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Supreme Court Hears Argument on Whether Cellphone Records Are Protected by Fourth Amendment

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This morning the Supreme Court heard argument on whether prosecutors violated the Fourth Amendment, which bars unreasonable searches, when they obtained without a warrant a suspect's cellphone records for information revealing his location and movements over the course of several months.

In late 2010 and early 2011, armed robbers stole smartphones from a series of Radio Shack and T-Mobile stores in Michigan and Ohio. Timothy Carpenter was alleged to have organized the robberies, often supplying the guns used and acting as a lookout. The police arrested four people in connection with the robberies, and one individual confessed, giving the FBI his cell number and the cell numbers of his co-conspirators. The government applied to federal magistrate judges for three court orders pursuant to the Stored Communications Act, directing cellular service providers to disclose records for multiple cell-phone numbers, including Carpenter's.

The records included information from cell towers spanning 127 days and placing Carpenter's phone at nearly 13,000 locations. They showed that his phone was nearby when several of the robberies took place. That and other evidence was used to convict Carpenter, and he was sentenced to 116 years in prison.

Carpenter appealed his conviction, claiming the government violated the Fourth Amendment's ban on unreasonable searches and seizures. The trial court and the United States Court of Appeals for the Sixth Circuit held that it did not, relying on the third-party doctrine: individuals who voluntarily share information with a third party have no reasonable expectation of privacy as to the information.

At play in the case before the Supreme Court is whether under the Fourth Amendment a warrant was required for the data the government obtained from cellular service providers. Under the Stored Communications Act, enacted in 1986 and used by the government to get Carpenter's cellphone data, prosecutors do not have to make a probable cause showing as they would for a warrant. Rather, they need only demonstrate "specific and articulable facts showing that there are reasonable grounds to believe that . . . the records or other information sought are relevant to an ongoing criminal investigation."

Supreme Court cases from long before the cellphone era may support the notion that the government did not need a warrant. In the 1979 case of *Smith v. Maryland*, the Court ruled that a suspect had no reasonable

expectation of privacy with respect to numbers dialed from his phone, a landline, because the suspect had allowed a third party, the phone company, to have access to the information.

More recent cases, however, may support Carpenter's argument that he had an expectation of privacy with respect to his cellphone records. In the 2012 case of *United States v. Jones*, the Court held that the surreptitious and warrantless attachment of a GPS tracking device to a defendant's car constituted an unconstitutional search. In a concurring opinion, Justice Sotomayor wrote that "the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties [the *Smith* standard] 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." Justice Alito's concurrence concluded that the long-term use of the GPS device to track the defendant's vehicle's movements over an extended period of time constituted a Fourth Amendment search, requiring a warrant.

And, in the 2014 case of *Riley v. California*, the Court held that police must have a warrant to search the cellphones of people they arrest. Writing for a unanimous Court, Chief Justice Roberts stated that even the "term 'cell phone' is itself a misleading shorthand; many of these devices are in fact minicomputers that also have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, diaries, albums, televisions, maps, or newspapers."

In *Carpenter*, the Court could possibly extend these more recent cases to rule that individuals have an expectation of privacy as to their digital data and movements. An amicus brief filed by companies including Apple, Facebook, Google, Microsoft, and Twitter urges the Court to bring Fourth Amendment law into the digital age, where transmitted data reveals a wealth of information on people's private lives, yet people still expect their digital data to be private.

The Court's ruling is expected late this term.

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