Brief in Favor of the Respondent in Carpenter v. U.S. –Broude

**Teacher's note: Caroline Broude was originally assigned to work with a partner, Fangyi Wang, but Fangyi unfortunately came down with the flu early in the research/analysis process and was out of school for more than a week. Caroline wanted to continue on on her own, and I hope you will consider her work. –Carolyn Brunelle, History Teacher, Westover School

Respondent Brief- Caroline

To be in the Supreme Court of the United States in

November Term 2017

Timothy Ivory Carpenter, Petitioner

v.

United States of America, Respondent

Petitioner's Opening Brief

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Oral argument: https://youtu.be/2pJFCLddvTM

Questions Presented:

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

Was there a seizure?

Was there a search?

Was any search or seizure of "persons, houses, papers, [or] effects"?

When is there a reasonable expectation of privacy?

When does a search or seizure require a warrant

What is the distinction between the content of a communication and the information necessary to convey said information?

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Statement of Argument

The Fourth Amendment protects citizens from unreasonable searches and seizures, by requiring a court to issue a warrant only upon probable cause. Mr. Carpenter claims that the FBI did not follow the parameters set out by the Fourth Amendment when they seized his cellular tower location log; however, Mr. Carpenter's declaration is erroneous. First, the FBI followed the strict guidelines set by the Stored Communications Act and appropriately obtained permission to seize Mr. Carpenter's data. The FBI provided the court with specific evidence to prove that Mr. Carpenter was suspected of being an accomplice and followed the court's parameters once the permission was issued. Secondly, the seizure of Carpenter's data fell under precedents set by previous Supreme Court cases. The FBI did not search any of Carpenter's private effects, a precedent set by Ex Parte Jackson, Boyd v. United States, Katz v. United States. In addition, the FBI followed the parameters set by the Third Party Doctrine, established by Miller v. United States and Smith v. Maryland, as Carpenter had voluntarily turned over this location data and thus he could not reasonably expect that that

data be kept private. Carpenter's tracking data was found without entering his property, unlike in Jones v. United States. Finally, the FBI's seizure of Carpenter's cellular log followed the ideals of citizens who ratified the Constitution, as the permission granted was specific with an eminent probable cause. Therefore, the United States constitutionally obtained Mr. Carpenter's telecommunications data.

Argument

1. **The FBI followed the guidelines set out in the Stored Communications Act to be granted permission to obtain Carpenter's location data.**

The FBI legally conducted their search of Carpenter's phone log through means of the Stored Communications Act. The Stored Communications Act sets out parameters which judges follow to grant permission to a "governmental entity" for the search of an individual's stored electronic data. The Stored Communications Act states that any court of competent jurisdiction can issue such permissions if the 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." The FBI provided the cellular information from the phone of one of the individuals who confessed to the T-Mobile and Radioshack robberies; this data provided reasonable facts and evidence to prove that Carpenter was a viable suspect as an accomplice to these robberies and that the telecommunication data was vital to solving this case. Upon obtaining the permission, the FBI only seized the cellular log that they were given permission to acquire. Therefore, the FBI did not in fact need a warrant to obtain such locational logs as set out in the Stored Communications Act and in fact the government was simply following the laws of this nation.

Current citizens may feel that the Stored Communications Act is exactly what significant historical figures feared. This is in fact not the case. James Otis wrote a strongly opinionated argument against the Writs of Assistance, which established the use of general search warrants that gave officers an overall right to search boats and ships coming into our ports. James Otis feared that Writ of Assistance would establish "precedents of general warrants to search suspected houses." George Mason expressed similar apprehensions a mere 15 years later. He also feared a general warrant that would allow to search of "suspected places without evidence of a fact committed, or to seize any person or persons not named, or

whose offence is not particularly described and supported by evidence." However, The Stored Communications Act is not what Otis feared. The SCA provides clear and specific guidelines about what can be searched or seized and is thus not general. Otis worried that the process of obtaining a lower or special warrant would be simplified and thus allowing just about anyone to search or seize whatever they so desire. Otis' concerns are not prevalent in the SCA, as in order to get such a permission, the government needs to show clear and specific evidence to prove that such a permission is necessary. In conclusion, The Stored Communications Act is specific with what can be searched and seized and is only issued with substantial and convincing data is provided; therefore, Otis' fears have not become a reality.

