Team R10

No. 4-422

IN THE

Supreme Court of the United States

Jayne Austin,

Petitioner,

v.

The United States of America,

Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For the Thirteenth Circuit

Brief for the Respondent – The United States of America

Team R10
Counsel for the Respondent
October 6, 2019

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ISSUES PRESENTED

1. Does an individual have standing to contest a search of a rental vehicle that the individual rented on another's account without that other person's permission?

2. Is the acquisition of the location data of a rental vehicle a "search" within the meaning of the Fourth Amendment and *Carpenter v. United States*, 138 S. Ct. 2206 (2018)?

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Thirteenth Circuit is unreported and may be found at pages 9-16 of the Record, respectively. The decision of the United States District Court for the Southern District of Netherland is unreported and may be found on pages 1-8 of the Record, respectively.

STATEMENT OF JURISDICTION

The statement of jurisdiction has been omitted in accordance with the rules of the University of San Diego School of Law National Criminal Procedure Moot Court Competition.

STATEMENT OF THE CASE

A. Statement of the Facts

On January 3, 2019, Jayne Austin, was pulled over by Police Officer Charles Kreuzberger, for failure to stop at a stop sign. R. at 2. Austin was driving a 2017 Black Toyota Prius (license plate number: R0LL3M) that she rented through a software application ("app") available on mobile devices, YOUBER. *Id*. YOUBER is a rental car service that offers a rental agreement to be made through the app where the renter is charged a fixed fee per hour for the use of the car. *Id*. The YOUBER app is accessible via an individual's cell phone, which connects to YOUBER vehicles through Bluetooth and GPS technology. *Id*. Per its corporate policies and procedures, YOUBER tracks every YOUBER vehicle using GPS and Bluetooth signals from each user's cellphone. R. at 3.

Upon creating an account in the app, the user must accept YOUBER's terms and conditions, including a clause permitting YOUBER to track each user's location when renting a vehicle. R. at 3-4. The GPS and Bluetooth activate once the cellphone associated with the user's account is in the vehicle. R. at 4. Every two minutes, YOUBER tracks the timestamped location of the vehicle for security purposes, regardless of the rental status of the vehicle. *Id.* YOUBER vehicles are identifiable by a small, bright pink YOUBER logo on the bottom corner of the passenger side of the windshield. R. at 2. The vehicle Austin was stopped in contained such features. R. at 3.

During the stop, Officer Kreuzberger noticed Austin's name on her license was different from the name listed on the rental agreement in the YOUBER app. R. at 3. The name listed on the rental agreement was Martha Lloyd, Austin's on-and-off again-partner. *Id*. Austin did not have an account of her own with YOUBER. *Id.* Instead, she used Lloyd's account that first became active on July 27, 2018. *Id*. Officer Kreuzberger informed Austin that he did not need her consent to

search the vehicle because she was not listed on the rental agreement. R. at 3. Subsequently, Officer Kreuzberger searched the trunk, where he found a BB gun modeled after a .45 caliber handgun with the orange tip removed, a maroon ski mask, and a duffel bag containing $50,000 and blue dye packs. *Id*. Officer Kreuzberger also found many personal items in the vehicle, such as clothes, shoes, bedding, pillows, an inhaler, and a cooler full of food and drinks. *Id.* Officer Kreuzberger notated in his report that he believed the car to be "lived in". *Id.*

During his investigation, Officer Kreuzberger received a dispatch to look out for a 2017 Black Toyota Prius with YOUBER logo driven by a suspect who allegedly robbed a nearby *Darcy and Bingley Credit Union*. R. at 3. A surveillance camera caught a partial license plate "R0L." *Id*. The suspect was seen wearing a maroon ski mask and using a .45 caliber handgun. *Id*. Officer Kreuzberger arrested Austin based on the items found in the vehicle, the dispatch, and the partial match of the license plate. *Id.*

Austin's online blog titled, LET IT ALL FALL DOWN!, consisted of multiple "sessions" or poems concerning alleged and proven financial corruption in the United States banking industry. R. at 1. and Ex. C at 26-27. Many of Austin's posts focused on *Darcy and Bingley Credit Union*. *Id.* Austin called for rebellion against this particular bank and even called for its downfall. *Id*.

Two days after Austin's arrest, Detective Boober Hamm took on Austin's case. R. at 3. Detective Hamm uncovered five open bank robbery cases occurring between October 15, 2018, and December 15, 2018, which matched the modus operandi of the robbery on January 3, 2019. *Id*. Four of the robberies took place in California and one in Nevada. *Id*. All of the robberies occurred at various *Darcy and Bingley Credit Union* locations. R. at 1.

