PenaMerchantPetitionerBrief

IN THE SUPREME COURT OF THE UNITED STATES

[CARPENTER]

Petitioner,

Vs.

[UNITED STATES]

Respondent,

United States 6th Circuit Court of Appeals

BRIEF FOR

PETITIONER

Mahak Merchant

Simon Pena

TABLE OF CITED AUTHORITIES

Riley v. United States 573 U.S. __

United States v. Jacobsen 466 U.S. 109 (1984)

Telecommunications Act of 1996

Dickman v. C.I.R 465 U.S. 330 (1984)

Tech Experts

Kyllo v. United States 533 U.S. 27 (2001)

HISTORICAL SOURCES

James Otis: Against Writs of Assistance.....

I'm Not Dead Yet: *Katz, Jones,* and the 4th Amendment in the 21st century....

U.S. Const.....

Massachusetts Declaration of Rights.....

FACTS OF THE CASE

Four men, including the petitioner, were arrested in connection with a series of armed robberies. One of the alleged conspirators gave the phone numbers of the other participants, as well as his own, without the knowledge or consent of the people to whom those phone numbers belonged to. The police then obtained transactional records without a warrant including but not limited to the phone numbers dialed and calls received as well as Cell Site Location Information Data.

This Cell Site Location Information Data spanned over 127 Days, which the government relied on when charging the petitioner Timothy Carpenter with, among other things,

aiding and abetting robbery that affected interstate commerce, in violation of the *Hobbs Act 18 U.S.C. 1951*.

QUESTIONS PRESENTED

Does the warrantless search and seizure of cell phone records including location data over the course of 127 days violate the 4th Amendment?

STATEMENT OF THE ARGUMENT

In this brief we will be addressing that 1. There was both a search and seizure of Mr. Carpenters papers and effects. 2. That the *Stored Communications Act* does not fulfill the warrant requirement to the 4th Amendment rendering the searches unconstitutional, and that even if the *Stored Communications Act* is a valid bypass of the 4th Amendment we will be addressing that the magistrate judges granted the court orders for disclosure unreasonably, and finally 3. The Third-Party doctrine is not applicable in today's case. Each of these issues will allow for a ruling in favor of Mr. Carpenter in the case before the court today.

ARGUMENT

I

The first issue addressed in this brief is whether or not there was a search of any "persons, houses, papers, and effects, " In this day and age, technology has become an appendage to American society. Unfettered, this would enable the federal government to easily track most of the American population. Fortunately, this court has established a strong defense against

such invasions of privacy. For example, in *United States v. Jones 132 S.Ct. 945 (2012)* the government installed a GPS tracker on Jones' car, which then proceeded to document the location of Jones for a month. This court held that due to the length and invasive nature of the GPS tracking, it was considered to be a warrantless and unconstitutional search under the 4th Amendment. Similar to *Jones*, in today's case, the federal government has again violated the right to privacy. Specifically, the government failed to obtain a legitimate search warrant and instead attempted to surpass the warrant requirement by insufficiently issuing a "court order for disclosure," under the *Stored Communications Act*. There was no search warrant in *Jones* and there is no search warrant in this case either. Due to the fact that the government attempted to surpass the 4th Amendment by using the *Stored Communications Act*, they failed to acquire anything to indicate an oath, affirmation or a trustworthy source was in place. The *Massachusetts Declaration of Rights* even stated that "all warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation." The lack of an affidavit, blatantly shows that the government has violated some aspect of the 4th Amendment. Furthermore, in *Jones* this court held that a month was a prolonged period of time, however, in today's case, there was information collected for 127 days. Over the span of that 127 day period, the government obtained 12,898 points of data from Carpenter alone. The prolonged period of time for which the data was collected requires a proper way to obtain said information: a search warrant. This is due to the fact that tracking a citizen for such a broad period is guaranteed to expose "a staggering amount of information that surely must be protected under the 4th Amendment," *United States v. Davis.* This search, due to its invasiveness and length, was a violation of privacy and a violation of the 4th Amendment.

There was also a seizure of Timothy Carpenter's property. The seizing of documents that tracked Timothy Carpenter for 127 days is unconstitutional under the 4th Amendment. Justice Brandeis in his analysis of the 4th Amendment said "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited." and this court held in *Riley v. United States* that "it is vital to safeguard a sphere of individual privacy in which people can conduct their affairs free of unwarranted government intrusion." However in today's case, not only did the government conduct a warrantless search, they also seized private documents and interfered with Timothy Carpenter's property. A seizure "occurs when there is some meaningful interference with an individual's possessory interests," *United States v. Jacobsen.* The reason this is a seizure is due to the fact that the government interfered with Timothy Carpenter's property and papers. Under *The Telecommunications Act of 1996,* cell phone users are entitled and able to control and limit what their Cell Site Location Information is used for. The Act further allows the cell phone user the right to exclude other parties from gaining unwarranted access to that same information. In

addition to this, the Federal Communication Commission (FCC) has determined that papers containing Cell Site Location Information are the customers records, which in turn give the customer full reign on what they choose to do with that information. By gaining access to these papers that rightfully belonged to Timothy Carpenter, the federal government seized records without a warrant. *Dickman v C.I.R* held that "a person need not possess all of the 'bundle of sticks' of property rights in order to have a protected interest in a location or thing." Timothy Carpenter possessed a right to his papers, and that right was violated.

