Circuit.

The United States moved the court of appeals pursuant to Fed. R. App. P. 27 to summarily affirm the decision below. The court of appeals granted the motion and affirmed all of petitioner's convictions without opinion.

ARGUMENTS

A. The Warrantless Use of Facial Recognition Software in Criminal Investigations Is Consistent with the Fourth Amendment.

1. Facial Recognition Is a Permissible Derivative Use of Lawfully Acquired Evidence.

The Fourth Amendment protects the inviolability of "persons, houses, papers, and effects" without warrant. U.S. Const, amend. IV. What it emphatically does not cover, however, is the derivative use of lawfully acquired evidence by law enforcement. As facial recognition undoubtedly constitutes a derivative use rather than an independent search or seizure, it is not within the scope of the Fourth Amendment.

(a) Petitioner knowingly exposed himself to closed-camera surveillance and uploaded images of himself to the public Internet.

It is beyond dispute that the photographic evidence fed into the facial recognition algorithm—both the public internet pictures of Mr. Joyner and the video footage at the gas station—was lawfully obtained by law enforcement.

In 2020, it is abundantly clear to any reasonable person that "the monitoring of vehicles and premises has become ubiquitous." *Joao Control & Monitoring Sys., LLC v. Telular Corp.*, 173 F. Supp. 3d 717, 727 (N.D. Ill. 2016). Mr. Joyner would have undoubtedly known when he walked into a gas station following the homicide that there was a high risk that his physical features, including his face, would be

recorded by camera. He can hardly claim now that police cannot take that footage and compare it to public photographs to attempt to find a match for the suspect.

Likewise, Mr. Joyner cannot claim any violation of his privacy interest from the government's acquisition of public photographs of his person which he or an organization to which he is affiliated has posted to the public internet. *See U.S. v. Meregildo*, 883 F. Supp. 2d 523, 525 (S.D.N.Y. 2012), *aff'd sub nom U.S. v. Pierce*, 785 F.3d 832 (2d Cir. 2015) ("When a social media user disseminates his postings and information to the public, they are not protected by the Fourth Amendment.").

Consequently, whatever privacy interest that Mr. Joyner may have had in his facial characteristics has been abandoned through his voluntary dissemination of this information.

(b) The third party doctrine eliminates any expectation of privacy from his private social media images obtained by police.

The same is true of the non-public photographs used by the algorithm to generate a facial match.

While there is obviously no privacy interest in any of the publicly-accessible images which featured in the police use of facial recognition, a different legal standard applies to the "images taken from social media sites that are not publicly accessible without permission" used by the algorithm. Pet. for Cert. at 12. However, the legal conclusion remains the same: these photographs equally implicate no actionable privacy interest at law.

The third party doctrine posits that a person "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *U.S. v. Miller*, 425 U.S. 435, 443

(1976). Accordingly, the doctrine precludes a Fourth Amendment violation insofar that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 US 735, 743-44 (1979). The same standard is applicable whether the third party is a natural person or some form of automated equipment. *Id.* at 745.

Here, one of the inputs which is used by the facial recognition algorithm acquires access to photographs that Mr. Joyner uploaded to restricted-access websites. However, because he has voluntarily accepted the website's terms and conditions and turned his facial data to the website, he can allege no privacy interest when the said third party grants the police access to the same.

> *(c) Insofar as no input to the facial recognition software implicates a privacy interest, neither does the algorithm itself.*

Having established above that Mr. Joyner simply has no Fourth Amendment interest in either the closed-circuit camera footage or the images on the Internet, the two only inputs used by the facial recognition matching algorithm in question, the question now turns to whether he has a Fourth Amendment interest in the facial analysis itself. The answer is no.

In spite of petitioner's assertion to the contrary, it is in fact the act of collecting data to input into the algorithm that could constitute a search; the running of the facial algorithm itself is merely a "derivative use" of acquired evidence that in itself can "work no new Fourth Amendment wrong." *U.S. v. Calandra*, 414 U.S. 338, 354 (1974). *Cf. Ferguson v. Charleston*, 532 U.S. 67. 92 (2001) (Scalia, J., dissenting) ("There

is only one act that could conceivably be regarded as a search of petitioners in the present case: the *taking* of the urine sample.").

