Respondent Brief – Pleas & Repp

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In the Supreme Court of the United States

February Term, 2018

TIMOTHY IVORY CARPENTER, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENT'S OPENING BRIEF

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Oral Argument: https://youtu.be/UxJRVC1aTm8

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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Cases

Smith v. Maryland,

565 U.S. 400
(1979).....4, 5, 6

United States v. Miller,

425 U.S. 435, 443
(1976).....4, 5

Statement of Argument

The Fourth Amendment of the United States protects people from unreasonable searches and seizures of their persons, houses, papers, and effects by requiring the use of judge-issued warrants. The defendant in Carpenter v. U.S. has asserted that law enforcement's search violated the Fourth Amendment, saying that there was a lack of probable cause. The District Court of Eastern Michigan has disagreed with this assertion and maintain that law enforcement's examination of cell site records is not a search, rendering the need for a warrant and, subsequently, Fourth Amendment protection, inapplicable. In addition, the Sixth Circuit Court of Appeals stated, upon reviewing the case, that "In Fourth Amendment cases the Supreme Court has long recognized a distinction between the content of a communication and the information necessary to convey it. Content, per this distinction, is protected under the Fourth Amendment, but routing information is not."

As was established in Katz v. U.S., the Fourth Amendment only applies when the defendant has a reasonable expectation of privacy in the specific place that was searched. Thus, a warrant is not needed in situations when the defendant does not have a reasonable expectation of privacy. In order to determine when a person has a reasonable expectation of privacy, the context of the situation must be considered. In Rakas v. Illinois, the Court established that the expectation of privacy must be determined by referencing sources beyond the Fourth Amendment itself.

In this case, the Third-Party Doctrine is the relevant source – or standard – to determine the expectation of privacy. Under Smith v. Maryland, Fourth Amendment protection does not extend to information given to third parties. Furthermore, in U.S. v. Miller, information from a bank was not protected because the customer lacked "ownership" or "possession" of the information. Similarly, the cell site data of phone users is under the possession of the provider. The Court also determined in the case that the information used had already been voluntarily exposed to the banks. In this case, correspondingly, the cell site data that law enforcement used would have already been exposed to the cell company. Under the aforementioned standards, the defendant would not

have a reasonable expectation of privacy, and consequently, a warrant would not have been required.

In the opinion for Olmstead v. U.S., Justice Taft stated that since the Fourth Amendment was intended to protect people's property, unless law enforcement tresspasses on what is owned or controlled, there is no "search." In this case, the cell site data was not owned or controlled by the defendant. Finally, the Court established in California v Hodari D. that in order to expect Fourth Amendment protection, there must actually be a "search," and a "seizure." Since this case involves no legally-recognized "search," Fourth Amendment protection does not apply.

Argument

The case of Carpenter v. U.S. largely revolves around the defendants' expectation, or rather lack thereof, of privacy. To assert that any seizures ensued during the crime scene would be inaccurate because no evidence was forcefully impounded; one of the four men involved in the robberies admitted his involvement in the crime, subsequently offering his and his accomplices' phone numbers to the police as a means of evidence. The voluntary nature of this acquisition of evidence is precisely what prevents the cell phone numbers from being considered "seized." This confession, but even more importantly, this concession of evidence, actually interferes with any potential expectation of privacy according to The Third-Party Doctrine. This legal doctrine holds that once an individual voluntarily hands over information or evidence to a third party, they automatically rescind their expectations of privacy. The application of The Third-Party Doctrine can be seen in cases such as Smith v. Maryland and U.S. v. Miller. In Smith v. Maryland, it was decided that telephone numbers do not possess any constitutional protections and therefore do not receive a reasonable expectation of privacy because they are willingly provided to telephone companies. Regarding the case of U.S. v. Miller, the Supreme Court determined that any information available in business transaction records also does not have any reasonable expectation of privacy when the government obtains it from a third party.