The New York Ratification Convention Debates and Proceedings, that occured on July 19th 1788, also express concerns about an establishment of a general warrant. They decided "that all general warrants (or such in which the place or person suspected, are not particularly designated) are dangerous and ought not to be granted." The Stored Communications Act does not constitute the creation of general warrants. In order for the court to grant a permission to the government under the SCA, they need to be presented with sufficient evidence proving that requested seizure of such telecommunication data is necessary and called for. In addition, the permissions granted under the SCA clearly state what specific items are permitted to be seized, nothing can be searched other than what is outlined in the permission. The specificity and requirements of the SCA would tranquilize any fears of Mason, Otis and those who were involved with the New York Ratification Convention Debates and Proceedings.

2. **Judicial precedent establishes that the search and seizure of such user cellular location data is permissible.**

As previous Supreme Court decisions have determined, the seizure of Mr. Carpenter's cellular tracking data is constitutionally valid, because of the absence of a reasonable expectation of privacy and the presence of a eminent probable cause to search or seize his property. Katz v. United States determined the definition of reasonable expectation of privacy. The Court had suspicion that Katz was sharing illegal gambling information over the phone and thus decided to install a listening device onto the cell phone booth that Katz was using. The Court established that Katz had a reasonable expectation to privacy over the contents of his phone call. In Haron's concurring opinion, he expresses that one can reasonably expect privacy when definitive efforts of concealing such properties are displayed

and when it appears clear that society would deem such protection to be standard. In Carpenter's case, he made no affirmative action to conceal such cellular location data and there is no definitive evidence that society mandates its protection. Additionally, when the officials petitioned for permission to investigate "transactional records" from the magistrate judges, they presented the phone numbers of the accomplices under definitive claims that such individuals had been involved in the armed robberies. Such definitive evidence of the telephonic records was a strong probable cause for the release of Carpenter's location data. As stated in the previous section, the FBI was correctly following the strict guidelines that the Stored Communications Act constitutionally set out.

Katz v. United States also reinforced principles regarding the expectation of privacy surrounding one's personal properties, a principle that had been established by Ex Parte Jackson and Boyd v. United States in the previous century; yet, none of these principles are applicable to this case. Ex Parte Jackson held that the government does not have the right to make inquiry on an individual's personal affairs. Ex Parte Jackson defined a written letter as a "private affair," which comes along with a reasonable expectation of privacy. Boyd, a mere eight years later, continued the theme of an expectation to privacy over personal property by deeming that warrantless searches of one's personal invoices is unconstitutional. Both Ex Parte Jackson and Boyd are outdated forms of the personal properties, whose precedents have proven crucial for future cases surrounding modern technology. Katz applied this legal precedent to the contents of modern cell phones. In Stewart's Majority opinion he declared that Katz relied on the expectation of privacy to freely speak while on the phone; thus, when the government placed the eavesdropping device onto the telephone booth, the government was engaging in a warrantless search and seizure of his private information. The decision of Katz established the protection over the contents of one's phones calls, considering them a property that contains personal information (as discussed in Ex Parte Jackson and Boyd). A very similar precedent was set in the Riley v. California case many years following Katz, where the Court ruled that entering a subject's phone and searching through its contents requires a warrant. In both of Katz and Riley, the court established that one has a reasonable expectation to privacy, thus requiring a warrant to search.

The precedents set by Ex Parte Jackson, Boyd v. United States, Katz v. United States and Riley v. California are therefore not applicable to this case. The contents of Carpenter's calls remained untouched and the information inside of his phone was not viewed. The only information obtained by the government was a log of which towers Carpenter's cell phone signals were sent through. The location data was not a private affair as they are public records in the hands of third party companies. As a result, the government was not conducting an unconstitutional warrantless search on items that have been defined as reasonably accepted to be kept private.

