IN THE SUPREME COURT OF

THE STATE OF THE UNITED STATES

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TIMOTHY IVORY CARPENTER,

Petitioner

Vs.

UNITED STATES OF AMERICA,

Respondent

_____

_____

Brief for Respondent

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?

Makaylia Askew
Joanna Boyer

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## Statement of the case

In April 2011 the police arrested four men for committing nine armed robberies spanning across several months at various Radio Shack and T-Mobile stores across Detroit, Michigan. One of the men arrested confessed to these robberies and gave the FBI the names and numbers of 15 other men that acted as accomplices as well as his own cell phone records. The FBI searched through his records to identify other numbers that were contacted during the time of the robberies and requested a court order for the suspect's cell records. The magistrate judges granted the law enforcement's request for the cell records, including cell-site location data, under the Stored Communications Act. Through their cell records the police obtained evidence implicating Timothy Carpenter's and Timothy Sander's involvement in the armed robberies. Carpenter and Sanders moved to suppress the evidence derived from the FBI's search of their cell phones. The United States District Court for the Eastern District of Michigan denied their motion to suppress the evidence.

## Statement of the Argument

The FBI did not violate Mr. Carpenters Fourth Amendment rights by obtaining and using his cell-site location data without a warrant because the collection of cell-site location data does not implicate the Fourth Amendment. Carpenter did not have an expectation of privacy over his cell-site location that society is prepared to recognize as reasonable and, even if he did, the data was given to the FBI by the phone provider who acted as a third party, and governmental entities may procure data without obtaining a warrant under the Stored Communications Act.

## Argument One: The FBI's collection of Carpenters location did not implicate the Fourth Amendment

Carpenter's cell-site location is not protected under the Fourth Amendment because he has no reasonable expectation of privacy when moving through a public place. The Fourth Amendment states that "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." Soldal v. Cook County, 506 U.S. 56 (1992) defines a "search" as something that occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A person's movements through public have never been recognized as a protected element under the Fourth Amendment because "a person has no reasonable expectation of privacy in his movements from one place to another." United States v. Knotts, 460 U.S. (1983). The court in Katz v. United States 389 U.S. 347 (1967) continued this rationale by recognizing that the Fourth Amendment protects persons, not places, and that there is no Fourth Amendment protection when the petitioner makes no moves to preserve the privacy of the information in question. The cell-site location data that Carpenter is attempting to suppress clearly pertains to a place not a person because the record offers nothing besides a location and Carpenter did not take any steps to preserve the privacy of his location, had he simply turned his phone off while moving around areas he wanted to remain private the issue would be different however he did not and therefore failed to establish a reasonable expectation of privacy.

**Argument two: The FBI's collection of Carpenter's cell-site location data did not violate the Fourth Amendment because the expectation of privacy Carpenter had was forfeited due to the third party doctrine**

Even if Carpenter had an expectation of privacy, he has given up that privacy protection by giving his cell-site data to a third party. The third party doctrine was created in Katz v. United States 389 U.S. 347 (1967) and upheld in Smith v. Maryland 442 U.S. 735 (1979) which held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" and that "cell-phone users, like landline users, do not have a general expectation that data generated when they use telephone company equipment will remain secret."

United States v. Davis 785 F.3d 498 (2015) established a test to explain when the third party doctrine does not violate the Fourth amendment. This case sets up an analogous situation before the court to the one presented today; Davis was brought up on charges under the Hobbs Act and the federal government collected his cell records spanning across the time the robberies took place, including his cell-site location data. The court in that case held that the use of the third party doctrine did not violate the Fourth Amendment because the records did not show (1) the contents of any call; (2) the contents of any cell phone; (3) any data at all for text messages sent or received; or (4) any cell tower location information for when the cell phone was turned on but not being used to make or receive a call. The government did not seek, nor did it obtain, any GPS or real-time location information." None of those things have occurred in the case before the court and, unlike the case in Jones v. United States; the FBI did not collect any real time location. The FBI merely obtained Carpenter's cell-site location data when the phone was on around the times the robberies occurred.