In the event this court does choose to rule that the procurement of Cell Site Location Information data is not a violation of the 4th Amendment, there will be a burden applied to future cases of this nature. As society and technology adapts, Cell Site Location Information will get more precise and although it was within 50 feet for this case, technology will become more precise. This makes citizens more vulnerable to the tactics of the federal government. *Riley v. California* described cell phones as " such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." Today, over 95% of Americans have at least one cell phone, which enables them to be tracked by the federal government. With the expansion of Cell Site Location Information data, these "small cell" locations could potentially track cell-phone users down a location within 10 meters of where they are. (*Tech. Experts Br. 16-17 & n.23.*). The future of Cell Site Location Information gives the government the power to spy on everyone, and the mere "awareness that the Government may be watching chills associational and expressive freedoms." *United States v. Jones,* forcing citizens to choose between being regular members of society, or having their privacy.

II

The state claims that because the magistrate judges issued "court orders for disclosure" under the *Stored Communications Act (18 U.S.C. Chapter 121 §§ 2701–2712)* the warrant requirement of the 4th Amendment was fulfilled. However, there are a few issues with this contention. First, the Stored Communications Act and the court orders for disclosure do not present the same requirements as a true warrant. Therefore, because the warrant requirement was not fulfilled it would constitute a violation of the 4th Amendment. Further, even if the court orders for disclosure do fulfill the warrant requirement of the 4th Amendment, the magistrate judges have erred in issuing the warrant, as the section of the *Stored Communications Act* that states the court must quash a request when the "information or records requested are unusually voluminous" in nature. The *Stored Communications Act* does not fulfill the warrant requirement of the 4th Amendment. For our purposes the 4th Amendment states "The right of the people to be

secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Whereas the stored communications act states that "A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."

There are two major differences between the warrant requirement of the 4th Amendment and the requirements of *Stored Communications Act* in the latter the government need not show probable cause as required by the 4th Amendment but rather they must show "reasonable grounds" to believe that the "information sought is relevant and material" These are two very different standards. To prove probable cause a person must show "acts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed." *Brinegar v. the United States 388 U.S 160 (1949)* To get a court order for disclosure again they must only show "specific and articulable facts to show..." not that a crime has been or will be committed but that "the information sought is relevant to an ongoing criminal investigation." *Stored Communications Act.* This relevance test, in our view, does not meet the standards of the 4th Amendment, and of *Brinegar supra*.

In addition, due to the nature of the content, there are very few obstacles in place for the government to go through in order to have access to these records.The only burden that would be placed upon officers in gaining access to these records would be to obtain a search warrant because, "there is no way for an officer to know in advance whether a suspect's Cell Site Location Information will reveal more or less precise location information, thus necessitating the protection of a warrant." *Kyllo v. United States* The only way this search would have been reasonable would be with a warrant. The American Civil Liberties Union (ACLU) states in their amicus brief that "this Court's more recent precedent dictates that the government cannot capitalize on new technology to shrink privacy" which is why cases like *Smith* and *Miller* don't hold as much weight as other cases, due to the fact they were decided in a society where technology was not as prevalent or necessary to carry out every day functions. Therefore, due to the nature and sensitivity of this information along with the unreasonable length of this tracking, the government's actions in today's case constitute a search under the 4th Amendment.

The second major difference between the two standards is what must be proven. The standard set in the 4th Amendment and in *Brinegar supra* is that a warrant must show that a crime has been committed and that there will be evidence to support that claim. However,

the stored communications act only requires that you show that the information sought is relevant to an ongoing criminal investigation. This widens the already fairly wide door into the private matters of ordinary citizens and lowers the standard. Under the *Stored Communications Act* if information from a normal disconnected citizens phone could possibly have information that would be just merely relevant to an ongoing investigation, that information can be obtained and analyzed by the federal government.

Even if the warrant requirement of the 4th Amendment is fulfilled by the *Stored Communications Act*, the requirements to obtain a court order for disclosure under that act were not met, as the 'impartial' magistrate abused the discretion in allowing the FBI to obtain "overly voluminous" information. The *Stored Communications Act* states that "A court issuing an order pursuant to this section... may quash or modify such order, if the information or records requested are unusually voluminous in nature...." this shows that the legislature in enacting this law had an interest in limiting the amount of information that may be obtained through this quasi-warrant. Further, the 4th Amendment protects people within the jurisdiction of the United States from "unreasonable searches and seizures" this shows that the Framers had an interest in the reasonability of the proposed searches that they were allowing warrants in. However, the judges in the case before the court have allowed 127 days of backlogs to be pulled without a true warrant, essentially allowing a person to be retroactively searched.

