

Sasadeusz-Wood Harlan Argument

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Petitioner Brief – Sasadeusz & Wood

To be in the Supreme Court of the United States

June Term, 2017

TIMOTHY IVORY CARPENTER, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

PETITIONER’S OPENING BRIEF

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QUESTION PRESENTED

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

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STATEMENT OF ARGUMENT

The fourth amendment’s requirement for a warrant does not allow the government to carry out unreasonable searches and seizures.¹ Since the creation of the Constitution, people in America have had a reasonable expectation of privacy in living their everyday lives. The expectation has been clarified and refined by the Court for years in cases; specifically *Ex Parte Jackson*, which held that there must be a warrant for opening letters², and *Boyd V. United States*, where it was established that a search is not limited to a physical invasion.³

More recently, *United States v. Jones* has followed a similar belief in protecting our privacy and holds that the Fourth Amendment offers some protection for trespass via a GPS tracker on cars. In our case, the Appeals Court has failed to take these property cases into consideration. Furthermore, the search and seizure of data without a judge-issued warrant based on probable cause go against the very foundation of the fourth amendment.⁵

Carpenter has a high expectation of privacy as he was living his daily life, yet the government was able to obtain data on his whereabouts and associations without a proper warrant.

According to the Fourth Amendment, warrants shall only be issued upon a probable cause supported by an affirmation, as well as a particular description of the place, or persons, being searched or seized.⁶ Just as letters can't be opened, as established in *Ex Parte Jackson*, data must not be accessed as well without an explicit warrant.

ARGUMENT I

When the outcomes of other location-tracking cases are considered, the tracking of cell phone data over 127 days constitutes a search.

The purpose of the Fourth Amendment is clear: search and seizures must be accompanied by a proper warrant based on probable cause. The founder's purpose of this amendment was not random. The fourth amendment can be seen as a response to the wide-reaching Writs of Assistance which the British used to search colonial property.^{7,8} The framers realized that a process for gaining warrants must be fair and just, to ensure protection against unjust government intrusion.

According to the Fourth Amendment, "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." Its purpose is clear. Searches and seizures must, in fact, have a specific warrant to be valid.⁹ A cell phone's data is no different.

In *Riley v. California*, phones inherently have a high expectation of privacy, due to the fact that they are microcomputers which hold an entire record of our lives. Therefore, a warrant is required to search the contents of them.¹⁰ Furthermore, the right still applies to those who have been arrested, as held in *U.S. v. Wurie*, where the Supreme Court unanimously held that a cell phone search of an arrested suspect must have a warrant as well.¹¹ The world has changed since the late 1700's. Phones are practically essential in living day to day lives and as such, it is important to realize the implications of tracking a cell phone. In our case, the government tracked the location pings of Carpenter for a period of 127 days. This tracker monitoring displayed every location of Carpenter for every day.

In addition, the court has ruled in favor of requiring a warrant for searching a suspect's location as well. In *U.S. V Jones*, the Supreme Court held that installing a GPS tracker on a vehicle without a warrant constitutes an unlawful search. "[L]onger term GPS monitoring

in government investigations of most offenses impinges on expectations of privacy.”¹² Carpenter was tracked for a period of 127 days. This long-term monitoring by the government would clearly infringe on a reasonable person’s expectations of privacy.

Because of past precedent set in cases *U.S v. Jones* and *Boyd v. U.S*, we are led to the conclusion that the tracking of Carpenter’s location is a clear search and therefore subject to the warrant requirement in the Fourth Amendment. In *U.S v. Jones*, with the police putting a GPS tracking device on Jones’s car, the Court established that this tracking of location was unconstitutional. Applying this logic to this case, the tracking of Carpenter’s location through cell phone pings should be ruled unconstitutional as well. The Court has also established that a search does not only pertain to physical possessions in *Boyd v. U.S*. The data in question in this present case was not physical yet deserves every bit as much protection as a person’s home, property, and effects.¹³

Defense of unreasonable searches has been understood since the birth of the nation. The Massachusetts Declaration of Rights holds that “Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions.” Therefore, any search of a person must require a warrant.¹⁴ In fact, there are more recent laws which back up this claim, even to the digital level. Section b of 18 U.S. Code S2703 states that “A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication... without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure.”¹⁵

Keeping in mind these previous rulings, there is no question that the tracking of cell phone data constitutes a search. In the 21st century age, laws must adapt to new technologies. In our modern era, our phones and emails are yesterday’s papers and effects. Allowing the warrantless search of location is a dangerous step away from the vision of the founders. In the Constitutional Accountability Center amicus brief to *Riley V California*, “The framers wanted to strip the government of the arbitrary power to rifle through a person’s belongings in the hope of finding something incriminating.”¹⁶ The search of cell phone location without a warrant is the opposite view of the founders. In this era, cell phones have adapted to become a part of our lives. From calendars, to messages, and to addresses, our cell phones have essentially become a digital version of ourselves. It only makes sense that a search of cell phone location must require a warrant to be issued. Police should have the option of searching through cell phone location pings, but they must undoubtedly have a warrant to do so. Being that this was a search, under the Stored Communications Act, the

police must be required to receive a warrant to obtain the location data of Carpenter's cell phone over the course of 127 days. 17

