



U.S. Supreme Court Preview: Carpenter v. United States

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Categories : [Search and Seizure](#), [Uncategorized](#)

Tagged as : [carpenter](#), [cell phone tracking](#), [cell site location information](#), [supreme court](#), [third party doctrine](#)

Date : September 25, 2017

In June, the United States Supreme Court granted certiorari in *Carpenter v. United States* (No. 16-402) (docket [here](#)), a case involving the intersection of technology and the Fourth Amendment and application of the third-party doctrine to digital data. In this post I'll preview that case.

During an investigation into a series of robberies of Radio Shack and T-Mobile stores in Michigan and Ohio, the government sought and obtained four months of historical cell site location records for Carpenter and other suspects. Generally, cell site records show which cell tower a cell phone has connected to, including when making or receiving a call. Historical records pertain to data regarding past (as opposed to future) connections. The orders directed the cellular service provider to give the government cell site information for the target phones at call origination and termination, for both incoming and outgoing calls. Using cell site location information produced as to Carpenter's phone, the government was able to identify the area where his phone was located and thus his location and movements at multiple points each day. The information was obtained pursuant to disclosure orders issued under the Stored Communications Act (SCA). Under the SCA, a disclosure order does not require a finding of probable cause. Instead, the SCA authorizes the issuance of a disclosure order whenever the government "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). All told, the government received 127 days of cell site location records for Carpenter's phone.

Before trial, Carpenter sought to suppress the cell site location information, arguing that the Fourth Amendment prohibits the acquisition of that information without probable cause and a warrant. The trial court denied the motion. At trial, the government relied on the information to establish Carpenter's location on the days the robberies occurred. Specifically, an FBI agent created maps showing that Carpenter's and his accomplice's phones were within half a mile to 2 miles of the location of each of the robberies around the time that the crimes occurred. Carpenter was convicted and he appealed. The Sixth Circuit affirmed, *United States v. Carpenter*, 819 F.3d 880 (2016), and the United States Supreme Court granted certiorari. The question before the Court is: Whether the warrantless seizure and search of the records revealing Carpenter's location and movements over the course of 127 days is permitted by the Fourth Amendment.

Carpenter argues that he has a reasonable expectation of privacy in cell site location information held by his cellular service provider. Brief for Petitioner, *Carpenter v. United States* (No. 16-402), 2017 WL 3575179, at *16. He asserts that the Court's decades old third-party doctrine cases--*Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976)--should not apply when the government seeks detailed records from a cell phone provider cataloging the location and movements of a cell phone user over many months. Brief for Petitioner at *11-12. In *Smith*, the Court ruled that the short-term use of a pen register to capture the telephone numbers a person dials is not a search under the Fourth Amendment. 442 U.S. at 740-42. The Court reasoned, in part, that when dialing the phone number the caller voluntarily conveys the information to the telephone company. *Id.* Likewise, in *Miller* the Court concluded that bank customers do not have any Fourth Amendment interest in their bank records because all the information in those records has been voluntarily conveyed to the bank. 425 U.S. at 438-40. Carpenter relies on *United States v. Jones*, 565 U.S. 400 (2012) (holding that tracking a car with a GPS device is a Fourth Amendment search), to argue that acquisition of long-term location information from a cellular service provider is a search. Brief for Petitioner

at *16-23.

The Government responds that *Miller* and *Smith* resolve the case. Brief for the United States in Opposition, *Carpenter v. United States* (No. 16-402), 2017 WL 411305, at *14. First, the Government argues, Carpenter lacks any subjective expectation of privacy in phone company records of cell site data because that information is in business records that the companies create for their own purposes. *Id.* Additionally, the government asserts, cell phone users understand that their phones emit signals that are conveyed to their service providers as a necessary incident to making or receiving calls. *Id.* at 15. And, under the third-party doctrine, the government asserts, there can be no reasonable expectation of privacy in information turned over to the phone company. *Id.* Finally, the government contends, even if the acquisition of the records qualified as a search, the government's conduct was constitutionally reasonable. *Id.* at 23.

A number of criticisms have been leveled at application of the third-party doctrine to the kinds of digital information at issue in *Carpenter*. Justice Sotomayor previewed the issue in her concurring opinion in *Jones* when she said:

[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.

565 U.S. at 417 (Sotomayor, J., concurring) (citation omitted).

However the Court rules, its decision will be an important one with respect to the application of the Fourth Amendment to new technology. Stay tuned. We'll keep you updated as the case progresses.