Detective Hamm served a subpoena duces tecum on YOUBER to obtain all the GPS and Bluetooth information related to the account Austin allegedly used between October 3, 2018

through January 3, 2019. *Id*. The subpoenaed records showed that Martha Lloyd's YOUBER account was used to rent cars in the locations and at the times of each of the other five robberies. R. at 4. Surveillance footage from the banks revealed the same 2017 Black Toyota Prius that Austin was stopped in was used at five of the six bank robberies. *Id*. The vehicle used in the third robbery was also a YOUBER vehicle: a yellow 2016 Volkswagen Beetle. *Id.* After review of all the mapping data sent by YOUBER, Detective Hamm recommended charging Austin with six counts of bank robbery under 18 U.S. Code s 2113 Bank Robber and Incidental Crimes. *Id*.

B. Procedural History

On January 21, 2019, Jayne Austin ("Petitioner") was charged by indictment with six counts of 18 U.S. Code § 2113 Bank Robber and Incidental Crimes. R. at 1. Case number 20-PKS12-20-RCN15 was assigned and trial proceedings were initiated. *Id.* Judge Early denied two motions to suppress evidence on February 25, 2019. *Id.* A timely appeal was made to the United States Court of Appeals for the Thirteenth Circuit. Judge Kaitlyn Enticknap, Judge Alexandria Heins, and Judge Maura Duffy issued their decision on March 4, 2019, upholding the lower court's decision and affirming Ms. Austin's conviction at trial. The Supreme Court of the United States granted Writ of Certiorari, briefs to be filed by October 6, 2019, and oral argument to be presented on November 1, 2019.

SUMMARY OF THE ARGUMENT

I. The Government did not violate Austin's Fourth Amendment rights by searching and seizing the YOUBER vehicle she occupied because Austin did not have standing to contest the government's conduct. The Fourth Amendment of the United States Constitution protects the People from unreasonable searches and seizures conducted by the Government without probable cause and warrant that is approved by a neutral magistrate. For an individual to have protection within the bounds of the Fourth Amendment, she must have standing to contest a search or seizure. Courts have consistently recognized that an individual does not have standing to challenge a search or seizure by the Government if she does not have a legitimate expectation of privacy that society is prepared to recognize as reasonable. No evidence supports the conclusion that Austin manifested an actual expectation of privacy in the YOUBER vehicle, of which she had no possessory interest. Austin fraudulently operated the YOUBER vehicle under another person's name to commit heinous crimes. Society does not recognize this behavior to support Austin's Fourth Amendment violation claim.

II. The Government's acquisition of GPS location records from a third party company does not constitute a search within the meaning of the Fourth Amendment. In adherence to this Court's third-party doctrine, an individual has no claim under the Fourth Amendment to resist the production of business records held by a third party. Therefore, YOUBER'S production of its records to the Government did not constitute a search because Austin did not have a reasonable expectation of privacy in the records. Austin is unable to establish a governmental search because she had neither a subjective or objective reasonable expectation of privacy in YOUBER'S business records. No evidence supports the conclusion that Austin manifested an actual expectation of

privacy in the records YOUBER created to document the use of its vehicles. The GPS location data records that Austin sought to suppress were created in the ordinary course of business.

STANDARD OF REVIEW

In a de novo review, the appellate court decides the legal issue anew and independent from the lower court's decision. Despite some variance between appellate jurisdictions on the interpretation of the level of deference for the lower court's determinations, the current appropriate standard of review for Fourth Amendment analysis is de novo. *See Ornelas v. United States*, 517 U.S. 690, 697, 116 S. Ct. 1657, 1662, 134 L. Ed. 2d 911 (1996). This Court reasoned that "independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id*. A de novo review does not entirely do away with the lower court's decision; instead, the appellate court evaluates the facts and determines which court is best positioned to decide the issue in question ultimately. When "the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104, 114, 106 S. Ct. 445, 451, 88 L. Ed. 2d 405 (1985). The issues concerning the instant case require an evaluation of a mixture of facts and law. Therefore a de novo review by this court is the appropriate standard.

ARGUMENT

I. THE GOVERNMENT'S CONDUCT DID NOT CONSTITUTE AN UNREASONABLE SEARCH OR SEIZURE IN VIOLATION OF AUSTIN'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT.

For Austin to prevail on her claim, she must prove that she had standing to contest the search (i.e., that her Fourth Amendment rights were *compromised* by the governmental conduct). To establish a governmental search of which she would have standing to contest, Austin must satisfy the two prongs of the requirement as outlined in *Katz.* The test is a "twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576 (1967); *see, e.g*., *Smith* v. *Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220 (1979) (applying twofold requirement set forth in Justice Harlan's concurring opinion). Austin is unable to make these showings.