3. **The Third Party Doctrine holds that citizens who voluntarily transfer information to third party companies do not have a reasonable expectation to privacy.**

The Third Party Doctrine states that citizens do not have an expectation to privacy in information that is voluntarily provided to third party companies, a principle established by Miller v. United States and Smith v. Maryland. In Miller v. United States, the Court decided that bank business records cannot reasonably be expected to be kept private. Miller's rights were not violated through the seizing of his banking records as such information was a part of that bank's general business records. By conducting transactions through this bank, Miller was voluntarily giving his information away, a third party company, and thus he did not have the rights to that data. Smith v. Maryland took a similar approach on cell phone logs of a user's cell phone number calling log. The court established that an individual does not have the right to privacy over cellular tower logs because they are used in the phone company's everyday affairs, a fact of which users are aware. The customers are voluntarily giving over their cell phone data to the cellular company, a third party, which means that the customer has lost the right to privacy over such data. The similar principles set out in these two cases are what led to the establishment of the third party doctrine.

Carpenter's tower location log is similar to Miller's banking records and Smith's calling log. Carpenter's location data is in the hands of his cellular provider, a third party company, just as Smith's caller log in the hands of his cellular provider. Carpenter's data location is used in the everyday business of the cellular companies, just as Miller's banking records are used in the daily business of the bank. It is a well-known fact that in order for a phone call to go through, the individual's cell phone needs to connect to local cellular tower. The connections are understood by users to be recorded as outlined in the terms and conditions of their cellular provider's contract. Therefore, Carpenter was well aware that his connections to cellular towers were going to be logged when he made a call and customers are also well aware that such logs are used in the everyday affairs of the cellular companies. This means that Carpenter voluntarily puts his location log in the hands of the cellular company, a third party, and thus under the Third Party Doctrine he does not have a reasonable right to privacy over his logs.

4. **The precedent set by Jones v. United States regarding the tracking of an individual does not apply to this case.**

Jones v. United States concerned completely different circumstances from the issues in question in this case. In Jones' case, the government broke into his car to install the tracking device and then recorded his every movement. The Court established that attaching GPS tracking in Jones' car was an unconstitutional search. Justice Alito wrote in his concurrence that the Supreme Court had "to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred." Breaking and entering Jones' car to install the device was determined to be unconstitutional. However, such precedent is not applicable to Carpenter's location data in question. In Jones' case the police directly broke into his private property to place the tracker in his car. Jones had a reasonable expectation of privacy when considering his car: it is his property and it can be reasonably expected that others are not going to enter unless given his permission. In Carpenter v. United States, the police did not enter or tamper with Carpenter's personal property, and thus he was not unconstitutionally searched. Additionally, the location data in Jones v. United States was created solely for the purpose of proving Jones guilty, the data was produced by the government. In Carpenter's case, the cellular tower log had already been recorded before the FBI sought to retrieve it and the cellular company was using such data on a day to day basis. Carpenter was well aware that such data existed when signing up for his wireless plan and understood that such data was recorded and used. Thus, in Jones v. United States, the government was unconstitutionally creating evidence to convict Jones of the crime, while in this case the government was simply using already established data that Carpenter was well aware of.

The article To the Farmers and Planters of Maryland, Md, written in 1788, depicts vivid scenes of government officials abusing their power to search and seize anything that seems even remotely suspicious: " they often search the clothes, petticoats and pockets of ladies or gentlemen (particularly when they are coming from on board an East India ship), and if they find any the least article that you cannot prove the duty to be paid on, seize it and carry it away with them." Many fear that the seizing of Carpenter's tower connection log is an example of the country acting in the gruesome manner outlined in To the Farmers and Planters of Maryland, Md. One does not need to worry as Carpenter's case is nothing like the monarchical methods of historical searches and seizures. The government in this case was not acting viciously or spontaneously when they seized Carpenter's cellular connection data. The FBI followed the strict guidelines of the Stored Communications Act by providing strong and pertinent evidence of the need for his records. A court of competent jurisdiction issued the permission and only then did the FBI seize Carpenter's data. In

addition, the government only took the data that they were granted, nothing more, nothing less, unlike what was described in To the Farmers and Planters of Maryland, Md. To conclude, the government was not acting in a monarchical or unruly manner as they followed all parameters set out by the Stored Communications Act and only seized the information that they were given permission to.