The court has considered whether to apply the third party doctrine to cell-site data in cases like United States v. Graham 846 F.Supp.2d 384 (2012) which held that cell-site location data does not implicate the Fourth Amendment, and United States v. Powell 379 U.S. 48 (1964) which held that there is no reasonable expectation of privacy in cell-site location information. United States v. Miller 425 U.S. 435 (1976) created a way to analyze whether information fell under the third party doctrine by holding that Miller had no protectable Fourth Amendment interest in the account records at issue because the documents were: (1) business records of transactions to which the banks were parties and (2) voluntarily conveyed to the banks." In doing so the court created the requirement that a person have "ownership and possession" over the papers and the records they are attempting to protect under the Fourth Amendment. However, as with the bank records in Miller, Carpenter can assert neither ownership nor possession of the cell-site records. Rather, the cell phone providers created the records for their own business purposes as part of the process of providing telephone service to customers.

To address the first point of the Miller test, it is clear that Carpenter's cell phone provider is a party in business transactions dealing with his phone because customers of a cell phone provider must sign a contract acknowledging, among other things, that the company documents and records their cellular record and Carpenter willingly signed an agreement with the company in exchange for its service. Contrary to the petitioner's suggestion that Americans are oblivious that cellular data can be used to track your location and therefore withhold some level of privacy, the court in Smith v. Maryland 442 U.S. 735 (1979) "doubted that people, in general, entertain any actual expectation of privacy," given that "all telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through the telephone company switching

equipment that their calls are completed." The Court further emphasized that "the phone company has facilities for recording this information" and "does in fact record this information for a variety of legitimate business purposes." Moving onto the second part of the Miller test, Carpenter's action in conveying information about his location to cell towers was voluntary, as in Miller and Smith. In those cases, like this one, individuals were required to reveal information about themselves to use an important service provided by a business that was a "ubiquitous part of modern society."

Even if Carpenter feels he has an expectation of privacy over his cell-site location data, it is not one that society is willing to recognize. United States v. Graham 846 F.Supp.2d 384 (2012) held that "even if the defendant did harbor some subjective expectation that his cell-site location would remain private, this expectation is not one that society is prepared to recognize as reasonable."

Carpenter could have ensured his privacy easily by turning his phone off; however, he did not and thus lost any claim to a reasonable expectation of privacy. Without an expectation of privacy that society is prepared to recognize as reasonable, there is no search that requires the protections of the Fourth Amendment through a warrant.

**Argument Three: The Stored Communications Act requirement complies with applicable Fourth Amendment principles and is not constitutionally unreasonable**

Even if Carpenter is still entitled to certain privacy protections, the extent of the protections offered by the Fourth Amendment has been the topic at issue for the this court as technology advances and new questions of privacy are asked. The government's best solution to these changes can be found in United States v. Skinner, 690 F.3d 772 (2012) which held that "technological changes can alter societal expectations of privacy, " but reasoned, "at the same time, law enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system. The court in Olmstead v United States defined this reasoning by holding that "In circumstances involving dramatic technological change, the best solution to privacy concerns may be a legislative body which is best situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." In United States v. Jones 132 S. Ct. 945 (2012), the Fifth Circuit concluded that a legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way. In the end the Fifth Circuit determined: (1) Congress has crafted such a legislative solution in the Stored Communications Act, and (2) the Stored Communications Act 'conforms to existing Supreme Court Fourth Amendment precedent' and declined to create a new rule to hold that Congress's balancing of privacy and safety is unconstitutional.

The legislation in this case was passed by Congress after they considered the new circumstances that arose due to cell-site location data. They passed the Stored Communications Act which provides that "A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication and disclose a record or other information pertaining to a subscriber to or customer of such service that is in electronic storage in an electronic communications system for one hundred and eighty days or less if the contents of the wire or electronic communication was given on behalf of, and received by, means of electronic transmission, such as a subscriber or customer of such remote computing service as long as the governmental entity obtains a court order by showing 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." This act allows the government to procure digital information without an official court order because it establishes certain procedural safeguards to ensure that the privacy protections offered in the Fourth Amendment are secured. Through this wording the Founding Fathers have established that, in order to protect a person's privacy rights, there must be probable cause that a crime has occurred, a court order, and a way to hold the officer making the search accountable.