Furthermore, the circumstances under which the police conducted this search would not have been able to obtain a warrant. Searching the location of a cell phone over the course of 127 days is incredibly general, and not "particularly describing the place to be searched."¹⁸ The police also did not have sufficient evidence of an act being committed by Carpenter in these several locations over the course of over 3 months. All of these fit into the objections to a warrant made in the Virginia Declaration of Rights. Written by George Mason, the declaration states that in order for a warrant to be granted, the person and effects in question should be specific and particularly described. If everything is not specifically described, the warrant should be deemed "grievous and oppressive" and should not be granted.¹⁹ Under this logic, even if the police went to a judge to obtain a search warrant to look at the general whereabouts of Carpenter, the police would not have been granted one, making this invasive search even more obviously unconstitutional.

Through analysis of the Fourth amendment, supplemented with older and recent rulings, it is clear that the tracking a cell phone over 127 days was a search without a proper warrant.

Argument 2

Considering the prevalence of cell phone use in modern life, Carpenter had a reasonable expectation of privacy.

Phones have become an integral part of our lives. Most times, we are required to carry one in order to keep a job and simply live our daily lives. We are required to sign contracts whenever we buy a cell phone and a cell phone plan which include several different clauses regarding privacy. Agreeing to these clauses is required to have a working cell phone yet this decision is made reluctantly, as we may not agree with the clauses presented. We are therefore unwillingly agreeing to a certain clause in these contracts which says that the cell phone company will provide certain location data in order to cooperate with the police. To do this, the police must first receive a court order. The police in this case were able to obtain a court order and Carpenter's cell provider handed over the information.

In *Katz v. United States*, the Court established privacy regarding telephones. In this case, the police placed an eavesdropping device on a telephone that Katz used. The Court established that listening on a telephone call without a warrant violated the Fourth Amendment.²⁰ It stated that the Fourth Amendment does not only include physical effects but conversations and, more generally, phones.

Previous appellate courts have failed to recognize how the terms of privacy have changed through the modern age. Given that phones are now necessary in conducting a regular daily life and in order to have a working phone we must agree to the cell phone provider's contract, we are therefore unwillingly providing our private information to the companies. By doing so, we are apparently left unprotected as the police can simply defend a warrantless search using the Third Party Doctrine. We must consider that since the world has developed technologically, there are more protections needed in order to live our daily lives securely under the Fourth Amendment.

It has also been established that in living our day to day lives, we have a high expectation of privacy. This reasoning comes from the case *United States v. Jones*. Jones had been living his daily life, using his car to get around, unaware that the police had put a GPS tracker on his vehicle. The Court ruled in this case that the 24/7 warrantless monitoring was unconstitutional under the Fourth Amendment.²¹ This case has incredibly similar qualities to that of *U.S v. Jones*. Carpenter was unaware he was being tracked, was living his daily life, and the police never obtained a valid warrant to get this information. We argue that the phone should be considered similar to Jones's car as both are necessary for living day to day lives in today's world. Using the argument that cell phone data is willingly supplied to the cell phone provider can be applied to cars as well. Tesla uses location data to track their cars today. Using the argument in *U.S v. Jones*, this data should be protected from government surveillance under the Fourth Amendment, therefore we must see the similarities, and apparent legal contradiction between this protected Tesla data, and the supposed unprotected phone data for Carpenter.^{22,23}

CONCLUSION

In short, the tracking of a cell phone ping over a period of 127 days is a search. As described by the Fourth Amendment, a warrant must be based upon probable cause, along with a specific identification of the place or person being searched. In this case, Carpenter was the specific target of the search. *US V Jones* requires federal agents to receive a warrant when tracking a car. Point A of paragraph C of the Stored Communications act states that governmental entity may require a provider of electronic communication service or remote

computing service to disclose a record or other information pertaining to a subscriber to or customer of such service only when a governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure.

Indeed, searches and seizures require a warrant, and Carpenter had an expectation of privacy. As we have stated, phones are essentially a physical part of ourselves. Without them, it is impossible to live a complete and productive life in this day and age. The same way we require cars to live our lives, phones have the same necessity and should, therefore, have the same protections. Precedent has ruled that the government must receive a warrant to track vehicles via GPS, and cars are as essential in our lives as our phones. It only makes sense that Carpenter had such a high expectation of privacy that the government should have been required to have a warrant to track his location. Given all the similarities in the facts of this case to previous precedent-setting cases in the Court's history, it is clear that this search is a violation of the Fourth Amendment.

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