

DZHOKHAR'S FOUR PHONES

A month ago, the government argued in Dzhokhar Tsarnaev's case it had no discovery obligations under Section 215, which top government officials have said they used to achieve piece of mind.

Yesterday, Dzhokhar's college buddies challenged their confession based on a claim the government didn't have a warrant when it surrounded their apartment with 60 cops. The government's excuse is that Tsarnaev received the bills for four AT&T phones at that address, and one of the phones had recently been used to call Russia.

Tsarnaev was receiving AT&T bills for four phones at that address. One of the phones had called Russia from near the UMass-Dartmouth campus, which led investigators to think he might be nearby – perhaps at his friends' apartment.

"I proceeded with all haste and with blue lights flashing" to where the phones suggested Tsarnaev might be, Walker said.

Soon about 60 officers had the New Bedford home surrounded. Tsarnaev wasn't inside, but his two friends were, along with Kadyrbayev's girlfriend.

What happened next could affect the outcome of the cases against Tsarnaev's friends. Walker said the FBI had not obtained a search warrant. Agents took the two men from the apartment, handcuffed them and questioned them in unmarked cars, Walker said, before they agreed to go to the State Police barracks for further questioning.

Kadyrbayev's attorney Robert Stahl said

that amounted to “uncounseled, unwarranted seizures of these individuals.” If the FBI violated the defendants’ rights, then their statements, which prosecutors are calling “confessions,” could be excluded from their trials.

This all occurred while Dzhokhar was bleeding out in a boat in Watertown.

There are multiple ways the FBI could have gotten these phone records. They may well have a database of subscriber information for major providers, meaning they could learn which carrier he used quickly within FBI. They could have gotten the call records just with NSLs. (NSA’s phone dragnet wouldn’t be all that useful at that stage, though it might have provided interesting information on the Russia call.) The FBI might even have used Hemisphere, which provides geolocation. (Remember, though, that MA’s Supreme Court just ruled the police need a warrant for cell location.)

The defendants have already received some of Dzhokhar’s texts in discovery, so I assume there are no evidentiary problems with those.

In other words, we should assume this data came from normal FBI sources, not NSA ones. (If so, it’s another strike against the claim the NSA needs the phone dragnet for quickness, because this would have happened quickly if the FBI’s narrative is true.)

But it does raise interesting questions about dual sources for the data at hand.

Also remember, these are the same phones that the same buddies had limited discovery on texts from, because Dzhokhar had destroyed the one he was using.