A. Societal expectations do not support Austin's claim of a reasonable expectation of privacy pursuant to the Fourth Amendment.

The Fourth Amendment protects people from unreasonable searches and seizures. Whenever the government intrudes into an area where society has recognized an expectation of privacy, the government has conducted a search pursuant to the Fourth Amendment. The Fourth Amendment is meant to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2213, 201 L. Ed. 2d 507 (2018). The Framers drafted the Fourth Amendment in response to the 'reviled general warrants' and writs of assistance of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Id*. The Fourth Amendment's protection against unreasonable searches and seizures was originally "tied to

common-law trespass." *United States* v. *Jones*, 565 U.S. 400, 405, 132 S. Ct. 945, 949, 181 L. Ed. 2d 911 (2012). However, since this Court decided *Katz*, the standard is "a search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Maryland* v. *Macon*, 472 U.S. 463, 469, 105 S. Ct. 2778, 2782, 86 L. Ed. 2d 370 (1985).

To have standing to contest a search by the government, individuals must possess a reasonable expectation of privacy in their person or effect. Although the right to challenge a search on Fourth Amendment grounds historically has been referred to as "standing", the Court has opined that the concept is "more properly placed within the purview of substantive Fourth Amendment law than within that of standing." *Rakas* v. *Illinois*, 439 U.S. 128, 140, 99 S. Ct. 421, 428, 58 L. Ed. 2d 387 (1978). In *Rakas*, the court emphasized that "the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. *Id*. "That inquiry, in turn, requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Id*.

Also, "an individual's ability to claim protection of the Fourth Amendment depends upon whether he has a legitimate expectation of privacy in the invaded space." *Rakas*, 439 U.S. at 143. A "legitimate expectation of privacy" is a subjective expectation of privacy in the invaded place that "society is prepared to accept as reasonable." *Id.* An expectation of privacy is legitimate if it is one that society accepts as objectively reasonable. *See Minnesota* v. *Olson*, 495 U.S. 91, 95-96, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990); *California* v. *Greenwood*, 486 U.S. 35, 39, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988). As such, a legitimate and reasonable expectation of privacy is "one that has a source outside the Fourth Amendment, either by reference to concepts of real or

personal property law or to understandings that are recognized and permitted by society." *Minnesota* v. *Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 472, 142 L. Ed. 2d 373 (1998).

Austin contends to have a legitimate expectation of privacy in the YOUBER vehicle; however, her argument is flawed. Not only was she not listed as a driver on the rental agreement, Austin did not have permission from the authorized driver to operate the vehicle in her name. This Court addressed a similar issue in *Byrd* involving an unauthorized driver (petitioner) driving a rental vehicle. *See Byrd v. United States*, 138 S. Ct. 1518, 1524, 200 L. Ed. 2d 805 (2018). Contrary to the instant case, the petitioner in *Byrd* obtained permission from the authorized driver on the rental agreement to operate the vehicle. In *Bryd*, the petitioner and his girlfriend drove to a rental car facility wherein petitioner stayed outside in the parking lot while the girlfriend went inside and rented a car. *Id.* With the rental keys in hand, the petitioner's girlfriend returned to the parking lot and gave them to the petitioner. *Id.* The *Byrd* Court established that a person has a legitimate and reasonable expectation of privacy in a rental car without being listed on the agreement. However, the main factor was that the petitioner obtained express permission from the authorized driver. *Id.*

In the instant case, Martha Lloyd, the unauthorized driver, never permitted Austin to use her YOUBER account to rent and operate a vehicle in her name. During the Pretrial Evidentiary Hearing, Lloyd testified that she shared login information for services and electronic devices with Austin during their relationship that ended in September 2018. Ex. A at 18-19. But, Lloyd never explicitly permitted Austin to use her YOUBER account after September of 2018. Ex. A at 19. The sole reason Austin was able to access Lloyd's account was because Lloyd did not change the passwords to any of her accounts. "Well, I haven't changed the passwords to any of my accounts, but she hasn't asked me to use anything like YOUBER or YOUBEREATS." Ex. A at 19. Although

Lloyd gave Austin her YOUBER login information at one point in time, it does not translate to an authorization to rent a vehicle in her name. It meant that the YOUBER login information was shared with Austin along with other services and electronic devices, but express consent for Austin to rent a vehicle under Lloyd's name never existed. In fact, Lloyd was entirely unaware of Austin's use of YOUBER vehicles under her name because she "had switched over to a new app called BIFT for all my ridesharing. "I had canceled my credit card on YOUBER, but her authorized card was already on there." Ex. A at 20. As such, the authorized driver, Lloyd, was only made aware of Austin's usage when she discovered her separate credit card on her account. Ex A. at 20.