The first protection within the Stored Communication Act secures the probable cause protection by setting a statutory standard. While the standard of 'specific and articulable facts' may be less than the probable cause standard for a search warrant, the government is still required to obtain a court order and present to a judge facts showing reasonable grounds to believe the records are relevant and material to an ongoing criminal investigation, a reasoning that has been found constitutional in cases like United States v. Davis 785 F.3d 498 (2015) which held that "The Stored Communications Act does not lower the bar from a warrant to a § 2703(d) order. Rather, requiring a court order under § 2703(d) raises the bar from an ordinary subpoena to one with additional privacy protections built in. The government routinely issues subpoenas to third parties to produce a wide variety of business records, such as credit card statements, bank statements, hotel bills, purchase orders, and billing invoices. In enacting the Stored Communications Act, Congress has required more before the government can obtain cell phone records from a third-party business." Therefore, the Stored Communications Act goes above and beyond the constitutional requirements regarding compulsory subpoena process and sufficiently addresses the first protection in the Fourth Amendment.

The Stored Communications Act secures the second protection of a court order by allowing a governmental entity to obtain digital information only if they obtain a court order from a magistrate judge.

The Stored Communications Act secures the final protection offered in the Fourth Amendment because it holds the governmental entity accountable by "interposing a 'neutral and detached magistrate' between the citizen and the officer engaged in the often competitive enterprise of ferreting out crime." as held in United States v. Karo, 468 U.S. 705, (1984), the act also prohibits telephone companies from voluntarily disclosing such records to "a governmental entity" and bars "improper disclosure" of records obtained under § 2703(d), providing remedies for if such inappropriate disclosures occur, including penalties for violations of the Act's privacy-protecting provisions, including money damages and the mandatory commencement of disciplinary proceedings against offending federal officers.

Finally George Mason, in his Virginia Declaration of Rights, (unanimously adopted on June 12, 1776) he argues that "General warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any evidence, are grievous and oppressive, and ought not to be granted." James Otis also made similar appeals against general warrants in his Argument Against Writs of Assistance. He argues that general warrants are too vague to properly protect a citizens Fourth Amendment rights because anyone can receive a warrant and then be granted to search and seize anything, regardless if it was previously specified. The court order granted by the magistrate judge is different than a general warrant because the person making the request for the court order must be acting on behalf of a governmental entity and must list everything that they are trying to obtain in the order, which limits the power of the Stored Communications Act.

Larger aggregations of cell-site location data do not extend the governmental procurement past that which is protected under the Stored Communications Act because United States v. Graham 846 F.Supp.2d 384 (2012) held that the acquisition of cell site location data pursuant to the Stored Communications Act does not implicate the Fourth Amendment, regardless of the time period involved. United States v. Davis 785 F.3d 498 (2015) continues this by allowing acquisitions as long as the time period is within the timeframe of the crimes. Furthermore, Congress considered the length of surveillance and decided that 180 days or less offered sufficient protection. The FBI's procurement of data spanning across 127 days is well within Congress's 180 day protection and the FBI chose those days because they are around the times the armed robberies took place.

## CONCLUSION

Timothy Carpenters cell site location is not protected under the Fourth Amendment because he has no reasonable expectation of privacy when moving through a public place. A person's movements through public has never recognized as a protected element under the Fourth Amendment because "a person has no reasonable expectation of privacy in his movements from one place to another." As stated in United States v. Knotts, 460 U.S. (1983). The stored Communications act requirement complies with applicable Fourth Amendment principles and is not constitutionally unreasonable. This act does not lower the bar from a warrant to a §2703 order. Due to the third party doctrine the collection of Carpenters cell site location did not violate the Fourth Amendment. Smith v Maryland 442 U.S. 735 (1979) held that a person has no legitimate expectation of privacy in information he voluntarily turns over to 3rd parties and the cell phone users, like landlines users, do not have general expectation that data generated when they use telephone company equipment will remain secret. When taking this information into account it only helps to show that Timothy Carpenters Fourth Amendment rights when it comes to his cell site location was not violated.

## PRAYER

It is for these reasons that we pray that the court rule in favor of the Respondent, the United States and uphold the lower court's ruling.