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COMMENT

RECONCILING FOURTH AMENDMENT PROTECTION STANDARDS WITH MODERN TECHNOLOGY

UNITED STATES V. CARPENTER, 918 F.3D 880 (6TH CIR. 2016), *REV'D AND REMANDED BY* 138 S. CT. 2206, 2223 (2018).

*Camille Mennen**

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I. Introduction

The Fourth Amendment explicitly provides "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures,"[1] and further protects expectations of privacy if

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1 U.S. CONST. amend. IV.

an individual "'exhibited an actual (subjective) expectation of privacy'"[2] that society would accept as "'reasonable.'"[3] When addressing privacy expectations and communications, courts hold that, while the content of communications may be eligible for such protection,[4] information relating to the transfer of the communication is not.[5] The crux of *United States v. Carpenter* is whether the location information the government obtained from the defendants' wireless carriers' records under the Stored Communications Act[6] and subsequently used as evidence when prosecuting the defendants for violations of the Hobbs Act [7] was protected by the Fourth Amendment and therefore a warrantless search.[8]

This issue is important because it is, essentially, a decision to either characterize locational information derived through wireless carriers' records as subject to Fourth Amendment protection under an expectation of privacy[9] or as information used to send a communication and therefore ineligible for Fourth Amendment protection.[10] Such information could be deemed ineligible

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[2] United States v. Carpenter, 819 F.3d 880, 886 (6th Cir. 2016) (quoting Katz v. United States, 389 U.S. 347, 361 (1967)) [hereinafter *Carpenter I*], *rev'd and remanded by* 138 S. Ct. 2206, 2223 (2018) [hereinafter *Carpenter II*].
[3] 819 F.3d at 886 (quoting *Katz*, 389 U.S. at 361).
[4] *Id.* at 886 (applying Stored Communications Act, 18 U.S.C. § 2703(d) (2012)); *Ex parte* Jackson, 96 U.S. 727, 733 (1878)).
[5] *Carpenter I*, 819 F.3d 886.
[6] *Id*. at 884; *see* 18 U.S.C. § 2703(d) (2012).
[7] *Carpenter I*, 819 F.3d at 884 (applying the Hobbs Act, 18 U.S.C. § 1951 (2012)).
[8] Id.
[9] *Id.* at 886–87 (quoting *Katz*, 389 U.S. at 361.; Smith v. Maryland, 442 U.S. 735, 740 (1979)).
[10] *Carpenter*, 819 F.3d at 886–87 (quoting *Ex parte* Jackson, 96 U.S. 727, 733 (1878); *Smith*, 442 U.S. at 743).

for Fourth Amendment protection as information used to send a communication because locational records are the result of technology used to transmit cellphone signals[11] and the general public is aware that wireless carriers use location data to provide service.[12] However, customers' locational information could arguably qualify for Fourth Amendment protection under an expectation of privacy depending on the accuracy of the location data and the length of location monitoring.[13] The Sixth Circuit Court of Appeals affirmed that location records tracked through the provision of cellular service did not qualify for Fourth Amendment protections;[14] however, the Supreme Court granted a petition for certiorari[15] and found that the records were protected by the Fourth Amendment under an expectation of privacy and that the government's acquisition of such records was a warrantless search.[16]

II. Analysis

At first impression, the Sixth Circuit's affirmation that the government's acquisition of location records collected in the course of a business providing cellphone service was not a search because such records were not protected under the Fourth Amendment[17] may appear to align with the status quo. The court addressed the application of the widely accepted test for determining

[11] *Id.* at 885.
[12] *Id.* at 888.
[13] *Id.* at 888–89 (applying United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).
[14] *Id.* at 890.
[15] *Carpenter*, 819 F.3d 880 (6th Cir. 2016), *rev'd and remanded by* 138 S. Ct. 2206, 2223 (2018).
[16] United States v. Carpenter, 138 S. Ct. 2206, 2223 (2018), *rev'g* 819 F.3d 880 (6th Cir. 2016).
[17] *Carpenter I*, 819 F.3d at 890.

whether information is protected by an expectation of privacy as held in *Katz v. United States*,[18] which the Supreme Court has applied in a number of cases, including *Smith v. Maryland*.[19] This court determined that *Smith* was controlling precedent in the instant case and characterized location data recorded when providing cellphone service as analogous to the phone numbers referenced in *Smith*.[20] A cornerstone of the court's discussion of this analogy was testimony as to the imprecise nature of the cellphone location data.[21] If cellphone service location data continues to be notably imprecise, then the court's lack of concern over the privacy expectations related to this information would be expected and would carry no further implications. However, as Justice Stranch's concurring opinion[22] and subsequent Supreme Court decision[23] suggest, the rapidly advancing nature of technology and the importance of cellphone use in modern life suggest that cellphone location data is no longer comparable to a record of phone numbers dialed and is, in fact, entitled to Fourth Amendment protection due to an expectation of privacy.[24] The Supreme Court's decision,[25] by extension, suggests that going forward, existing case law pertaining to technology and expectations of privacy should be reconsidered in light of the evolving relationship between society and pervasive technology.[26]

