

Private: Respondent Brief – Matthew H./Tiana L.

Respondent Brief

To be in the Supreme Court of the United States

April Term, 2018

TIMOTHY IVORY CARPENTER, PETITIONER

RESPONDENT’S OPENING BRIEF

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Oral argument:

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 was enacted to provide a safeguard for persons against unreasonable searches and seizures by the government. The purpose is to grant an individual the right to protect his or her belongings from being unwantedly obtained without a probable cause thus establishing an expectation of privacy. In 2011, four men were arrested for armed robberies of stores such as T-Mobile and Radio Shack in Michigan. After one man came forward about his participation, the government intervened by asking magistrate judges to obtain his cell records to find others who were potentially involved. Following the completion of the retrieved information, the government was able to pinpoint two men, one named Timothy Carpenter. Carpenter was charged with multiple counts as his actions violated federal law. As defense, Carpenter claimed the actions of the government were a clear violation of his Fourth Amendment rights. However, the United States was not in the wrong for their obtainment of Carpenter’s transactional records. The Fourth Amendment grants individuals to be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” In Carpenter’s case, a warrant was not needed as the information collected and utilized by the government was supplied by a third-party. United States v. Miller specifically states, “The Fourth Amendment does not prohibit

the obtaining of information revealed to a third-party.” Otherwise stated, publicly accessible information such as cell records are not shielded by the Fourth Amendment given the fact that the phone company voluntarily granted the government access and Carpenter willingly allowed said information to be collected. Therefore, the United States did not overstep their boundaries and wrongfully violate the Fourth Amendment rights of Carpenter as the amendment does not apply to the conditions of the case.

Argument

I. The Plaintiff’s Fourth Amendment Rights Were Not Violated.

There was no violation of Carpenter’s Fourth Amendment rights by the United States government. In fact, the Fourth Amendment does not apply to Carpenter’s case in way shape or form, as will be shown in the presenting argument from myself and my co counsel. As affirmed by James Madison, a probable cause grants the government access to search and seize as long as a supportive defense of the claims is provided. Given this claim, there are set regulations that will concur whether or not one’s rights can be upheld in the court of law.

The case *Smith v. Maryland* concludes “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.” This set the standard for the limits as it relates to retrieving information stored in a cellular device. In regards to Carpenter, the government sought information under the Stored Communications Act, which allows access to telecommunications records only under the condition that “there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought.” As shown the Fourth Amendment ensures one’s protection of belongings against the government, but these rights do not apply to broad information, such as general location and call records, which are revealed to a third-party. Carpenter agreed to the terms and conditions presented by the third-party and the government simply collected those records as provided by the third-party in order to link Mr. Carpenter’s placement to the location of the crimes. With taken said information into account, Carpenter was not stripped of his Fourth Amendment rights because the agreement established with the cellular provider allowed for locational data to be obtained making this a fault of Carpenter and not of the United States government.

II. There was neither a search or a seizure because the government did not access information stored on the phone rather the information was willingly given by the

phone provider.

The information that the government used in the trial against Carpenter came from the telephone company and was being stored by the telephone company, it was not stored on Carpenter's phone. Carpenter did not own the information, it belonged to the telephone company. The information was collected by the telephone company through the normal course of the phone's operation. The information, call records and broad location, was outwardly visible. According to Ex Parte Jackson the government has the right to use such outwardly visible information without a warrant. Ex Parte Jackson ruled that the outside address and appearance of a letter could be used by the government in the 19th century, which applies to 21st century call records and rough location records can be used by the government without a warrant. It was this type of information that the government used and is not protected under the Fourth Amendment because it was outwardly visible.

Therefore, when Carpenter purchased and used his phone, he agreed that while using the phone, records of the existence, but not substance, of calls, and rough triangulated location would be collected and stored by the service provider. Furthermore, he accepted that the information shared with the service provider could possibly end up in the government's hands. If Carpenter had wanted to hide such broad information that was easily visible to the service provider and the government, he would not have used the phone. *US v. Miller* held that a person cannot expect Fourth Amendment protection to information that is willingly exposed to businesses, in that case a bank, and that such information can be seen by the government without a warrant. Carpenter, by using and having his phone on, exposed the information to a business, in his case, his service provider. In addition to *US v. Miller*, *Smith v. Maryland* held that information, like call records, voluntarily given to a third-party company, a phone company is an example of a third-party, is not protected under the Fourth Amendment. The phone's normal operation and use exposes information to the phone company.

Carpenter had to accept the risk that the information might be shared with the government, which is shown in the following court cases: *Smith v. Maryland* and *US v. Miller*. When he committed crimes while using and carrying his phone he accepted the risk that the information could be used against him in court, which it lawfully was. The opinion for *Smith v. Maryland* says, "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". Carpenter did not make any attempts to keep the information, that he gave to the service provider, private, unlike in *Smith v. Maryland*. Carpenter, by having and using his phone, could not reasonably expect to have the information of his call record and location kept private. Ex-parte Jackson says,

“The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be”. The difference with Carpenter was that the information, that the government used in his trial and he is now questioning, was not sealed on his phone, or “closed against inspection”. Carpenter was not forced to have his cell-phone on and with him when he committed the crime, nor did the government force him to make the phone calls that were on the records used in his case. The government did not force the phone on him and the government did not force the phone to collect information about his location and call records, the government merely accessed this information from the phone company. This access was not a search as defined and protected under the Fourth Amendment. The phone company got the information from Carpenter through the phone’s normal operation. Carpenter has also argued that his situation falls under *US v. Jones*, The Sixth Circuit court writes, “The second problem with the defendant’s’ reliance on Jones is that—unlike Jones—this is not a GPS-tracking case.” The opinion goes on to explain that unlike GPS the information that was used was not minutely accurate. The Massachusetts Declaration of Rights, an influential document, includes the passage, “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”. Furthermore, the New York Ratification Convention Debates contained the phrase, “That every freeman has a right to be secure from all unreasonable searches and seizures.”