What the courts have allowed to happen in today's case is analogous to the injustices that James Otis spoke about in his arguments made against writs of assistance in February of 1761. These writs of assistance were unilateral "warrants" of a court that allowed an officer of the law to go into a home and search for any and all smuggled material, James Otis stated that these "writs of assistance" went against the rights guaranteed to the people of Britain by British common law. This was a time that was moving towards the line that seperated the end of the American Colonies and the beginning of America. Our courts have allowed something to happen, that even the British Government questioned at the height of its tyrannical treatment of the 13 colonies.

The Bill of Rights, and the 4th Amendment in particular carries with it the importance to the founding fathers of personal privacy. In fact this undercurrent was identified in a way that only a justice is able to by Associate Justice Louis D. Brandeis, when he said "The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone — the most comprehensive of the rights and the right most valued by civilized men." To allow the government to so erroneously enter into the personal matters of a singular person, without a valid warrant, and without even fulfilling the requirements of a quasi-warrant properly is to go against what Justice Brandeis contends is "The most comprehensive of the rights, and the right most valued by civilized men." This right that

was solidified within the 4th Amendment and the constitution as a whole through the bill of rights. The right "to be let alone." As held in *Olmstead v United States*.

III

As a last line of defense the state attempts to use the third party doctrine, stating that this precludes all aspects of the 4th Amendment. However, for the third party doctrine to apply in the case before the court, the state must show that the information obtained by the police did not carry with it a reasonable expectation of privacy.

In order to determine if someone has a reasonable expectation of privacy according to *Katz v. United States 389 U.S. 347 (1976)* you must show two things "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.'"

First, Mr. Carpenter have "exhibited and actual (subjective) expectation of privacy." This section requires nothing more than an analysis of Mr. Carpenter's actions to determine if he felt that the information that was obtained would have been protected. In this instance it would be fairly simple to determine that Mr. Carpenter's actions from bringing this lawsuit, to keeping his phone on, are indicative of a feeling that he was safe in carrying his phone with him. Therefore, Mr. Carpenter did have a subjective expectation of privacy.

Second, Mr. Carpenter must show that society is "prepared to recognize" that expectation of privacy as "reasonable." In order to determine the reasonableness of Mr. Carpenter's expectation we look to the previous cases that have allowed a 4th Amendment issue to be raised. Specifically we look to *United States v. Jones supra.* where a GPS tracking device was attached to Jones' car and he was tracked. In *Jones* this court held that people do possess a reasonable expectation of privacy, even through public thoroughfares. This would show that society is willing to accept that people do have a reasonable expectation that they will not be tracked.

Further than the precedent set in cases like *Jones* the time span involved in this specific case, as well as the nature of the documents create what we would consider to be an expectation of privacy that society is willing to recognize. This is because the time period is so vast and it is not a current search. Federal agents were allowed to back track into a person's personal phone records, without obtaining a full warrant for 127 days, obtaining upwards of 12,500 points of data, and that was only pertaining to Mr. Carpenter. This is an outrageous amount of data for a court to allow to be obtained without a proper warrant, and possibly with a proper warrant being issued. It is because of the sheer amount of retroactive data that was obtained that we contend society would ready, and willing to recognize Mr. Carpenter's expectation of privacy as reasonable.

Moreover, the third-party doctrine relies on a separate legal concept for the termination of the reasonable expectation of privacy. That concept is consent. The truth of the matter is that much like a large percentage of the American population, Mr. Carpenter was unaware that he was being tracked every time that he called someone. Many people are unaware of the fact that the location information your phone produces as a result of electronic communication is stored, and that the location information will continue to be produced even when your location services are disabled. Mr. Carpenter could not have adequately consented to this record of his location because again, he was unaware that that piece of information was being tracked. Further than that Mr. Carpenter did not initiate each of the instances where he was being tracked, and the information that was seized was done so involuntarily. Unlike in *Miller supra.* Where Miller initiated each and every transaction, and was aware through his credit card records that he was being tracked, Mr. Carpenter did not initiate each and every one of the events that caused his location to be tracked. If Mr. Carpenter ever received a text message, or a phone call, his phone would be sending his location to the phone company and forcing him to be tracked against his will and consent. Therefore, Mr. Carpenter could not have adequately consented to the third party receiving this information.

CONCLUSION

The state relies on an overly restrictive view of the 4th Amendment, combined with the application of a law that intends to bypass the Amendment in its entirety, and a concept that bases itself in the consent of the individual to make their case. However, we have shown first, that the view of the 4th Amendment that the state would like to push is incorrect, in that Cell Site Location Information and cellphone data are covered under the 4th Amendment. Second, that the *Stored Communications Act* serves no purpose other than to bypass the 4th Amendment by creating an even lighter standard than the existing warrant requirement. And further we have shown that the courts erred in allowing the police to obtain 127 days of location information even under this lighter standard. Finally we have shown that the third party doctrine cannot apply in today's case as the third party doctrine is based on consent that was not freely given in the case before the court.

PRAYER

It is for the reasons previously stated, that we pray this court refuse to allow the government to use the *Stored Communications Act* to bypass the 4th Amendment, and to rule in favor of Mr. Carpenter the petitioner in today's case.