5. **18th century US citizens would have agreed to Carpenter's search under the principles for which they voted in the ratification of the Constitution.**

The Massachusetts Declaration of Rights of 1780 outlines parameters of obtaining warrants in order to search or seize one's properties. The Declaration outlined that the government cannot engage in a search or seizure "if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure." Such given parameters were followed when the FBI obtained Carpenter's cellular tower log. The FBI followed the SCA by getting permission from a court, issuing the authorization to the FBI (who are indeed types of civil officers), outlining the specific information that was to be searched and seized and following the parameters given by the court. Therefore, upon the principles set in the The Massachusetts Declaration of Rights, the search of Carpenter's log was acceptable.

The seizure of Carpenter's cell location information also coincides with James Madison's intentions when he proposed the Bill of Rights on March 4th, 1789, which were similar to those of the Massachusetts Declaration of 1780 and The New York Ratification Convention the prior year. James Madison outlined that citizens have the right 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 FBI followed all such regulations when obtaining Carpenter's cellular log: They did not invade on his personal property, they provided probable cause through poignant and strong evidence where they specifically described what they were going to search and why, they only obtained the cellular tower log (what they were given permission to do) and they waited until given authorization from a court to seize such records. Therefore, the FBI followed the founding fathers' agreed steps on seizing a citizen's information, and so the search was constitutional.

Conclusion

Our nation is constantly changing and evolving with the discovering of new technologies and methods of communications. If the citizens would would the addition of laws that outline the reasonable protections over cellular information, one must look to the Legislative branch to create laws including parameters of cell phone protection. It is not the job of the Court to make law, but rather the job is only to interpret the Constitution. However, in this case We as the Supreme Court simply need to interpret the text of the Constitution and the Fourth Amendment more specifically. The search of Carpenter's cellular information is not an unreasonable search or seizure as the Fourth Amendment describes and thus the United State was undergoing a legal search and seizure.

The Stored Communications Act is an example of applying the Constitution to our modern society, by setting up certain parameters for obtaining telecommunication data. In this case, the FBI correctly followed the SCA's framework and legally acquired a permission to seize Carpenter's data. They provided evident probable cause that Carpenter was an accomplice to nine armed robberies by providing the court with one of the confessed thief's phone. They followed the outlined parameters of the court's permission by seizing only Carpenter's tower connection log. The FBI followed every criteria of the SCA, meaning that they legally seized Carpenter's data.

The United States also adhered to all applicable Supreme Court precedents set by prior cases. Unlike Ex Parte Jackson, Boyd v. United States, Katz v. United States and Riley v. California, Carpenter's personal effects remained untouched. The contents of Carpenter's calls were not seized, only a mere record of which cell towers his phone connected to. The location data is not a private affair, because it is in the hands of a public company; therefore, the precedents from the cases above cannot be applied to Carpenter's telecommunication data. The precedents set by Miller v. United States and Smith v. Maryland are, on the other hand, applicable to this case. The decisions of Miller and Smith established the Third Party Doctrine, which dictates that an individual who gives information voluntarily to third party companies does not have a reasonable expectation to privacy. Carpenter voluntarily signed up for his cellular contract and thus voluntarily allowed the cellular company access to his connection logs; therefore, Carpenter could not reasonably expect that such information be kept private. Finally, Jones v. United States is not applicable to this case, because Jones involved the police trespassing into his personal property, his car. Because Carpenter's personal properties were not trespassed upon, the precedent set by Jones is not applicable to this case.

Eighteenth-century ideals coincide with the occurrences of this case. The citizens during the framing of the country were concerned that the courts would eventually succumb and allow "general warrants." The permissions that accompany the SCA are not general. In order to be issued a permission, the government entity needs to provide a clear probable cause for their proposed search. The Court then sets strict guidelines that describes what exactly can be searched and seized. These two parameters prove that the permissions granted under the SCA are not general, which therefore means that it would not upset some original citizens.

To conclude, the United States had the constitutional right to seize Carpenter's location log. They followed all protocols set in place and jumped all hurdles before obtaining such data. Carpenter could not have a reasonable expectation of privacy over location tracking log. Therefore, the lower court's decision should be upheld.