Carpenter was always secure from searches, but he was not secure from the government using his co-conspirators confessions and the outwardly visible information from his phone records being used as evidence against him. Carpenter’s rights were not violated because a search did not occur and throughout the investigation his rights, which are the same as all citizens, were protected.

In addition, there was not a search or seizure of “persons, houses, papers, [or] effects” because location is not any of these. Location is not a physical object and it is not personal information. Instead, location is outwardly visible and publicly available both to the phone company and to any one watching. *Ex Parte Jackson* applies to this case because of this. It is understood that the Fourth Amendment applies to physical objects and in *Boyd v. United States* that their does not need to be a physical search to constitute a violation of the Fourth Amendment. The difference in this case is that there was not a search, either physical or otherwise, that could fall under the Fourth Amendment.

III. The plaintiff had no reasonable expectation of privacy because the information obtained was granted by a third-party.

An individual does not receive the including benefits of the Fourth Amendment if the individual can not demonstrate there is a reasonable expectation of privacy for the information the government intends to obtain. There is a reasonable expectation of privacy present when it can be proven that the place intended to be searched or the items intended to be seized are both subjectively and objectively protected and once proven an individual is granted a reasonable expectation of privacy. The case *Katz v. United States* brought to the forefront the idea of expectation of privacy, which is simply an extension of the Fourth Amendment. After suspicion of activities of gambling, federal agents acted by wiring a public telephone Katz utilized during a transaction. The recordings that were retrieved led to Katz being convicted for the illegal transmission of wagering information across two cities (Los Angeles and Boston). Katz appealed by claiming that “records could not be used as evidence against him.” Through careful consideration, the Supreme Court ruled that it was a violation of Katz’s Fourth Amendment rights. Justice Harlan construed the Fourth Amendment to prohibit searches under two conditions which were that the parties “have exhibited an actual expectation of privacy” and that expectation must “be one that society is prepared to recognize as ‘reasonable.’” This case not only extended the Fourth Amendment, but also strengthened it given the fact that there is more criteria needed to be met, which makes a violation of one’s rights more easier to recognize. As it relates to *Carpenter*, it is clear there is no expectation of privacy. Since *Carpenter* willingly provided information to a third-party he dismisses his Fourth Amendment protection. According to the criteria needed to be met by the case *Katz v. United States*, *Carpenter* falls short. *Carpenter*’s cell records as provided by the third-party are not granted a reasonable expectation of privacy as he signed his rights away when he signed the agreement issued by his cellular carrier. Therefore, *Carpenter* does not hold a reasonable expectation of privacy.

As established *Carpenter* holds no reasonable expectation of privacy. The question that now presents itself is “When does a search or seizure require a warrant?” A warrant is required for a majority of searches. The standard process for a search has to have probable cause for the purpose of searching a suspect’s property or obtaining personal belongings. The government must present a valid stance for a judge to issue a warrant or to simply deny said request. The information *Carpenter* is contesting is outside this process because it was given to a third-party. The act of giving up this information allowed the government to access it through the Stored Communications Act which is a justifiable stance for not abiding by the normal warrant process because a warrant was not needed. As aforementioned by my co-counsel, the plaintiff was not searched rather the government simply collected the information by the third-party under the agreement *Carpenter* made when he signed his contract. Given that *Carpenter* supplied locational data to his cellular

provider he signed away all protection. The United States government had every right to pursue the stored information as provided by the third-party.

The suppliance of information by a third-party eliminates an individual's entitled expectation of privacy as the information was voluntarily shared. This legal principle is also known as the third-party doctrine. The obtainment of the transactional records by the United States government, which was granted by the magistrate judges was provided by a third-party with that being, the cell phone provider. The information gained allowed for the government to trace the location as it relates to the placements of the robberies and convict the participants. As supported by the third-party doctrine, Carpenter holds no reasonable expectation of privacy. There is no defense applicable to Carpenter. Carpenter has no expectation of privacy as he willingly complied to the locational data in placed by the third-party. The fault rests on the shoulders of Carpenter and not the United States government as they simply halted the progression of further criminal acts.

With taken into account the aforementioned information, it is important to understand the distinction between that of the content of a communication and the information necessary to convey said information. The content of a communication is protected under the Fourth Amendment as it is intended to safeguard conversations amongst two or more individuals. The information necessary to convey said information is provided through obtaining personal records, which would be an infringement by the government or persons to possess such information. *Smith v. Maryland* established this legal principle. The government retrieved the number dialed by Smith however keeping the contents of his conversation private simply for the purpose of linking location to the occurrence of crime. This established that routing information of a communication is not protected by the Fourth Amendment and the information necessary to convey said information is through locational data. In the case of Carpenter, the government only investigated the call log as it relates to the instituted cell towers in order to link him to the crime. The United States government took the necessary protocol to gather needed information to link Carpenter to the crime. Carpenter's obtained locational log does not shield him from the laws that are upheld by the United States government thus making the government's actions justifiable.

Proposed Standard

Under the standard instituted by the third-party doctrine, it is acceptable for the government to access call records and general location data stored by third-party service providers.

Conclusion

Carpenter’s Fourth Amendment rights were not violated because he did not have legal possession of the information that the government used in his case. Carpenter gave the information to the service provider, by using his phone. This act voided his right to claim that his Fourth Amendment rights applied to the information. Furthermore, the information was not his exact location or the content of his phone conversations. The information merely acknowledged that Carpenter had made phone calls and his general location. This conclusion is reached after examining the third-party doctrine and Supreme Court precedent.

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