In Carpenter v. U.S., police used the provided cell phone's records in order to discern the other accessories to the robberies. As previously established, phone numbers are not permitted any Fourth Amendment protections. After the FBI requested transactional records from magistrate judges, it was determined that

they would be allowed access in accordance to The Stored Communications Act, which authorizes the government to observe transactional records when they have reasonable grounds to believe they are pertinent to an ongoing criminal investigation.

These records led the police to Timothy Carpenter and Timothy Sanders. Both defendants argue that the FBI infringed upon their Fourth Amendment rights by conducting a warrantless search without any probable cause. In order for a search to occur, however, one must maintain a reasonable expectation of privacy, and in the case of Carpenter v. U.S., The Third-Party Doctrine relinquishes this expectation. The police's examination of the cell phone records cannot be considered a search due to the nonexistent expectation of privacy. Furthermore, probable cause is not necessary as it is stricter than the reasonable grounds standard which is associated with The Stored Communications Act.

In the case of Katz v. U.S., it is established that police cannot eavesdrop on phone calls without a proper search warrant. This is distinguished from Carpenter v. U.S. because no messages or phone calls from either party were read or listened to by the FBI. They had access to their phone numbers but remained unaware of the actual content of their communications. Although this data may be incriminating, no confession of guilt, either inadvertent or intentional, can be conjured based off of the defendants' transactional records. Conversations have a reasonable expectation of privacy while cell phone numbers do not. In addition, the concept that police can use these cell phone records but cannot view any sent messages (or listen to any phone calls) partially derives from Ex Parte Jackson, a case in which the Supreme Court settled that although the government can use the names and addresses written on a letter or package, they still need a search warrant to actually open them and observe their contents.

Concerning the locational data that was obtained in Carpenter v. U.S., it was ruled in U.S. v. Jones that police cannot attach GPS devices onto an individual's vehicle without a warrant. The locational data that was acquired from cell towers in Carpenter v. U.S. is far less specific than GPS devices on the grounds that they only entitle police to find the general area of an individual's whereabouts rather than their exact location. Cell site data involves service providers which are a third party. Furthermore, the FBI in U.S. v. Jones actively placed the GPS device onto the defendant's car to track him, while in Carpenter

v. U.S., the police simply utilized the already present cell site records for the ongoing investigation.

Precedents established by cases such as Ex Parte Jackson and Smith v. Maryland make it evident that not only was any expectation of privacy relinquished in Carpenter v. U.S., but also that the police were not in violation of the Fourth Amendment when they conducted a warrantless search and seizure. They acted in accordance with the Stored Communications Act and never intruded upon the contents of Carpenter's or Sanders' messages or phone calls. The defendants were in direct violation of The Hobbs Act and no evidence of the transactional records needed to be excluded from trial since no actual search or seizure was executed, meaning that the FBI did not have to request a search warrant to examine the records.

Proposed standard

Fourth Amendment protection does not extend to the information used to send messages because service providers retain control of the information under the Third-Party Doctrine. Fourth Amendment protection applies to the content of the message itself, not the information used to send it.

Conclusion

The warrantless search and seizure that occured in Carpenter v. U.S. does not violate the Fourth Amendment. The content of the message requires a search warrant to be used by law enforcement, but we agree with the Sixth Circuit's assertion that the Court must recognize the legal difference between the content of a message and the information used to transmit it. Therefore, content should be protected by the Fourth Amendment, but the information used to send it should not.

Under the Third-Party Doctrine, evidence voluntarily given to a third party is not protected by the Fourth Amendment. Since Fourth Amendment protection did not extend to the cell site data, there was no need for a warrant. Furthermore, the information used to transmit messages does not have the same reasonable expectation of privacy as the message itself. Ultimately, since the data was not protected under the Fourth Amendment, no "search" actually occurred and the rulings of the Sixth Circuit and the district court should be upheld,

along with the aforementioned proposed standard that differentiates between the protection of a message itself and the information used to send it.