Just as the testing of blood permissibly collected by police without a warrant at the scene of an automobile accident does not independently engender Fourth Amendment scrutiny, *see, e.g., U.S. v. Snyder*, 852 F.2d 471, 473 (9th Cir. 1988); *People v. King*, 663 N.Y.S.2d 610, 614 (N.Y. App. Div. 1997), *lv. denied*, 91 N.Y.2d 875 (1997), neither does analysis of photographs and video lawfully collected over the course of a police investigation for the purpose of enhancing its evidentiary value.

Having previously established that no Fourth Amendment violation has occurred in the acquisition of any of Mr. Joyner's personal information for input into the algorithm, it thus follows that the algorithm itself, a mere derivative use, is fully compliant with the Fourth Amendment. Accordingly, petitioner's challenge to the use of facial recognition software is misplaced because it targets a legitimate derivative use of lawfully-acquired evidence.

2. Facial Recognition Matching Is Not a Search within the Meaning of the Fourth Amendment.

Accepting, *arguendo*, that the act of testing previously acquired evidence can itself implicate a Fourth Amendment privacy interest, facial recognition testing is still not a 'search' for Fourth Amendment purposes because it does not violate a person's "reasonable expectation of privacy." *Katz v. U.S.*, 389 U.S. 347, 361 (1967).

(a) It is unreasonable for petitioner to expect law enforcement not to look for known facial patterns in public data.

The first prong of the two-pronged analysis outlined in *Katz* requires an examination of the aggrieved person's "actual (subjective) expectation of privacy." 389 U.S. at 361. In turn, this entails consideration of both the expectations of an average individual, *Smith*, *supra*, at 742-43, and the actual expectations of the petitioner. *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980).

An average person placed in the same position as petitioner would have no reasonable expectation of privacy in the circumstances alleged in the case at bar. Like the telephone users in question in *Smith*, people who enter an ordinary retail store do not "harbor any general expectation" that their visage will not be recorded, 442 U.S. at 743, nor that this recording will not be compared to photographs by law enforcement in the lawful course of an investigation.

Indeed, they can allege no such violation because it is well-established that there is no reasonable individual expectation of privacy in a public place. *Dow Chemical v. U.S.*, 476 U.S. 227, 238 (1986). Moreover, the police officer who recorded Mr. Joyner had a clear right to engage in warrantless visual inspection and recording in a publicly-accessible area of a retail store. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978) ("What is observable by the public is observable, without a warrant, by the Government inspector as well.").

This arithmetic does not fundamentally change when facial recognition is added to the formula because facial recognition simply takes footage acquired from public places in which petitioner has no reasonable expectation of privacy and compares it to a database. If petitioner has no expectation of privacy in public places at all, he has no more

expectation of privacy in the deployment of facial recognition in those same forums.

Likewise, petitioner cannot allege a reasonable privacy interest in the operation of the algorithm because it merely automates a visual inspection, which is not a search. *Dow Chemical*, *supra*, at 235. Had a police officer had taken a still from the surveillance video, printed it, and held it in his hand while walking through a crowd in an attempt to identify a suspect with similar facial characteristics, it is self-evident that petitioner could allege no Fourth Amendment wrong. The algorithm fundamentally behaves no differently and only automates the process of visual surveillance and analysis, engendering no greater expectation of privacy. The fact that it is automated alone cannot fundamentally change this calculus. *Cf. Smith*, *supra*, at 744-745 ("We are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate.").

The police had a clearly established right to access the surveillance video, to conduct a visual analysis in a public forum, and to put two and two together to match the subject of the video to an identity. No subjective expectation of privacy is ever violated.

(b) There is no objectively reasonable expectation of privacy because law enforcement has a clear right to view and analyze CCTV footage.

Likewise, petitioner cannot clear the second prong of the *Katz* analysis because society does not recognize a legitimate expectation of freedom from the sort of facial recognition in question in this case.

First, society recognizes no reasonable expectation of privacy in what a "person knowingly

exposes to the public, even in his own home or office." *California v. Ciraolo*, 476 U.S. 207 (1986), quoting *Katz*, *supra*, at 351. Facial recognition only utilizes what a person knowingly and voluntarily exposes to the public at large and is thus categorically exempt from the Fourth Amendment.

