Harlan Virtual Supreme Court: Carpenter v. US- Weindling and Bound

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Respondent Brief – Weindling & Bound

To be in the Supreme Court of the United States

October Term, 2017

TIMOTHY IVORY CARPENTER, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

RESPONDENT'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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The United States did not violate the Fourth Amendment because the obtention of cell-phone location data, CSLI, does not constitute a search as conceived by the framers.1 As established by Smith v. Maryland,2 information that is voluntarily given to a third party–which in this case is the data carrier–is not considered property or private because it is regularly used for legitimate business purposes. United States v. Miller resulted in an almost identical decision;3 in it, it was established that the petitioner, Mitch Miller, had no reasonable expectation of privacy concerning financial documents submitted to his banks. The checks and deposit slips in question were deemed "confidential communications but negotiable instruments to be used in commercial transactions" and thus were not considered private.4 Both cases contrast with Katz v. US,5 where federal agents used the actual conversations made in a phone booth to convict Michael Katz of illegally transferring gambling information. Katz had a reasonable expectation of privacy when entering the phone booth. In Ex Parte Jackson,6 the Supreme Court decided

that the "outward form and weight" of letters and packages, including the name and address of the recipient, could be used in criminal prosecutions. In today's increasingly digitized environment, emails and phone calls have assumed the position of letters and therefore should assume the same standards of Fourth Amendment jurisprudence. This understanding of cellphone contents as private was made clear in Riley v California,a where the privacy of cell phone contents, but not CSLI information are protected under the Fourth Amendment.b Any search of content requires a warrant. The distinction between the content of any given communication and the information necessary to convey it, in this case, the phone numbers dialed by Timothy Carpenter, is critical in determining the constitutionality of government investigation.

Argument

I. Measures taken by law enforcement officers in the Carpenter case are in accordance with the Stored Communications Act and the "third-party doctrine" legal principle.

The law enforcement officers in Carpenter did not violate the defendant's Fourth Amendment rights in using cell-site data to convict Carpenter of armed robberies; because they made no effort to search the contents of Carpenter's phone or his conversations, his privacy was not contravened. As such they required neither a warrant for their actions nor did they infringe upon the Stored Communications Act,7 which does not require "probable cause," but only "reasonable grounds" to obtain the records that confirmed Carpenter's involvement in the perpetrated crimes. Law enforcement operatives were clearly versed in Fourth Amendment regulations of the Katz v. U.S. ruling,8 and avoided anything resembling its content driven violations.9 Moreover, their actions in contacting the phone company for data on its towers conforms to the precedent established in Smith v. Maryland.10 There cannot be a reasonable expectation of privacy when using third party cell phone towers. In fact, the publicly disclosed privacy policies of cellphone companies like the one Carpenter used (MetroPCS, a division of T-Mobile) reserves the right of the carrier to reveal all data to law enforcement. Not only does the binding contract give MetroPCS the right to use any individuals location whenever the phone is on, it also can divulge information for legal process and protection. As stated in T-Mobile privacy policy, "We may disclose Personal Information, and other information about you, or your communications, where we have a good faith belief that access, use, preservation or disclosure of such information is reasonably necessary."11 US v. Miller further supports such theories, clearly stipulating that data obtained from a third party is ipso facto no longer personal or private property.12 The "third party doctrine" is a sound and well-established precedent that

justly navigates insuring the protection of privacy guaranteed by the Fourth Amendment. Taking a step back, one must remember the original requirement of the Fourth Amendment, which stemmed back to ideologies present in the Magna Carta:14 Government was not allowed to abuse their power through covert examinations of dwellings and detrimental seizures of property.15 The Carpenter case reflects none of such properties. Carpenter is a criminal who has been brought to justice by a law enforcement department respectful of our centuries-old Constitution and its application in our contemporary world as interpreted through multiple rulings of this Supreme Court.

II. The locational cell site information retrieved by the FBI is approximate and does not compare to the specific GPS data employed in U.S. v Jones

In his majority opinion in U.S. v Jones,16 former associate justice Antonin Scalia indicated that the Global-Positioning System (GPS) which was utilized to track the movements of Antoine Jones' Jeep established the vehicle's location within 50 to 100 feet. The court ruled that the installment of the GPS device on Jones' vehicle, without a warrant, constituted an unlawful search.17 It was unanimously agreed among the justices that such an intensive surveillance of Jones' location over the course of 28 days was not in accordance with the Fourth Amendment.18 Summing up the decision, Scalia wrote, "Longer term GPS monitoring in government investigations of most offenses impinges on expectations of privacy." To the unseasoned investigator, cell-site locational data used in Carpenter would likewise seem unconstitutional. However, the data in Carpenter only identifies the cell tower with which Carpenter's phone made signals over the course of 127 days. As explained by FBI agent Christopher Hess during the hearing for the appellate court, cellphones function by forming a radio connection with a nearby cell tower, which project different signals in each direction. Thus, by identifying the cell tower a customer's phone is connected to, the data carrier can identify the approximate location of a customer. In urban areas such as Detroit, each region of cellular coverage typically spans from a half-mile to two miles, a much broader and less specific area than that identified by the GPS tracker discussed in Jones.