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[18] *Id.* at 886 (quoting *Katz*, 389 U.S. at 361).
[19] *Smith*, 442 U.S. at 740.
[20] *Carpenter I*, 819 F.3d at 888.
[21] *Id.* at 889.
[22] *Id.* at 894 (Stranch, J., concurring).
[23] *Carpenter II*, 138 S. Ct. at 2206.
[24] *Id.* at 2217; *Carpenter I*, 819 F.3d at 894–97.
[25] *Carpenter II,* 138 S. Ct. 2206.
[26] *See id.* at 2218 (quoting Riley v. California, 573 U.S. 373, 386 (2014)).

If the Sixth Circuit's decision that location data recorded by cellphone service providers was not entitled to Fourth Amendment protection[27] had remained the controlling case law, it would have carried ramifications for a plethora of other information generated in the use of cellphones and other common technologies. Extending the line of reasoning employed in this decision,[28] additional information associated with the delivery of wireless service or other technological services would potentially also not have Fourth Amendment protection. Considering the ever-expanding role of technology in communication, healthcare, entertainment, and more, a strict application of acceptable expectations of privacy and Fourth Amendment protections could lead to the exposure of a wide range of personal information.[29]

The Supreme Court's decision to accept an expectation of privacy regarding location information generated through the use of cellular service[30] not only allays these potential concerns but indicates that stricter, traditional applications of privacy expectation tests may fall by the wayside when applied to technology-based search issues. After all, "the court is obligated—as '[s]ubtler and more far-reaching means of invading

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[27] *Carpenter I*, 819 F.3d at 890.

[28] *Id.* at 896 (Stranch, J., concurring) (expressing "concern about the applicability of a test that appears to admit to no limitation on the quantity of records or the length of time for which such records may be compelled" because "precedent suggests the need to develop a new test to determine when a warrant may be necessary under these or comparable circumstances").

[29] *See id.* at 894 (quoting *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring)).

[30] *Carpenter II*, 138 S. Ct. at 2217 ("[A]n individual maintains a legitimate expectation of privacy in the record of his physical movements. . . .").

privacy have become available to the Government'—to ensure that the 'progress of science' does not erode Fourth Amendment protections."[31] How standards for expectations of privacy will evolve in response to rapid technological change remains to be seen; understandings and expectations of the general public, academic research, and public policy concerns will certainly all contribute. Still, the Supreme Court's willingness to identify Fourth Amendment protection for the location records in *United States v. Carpenter*[32] highlights the increased difficulty in maintaining federal courts' longstanding reliance on the delineation between communication content and information used to convey communications[33] to determine when an expectation of privacy is "reasonable."[34] Moving forward, case law will need to elaborate on the Supreme Court's decision in *Carpenter*[35] and, in the meantime, society will need to be wary about the extent to which one may reasonably expect privacy and Fourth Amendment protections in the realm of technology. It is also important to note that this case was remanded and that the subsequent outcome may add additional detail regarding how to apply the opinion offered by the Supreme Court.[36]

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[31] *Id.* at 2223 (quoting Olmstead v. United States, 277 U.S. 438, 473–74 (1928)).
[32] *Id.* at 2206.
[33] *Carpenter I*, 819 F.3d at 886.
[34] *Id.* (quoting *Katz*, 389 U.S. at 361).
[35] See generally Carpenter II, 138 S. Ct. 2206.
[36] *Id.* at 2223.

III. Conclusion

Through granting certiorari for this case[37] and reversing and remanding the holding of the Sixth Circuit Court of Appeals,[38] the Supreme Court acknowledged that the traditional approaches to Fourth Amendment protections are not entirely congruent with modern technological advances and society's relationship with technology.[39] Although the Supreme Court's holding provided for Fourth Amendment protections for location records collected by third-party service providers through customers' use of cellphones[40] while the Sixth Circuit's holding did not,[41] a significant amount of personal information collected through various technologies and service providers remains unaddressed. As a result, users should exercise caution when harboring expectations of privacy while the policy of providing Fourth Amendment protections to personal information recorded through new technological developments undergoes further elaboration.

[37] United States v. Carpenter, 819 F.3d 880 (6th Cir. 2016), *rev'd and remanded by* 138 S. Ct. 2206, 2223 (2018).
[38] *Carpenter II*, 138 S. Ct. at 2223.
[39] *Id.*
[40] Id.
[41] *Carpenter I*, 819 F.3d at 890.