Second, our societal values clearly do not accept that the police should be barred from identifying a murderer recorded walking out on the open street simply because the government used a computer system to assist them in that task. The right to privacy already being heavily curtailed in a public forum, it is clearly outweighed by the strong societal considerations in allowing law enforcement to prevent and solve homicides using public-domain information without onerous procedural limitations.

Third, our society's conception of the Fourth Amendment is most offended when a person is prevented from retreating to the sanctity of their own home to evade search and surveillance. *Silverman v. U.S.*, 365 U. S. 505, 511 (1961). There is no such issue with facial recognition, which by definition is incapable of reaching into the sanctum of the personal domicile because the police would have no use for such algorithms if they already knew whose home they needed to surveil. One need only retreat into one's own home and any facial recognition surveillance would immediately cease.

3. Regardless, Facial Recognition Matching Is Exempt from the Ordinary Warrant Requirement.

Even if the Court found a reasonable expectation of privacy, facial recognition can also be regarded to fall within well-established exceptions to the warrant

requirement for a search because it is akin to either observation in plain view or to a dog sniff.

(a) Facial recognition only reveals what is in plain view of law enforcement.

Police did not need a warrant to conduct a facial recognition analysis because Mr. Joyner's likeness was in plain view of police. Under the controlling test, police must demonstrate that:

1. "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed";
2. "the item [must] be in plain view"; and
3. "its incriminating character must also be immediately apparent."

Horton v. California, 496 U.S. 128, 136 (1990) (internal quotation marks omitted).

All three prongs are easily satisfied in this case.

First, as previously discussed, law enforcement only used footage of Mr. Joyner recorded in public forums where he had no reasonable expectation of privacy under established law. Having filmed Mr. Joyner outside and acquired his photographs from the public internet, the police were thus lawfully situated to engage in observation.

Second, Mr. Joyner's facial features were in plain sight in the myriad photographs and videos which the police lawfully viewed from their vantage point. Whether recorded by the naked eye or by photographic equipment, police were able to directly observe the face of Mr. Joyner from a legal position and did not need to make any alterations to the scene in order to secure visibility of his face.

Third, the positive match returned by the algorithm constituted "[i]ncontrovertible testimony of the senses" that the facial features in question belonged to the criminal suspect. *Id.* at 137, n. 7. Because police had previously obtained roadside camera footage showing the vehicle leaving the crime scene, they had incontrovertible reason to believe that the face of the person who emerged from the vehicle was that of the criminal suspect.

Consequently, the plain view doctrine is invoked and the requirement for a search warrant is inapplicable.

(b) Alternatively, facial recognition is akin to a dog sniff.

In the alternative, the facial recognition in the case at bar can be viewed as analogous to a dog sniff. The same considerations which animated this Court's decision in *U.S. v. Place*, 462 U.S. 696 (1983), that a dog sniff was a *sui generis* activity that did not rise to the level of a search are applicable to the use of facial recognition.

As has previously been discussed in this brief at great length, facial recognition only takes photographs which are in plain view of law enforcement in order to detect a match. This is akin to the purpose of the drug dog, who "does not expose noncontraband items that otherwise would remain hidden from public view." *Id.* at 707.

The very limited breadth of facial recognition analysis is also comparable to a dog sniff, which "discloses only the presence or absence of narcotics, a contraband item." *Id.* Facial recognition as used in this case has a single purpose: to place a name to a nameless suspect in a murder. Any person who is not

the suspect in the murder will not be flagged by the algorithm and will stand to lose no privacy rights—"the information obtained is limited" to the murder suspect's identity, *id.*, and exclusively identifies criminal activity.

This is consequently a very narrow investigative procedure that should benefit from a similar *sui generis* exemption.

B. Regardless, Evidence Obtained Subsequently to the Identification of Petitioner Should Not Be Excluded.

1. The Identity of a Defendant Is Never Independently Suppressible.

This Court has previously acknowledged that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984).