III. The cell site data accessed by the FBI are collected by data carriers and are not part of the actual content of the communications, and thus fall under the third party doctrine.

The cell site data which indicated the approximate location of the respondent during the time of the crimes simply resulted from the respondent's action of making phone calls at the same time that the crime was committed. Only the fact that Carpenter was using his phone in a

certain cellular coverage sector, and nothing else, was used in the prosecution. Both the content of his conversations, and even the numbers which he dialed, which according the precedent established in Smith v Maryland would actually be acceptable in an investigation, were completely ignored.19 Indeed, only the general area of Carpenter's whereabouts are being utilized throughout this case. Furthermore, the sector which contained the respondent at the time of the crimes encompassed roughly 1,000 buildings, far too many for law enforcement to accurately locate the respondent at the crime scene.c This locational information which identifies Carpenter as a probable suspect cannot even be considered private, because it is already used by the carrier for business purposes. When the defendants made or received phone calls, the providers made records of which cell towers each defendant's phone had signaled during the call. The providers do this for billing and to identify weaknesses in signal in order to improve their network. Moreover, these providers always explain this feature in their contractual terms of service.d Cell phone users must also be at least generally aware that their devices cannot function without connection to cell towers, and that by establishing a connection with these towers they necessarily reveal their approximate location to the data carrier.e Carpenter's claim to a reasonable expectation of privacy is legally void because of the third party doctrine described above.

The distinction between the content of any given cell-phone communication and the location of the phone as revealed through cell site location information (CSLI) data is critical in determining the constitutionality of government investigations.f Riley did not extend Fourth Amendment privacy to CSLI data which falls under the "third party doctrine" as established in Smith,g and remains outside of Fourth amendment protections as "voluntarily" shared information.h Unlike in Jones,i in which a detailed GPS tracking was involved to reveal specific information, CSLI data does not provide what Justice Sotomayor detailed as "precise, comprehensive record" in the Carpenter case.j In summary, information collected from CSLI does not fall within the Fourth amendment restrictions imposed by Jones or Riley. Finally, in United States v. Knotts,k the Supreme Court ruled that warrantless monitoring of a defendant does not violate Fourth Amendment rights when a defendant traveled on public streets and thereby "voluntarily conveyed" his location to anyone passing by.

IV. There is no reasonable expectation of privacy because the respondent's appeal does not meet the two-fold requirement established by associate justice John Harlan in Katz.

In the 1967 Supreme Court case Katz v. United States,20 justice John Marshall Harlan II, endeavoring to to establish a standard for what can be considered private under the Fourth Amendment, articulated the two-pronged test which would be adopted to determine whether a government search is in fact subject to the limitations of the aforesaid amendment. In his

concurring opinion, he wrote "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected,' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable."21 Therefore, it was concluded that the information retrieved by government agents in Katz, who wiretapped a public phone booth to eavesdrop on Michael Katz's conversations, was gathered illegally, because upon closing the door of the booth and paying the toll for making the call, Michael Katz exhibited an expectation of privacy that the community could certainly deem reasonable. However, the court also stressed in this case that "what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."22 This last comment would have a profound influence on future cases US v. Miller and Smith v Maryland. In Miller,23 the Bureau of Alcohol, Tobacco, and Firearms obtained records from two of Mitch Miller's banks, such as financial statements and deposit slips, in order to prove that he had carried whiskey and alcohol distilling equipment on which the liquor tax had not been paid. Miller claimed, however, that he has a Fourth Amendment interest in the records kept by the banks because they are merely personal records that were made available for a limited purpose. Using the two-pronged test referred to above, the court reversed the decision of the appellate court, ruling that no reasonable expectation of privacy could be construed. In his majority opinion, Associate Justice Lewis Powell wrote, "All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business…The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."24 Therefore, in adjudicating the Carpenter case, we must adhere to precedent and maintain that the cell-site data which reveals the defendant's approximate location over the course of 127 days are part of regular business records and thus may not reasonably be considered private because, using Harlan's two-pronged test, Carpenter exhibited no actual or reasonable expectation of privacy by voluntarily giving his cellular information to his data carrier, MetroPCS, which uses this information for legitimate business purposes such as billing.

However, much more relevant to Carpenter is the Smith case, which concerned the various phone numbers dialed by Michael Lee Smith, a suspect in the robbery of Patricia McDonough. By asking Smith's telephone company to place a pen register on Smith's home telephone, which would record the numbers dialed on it, the police linked Smith to the robbery after having

found that he had dialed McDonough's number.25 Smith, the defendant, claimed that he had a legitimate Fourth Amendment interest in the phone numbers which he dialed in the confines of his own home. In response, the court wrote "the site of the call is immaterial for purposes of analysis in this case. Although petitioner's conduct may have been calculated to keep the contents of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed. Regardless of his location, petitioner had to convey that number to the telephone company in precisely the same way if he wished to complete his call. The fact that he dialed the number on his home phone rather than on some other phone could make no conceivable difference, nor could any subscriber rationally think that it would."26 Thus, Carpenter can make absolutely no claim to Amendment IV's protection for his cell-site data because his behavior could not, in any feasible manner, have been intended to maintain the secrecy of his cell phone activity.