As a result, "evidence concerning the identity of a defendant, obtained after an illegal police action, is not suppressible as 'fruit of the poisonous tree.'" *U.S. v. Garcia-Beltran*, 443 F.3d 1126, 1132 (9th Cir. 2006). Since Mr. Joyner cannot suppress the fact that he is in fact the individual who is the subject of the surveillance video at the gas station, this fact would have granted police the sufficient probable cause to obtain a search warrant against Mr. Joyner, making the discovery of the evidence of his involvement in the crime inevitable even without his confession.

Consequently, Mr. Joyner's confession cannot be excluded since evidence of his involvement

"inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444 (1984).

2. Law Enforcement Believed that their Conduct Was in Good Faith.

Alternatively, the Court should not exclude the evidence of Mr. Joyner's involvement in the homicide because it falls under the good-faith exception to the exclusionary rule and its exclusion would serve no legitimate deterrent purpose.

(a) Police officers acted in good faith in a hitherto settled area of constitutional law.

Petitioner cites no directly apropos cases on the question and only infers a prohibition from general language regarding searchers and evolutions in technology.

Instead, what *was* settled in the minds of law enforcement was that controlling precedent established the permissibility of warrantless observation of persons in a public forum. Since all the input to the algorithm were obtained in plain view of law enforcement, it would have been reasonably clear to the investigating officer that their conduct would have elicited little risk of Fourth Amendment concerns. This understanding, which emphasizes the centrality of the "reference to a place" in Fourth Amendment expectation-of-privacy analysis, *Katz*, *supra*, at 361, is fully consistently with current case law.

In such circumstances, law enforcement are entitled to an inference of good faith and should not be penalized for an evolution in the underlying case law which law enforcement had no ability to predict. Indeed, the concurrences cited by petitioner even

make it abundantly clear that the *Jones* holding is a limited evolution and not a straightforward application of current precedent, nor intended to be a general rule. Cf. *U.S. v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) ("the same technological advances that have made possible nontrespassory surveillance techniques *will also affect* the Katz test by shaping the evolution of societal privacy expectations") (emphasis added) (note the use of a speculative future tense).

(b) Suppression is unnecessary for deterring future unlawful conduct.

This Court has often reminded us that "[e]xclusion is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search." *Davis v. U.S.*, 564 U.S. 229, 236 (2011). Instead, it is solely meant to "compel respect for the constitutional guaranty" of the Fourth Amendment. *Id.*, quoting *Elkins v. U.S.*, 364 U.S. 206 (1960).

Because the ultimate function of the exclusionary rule is "to suppress the truth and set the criminal loose in the community without punishment," *id.*, it "has always been our last resort, not our first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Consequently, *Davis* prescribes a balancing test between the deterrence benefits of suppression and the grave costs to the criminal justice system from allowing a criminal to walk free.

Here, a reasonable person can have little qualm with the assertion that that officers involved acted in good faith. The officers had initially been recommended the services of the facial recognition software by a fellow police department and, as discussed earlier in the brief, had every reason to

believe that there was no Fourth Amendment concern due to the lack of a reasonable expectation of privacy in public spaces. In such circumstances where "the police act with an objectively reasonable good-faith belief that their conduct is lawful, [...] the deterrence rationale loses much of its force and exclusion cannot pay its way." *Id.* at 238.

Conversely, the harm that would be borne by society from allowing an admitted and convicted murderer who has shown sociopathic and bigoted disregard for human life to walk free would be palpable. Mr. Joyner's freedom would continue to pose a danger to Hispanic members of his community, and fundamental precepts of justice in our society dictate that a person who deliberately and wantonly takes another's life, and then willingly confesses to the crime, should remain behind bars.

Davis reminds us that suppression of evidence is a "last resort," and it is one which is clearly unwarranted given the circumstances of the case at bar.

CONCLUSION

The use of facial recognition software, as a new tool in the law enforcement arsenal, may be discomforting to some. Indeed, there may even be public policy reasons to restrict its use, but such policy determination is a judgment which our constitutional framework vests in Congress and the legislatures of the several states.

Insofar as the Fourth Amendment is concerned, there has been no search or invasion of privacy. Even accepting, *arguendo*, that the initial examination was unconstitutional, the circumstances of this case fall within well-established exemptions to the exclusionary rule.

For the foregoing reasons, the Court should affirm the decision of the court below and uphold Mr. Joyner's conviction.

Respectfully submitted,

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