Conclusion

The Fourth Amendment of the United States Constitution represents the virulent anti-government sentiment of colonial revolutionaries who repudiated the tyranny of King George III's oppressive monarchy and aimed to form a new, egalitarian democracy which would serve the interests of the people, not of those in charge.27 In writing a new constitution for a new nation after having suffered through the countless problems of the Articles of Confederation, anti-federalists campaigned vehemently for a bill of rights that would manifest the colonists' fear of power and concern for their own civil liberties. Indeed, the Massachusetts Bill of Rights had already articulated: "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."28 Among the first ten amendments which would ultimately be ratified, the fourth addressed the importance of respecting private property on a governmental level. It evolved from Madison's initial proposal,29 which went thusly: "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." The use of "persons," "houses," and "effects," which features in the actual amendment, does not require any adaptation to today's significantly different world. The terms "papers", however, does need some qualification. In Madison's time, papers meant physical documents such as letters, receipts, and personal records. However, in today's digitized world and indeed in the Carpenter case, "papers" can mean digital and online records such as texts, emails, and the cell-site data discussed in Carpenter. And, while the fourth amendment originally referred to the definition of "papers" as perceived by those of Madison's time, it has been adapted to protect the digitized versions of "papers" that we experience on a daily basis today. However, as noted in the several arguments made above, the content of any given communication, such as an email or a phone

call is most certainly protected from government intrusion, whereas the information needed to convey the communication is not. As in Ex Parte Jackson,30 the court ruled that the "outward form and weight" of a package, including the sender and recipient addresses, could be used in a court of law, so too should the cell site location data required to connect two callers be used to convict Timothy Carpenter of the armed robbery in which he partook.

Endnotes

1. U.S. Const. amend. IV.

2. Smith v. Maryland, 442 U.S. 735 (1979)

3. U.S. v. Miller, 307 U.S. 174 (1939)

4. U.S. v. Miller, 307 U.S. 174 (1939)
5. Katz v. U.S., 389 U.S. 347 (1967)

6. Ex Parte Jackson 96 U.S. 727 (1878)

a. Riley v. California, 573 U.S. __ (2014)

b. Bernardo, Christian. "The Fourth Amendment, CSLI Tracking, and the Mosaic Theory." Fordham Law Review, Fordham Law Review, 2017, ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5368&context=flr.

7. Stored Communications Act, 18 U.S.C. Chapter 121 §§ 2701–2712 (1986).

8. Katz v. U.S., 389 U.S. 347 (1967)

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10. Thompson, Richard M. "The Fourth Amendment Third-Party Doctrine ." Congressional Research Service, fas.org/sgp/crs/misc/R43586.pdf.

11. "T-Mobile Privacy Policy Highlights." T-Mobile, T-Mobile, 31 Dec. 2015, www.t-mobile.com/company/website/privacypolicy.aspx#fullpolicy.

13. U.S. v. Miller, 307 U.S. 174 (1939)

14. Ahuja, Alok (1986) "Civil Forfeiture, Warrantless Property Seizures, and the Fourth Amendment," Yale Law & Policy Review: Vol. 5:

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15. Ahuja, Alok (1986) "Civil Forfeiture, Warrantless Property Seizures, and the Fourth Amendment," Yale Law & Policy Review: Vol. 5:

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d.Thompson, Richard M. "The Fourth Amendment Third-Party Doctrine ." Congressional Research Service, fas.org/sgp/crs/misc/R43586.pdf.

e. Bernardo, Christian. "The Fourth Amendment, CSLI Tracking, and the Mosaic Theory." Fordham Law Review, Fordham Law Review, 2017, ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5368&context=flr.

f. Bernardo, Christian. "The Fourth Amendment, CSLI Tracking, and the Mosaic Theory." Fordham Law Review, Fordham Law Review, 2017, ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5368&context=flr.

g. Smith v. Maryland, 442 U.S. 735 (1979)

h. Riley v. California, 573 U.S. __ (2014)

i. U.S. v. Jones 132 S.Ct. 945 (2012)

j. U.S. v. Jones 132 S.Ct. 945 (2012)

k. U.S. v. Knotts, 460 U.S. 276 (1983)

20. Katz v. U.S., 389 U.S. 347 (1967)

21. Katz v. U.S., 389 U.S. 347 (1967)

22. Katz v. U.S., 389 U.S. 347 (1967)

23. U.S. v. Miller, 307 U.S. 174 (1939)

24. U.S. v. Miller, 307 U.S. 174 (1939)

25. Smith v. Maryland, 442 U.S. 735 (1979)

26. Smith v. Maryland, 442 U.S. 735 (1979)

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28. "Constitution of Massachusetts." ConSource, 25 Oct. 1780, consource.org/document/constitution-of-massachusetts-1780-10-25/20130122075650/.

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30. Ex Parte Jackson 96 U.S. 727 (1878)

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U.S. Const. amend. IV.

U.S. Const. amend I-X.