In addition, Austin was in unlawful or 'wrongful' possession of the vehicle. "*Rakas* makes clear 'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search." *Byrd,* 138 S. Ct. at 1529. The Government in *Byrd* argued that the petitioner should have no greater expectation of privacy than a car thief because he intentionally used a third party as a strawman in a calculated plan to mislead the rental company from the very outset, all to aid him in committing a crime. *See Byrd,* 1529–30. The *Byrd* court did not directly address this issue; however, this Court should not dismiss this critical point. Justice Kennedy's majority opinion in *Byrd* expressed, "a person present in a stolen automobile at the time of the search may not object to the lawfulness of the search of the automobile. No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car." *Id*. at 1529 (citing *Rakas*, 439 U.S. at 141). Whether Austin's actions amounted to a theft is immaterial. Austin's expectation of privacy in the YOUBER vehicle should not have been any different than that of a car thief. She was in unlawful possession of the YOUBER vehicle, of which neither the owner of the vehicle (YOUBER) nor the authorized driver (Lloyd) had any knowledge.

Further, Austin specifically intended to use the vehicle under false pretenses to execute her heinous criminal activity. Her intent is demonstrated through her "Session 6" poem titled "THEY ALL FALL DOWN!". The poem was written two days before Officer Kreuzberger stopped her and stated, "You (Lloyd) are my aid, my tool, my window into their world." R. at 27. There is no indication that Austin had a vehicle of her own; thus, she was only able to commit the armed robberies by using the YOUBER vehicle to flee the scenes of the robberies.

Therefore, the fact that Austin was an unauthorized and unpermitted user of the vehicle, coupled with her vexatious use, is inconsistent with the societal expectations regarding Fourth Amendment protections. Austin had no expectation of privacy in the car that "society is prepared to recognize as reasonable." *Rakas*, 439 U.S. at 144 (citing *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

B. Austin had an inherent lessened expectation of privacy in a vehicle.

Because Austin was arguably "living" in the YOUBER vehicle, she may contend that she was afforded Fourth Amendment protection similar to that of which was held in the PODSHARE cohabitation facilities she regularly occupied. R. at 1. It has been well established that Austin's expectation of privacy in those cohabitation facilities were similar to those one has in their home or an overnight guest in a home. "To hold than an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectation of privacy that we all share." *Minnesota* v. *Olson*, 495 U.S. at 110. However, when this Court referred to an "overnight guest", this "overnight guest" had permission from his host to be on the premises. "The houseguest is there with permission of his host, who is willing to share his house and privacy with his guest." *Id*. at 99. Austin did not have permission from the car owner or authorized driver to operate the vehicle and undoubtedly did not have consent to live in it. Regardless, Austin could not have held

the same Fourth Amendment protection as being in a home because she had a lessened expectation of privacy while in a vehicle compared to that of a home.

This Court has recognized that society expects a greater expectation of privacy in the home. "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 683, 5 L. Ed. 2d 734 (1961). However, this level of rigorous protection does not extend to moving automobiles. Vehicles are given a "lesser degree[s] of protection." *California*. v. *Carney*, 471 U.S. 386, 390, 105 S. Ct. 2066, 2068, 85 L. Ed. 2d 406 (1985). Unlike the home, vehicles are not considered the core protection of the Fourth Amendment and are therefore treated differently. "[T]here is a necessary difference between a search of a . . . dwelling house . . . and a search of a[n] . . . automobile." *Carroll* v. *United States*, 267 U.S. 132, 153, 45 S. Ct. 280, 285, 69 L. Ed. 543 (1925). That difference has established itself in case law. This Court has held that unless there is consent or exigent circumstances, law enforcement must first obtain a search warrant before entering a private residence. *See Steagald* v. *United States*, 451 U.S. 204, 205, 101 S. Ct. 1642, 1643, 68 L. Ed. 2d 38 (1981). Those same limited constraints do not apply to vehicles, which is why for vehicle searches, there are a greater number of exceptions to the general rule for warrants. For example, law enforcement may conduct an inventory search of a vehicle. "[P]olicies behind the warrant requirement are not implicated in an inventory search." *South Dakota* v. *Opperman*, 428 U.S. 364, 370, 96 S. Ct. 3092, 3097, 49 L. Ed. 2d 1000 (1976). Also, unlike the home, law enforcement may search a vehicle without a warrant if there is probable cause. Compare *United States* v. *Ross*, 456 U.S. 798, 806, 820, 102 S. Ct. 2157, 2163, 2182, 72 L. Ed. 2d 572 (1982), with *Payton* v. *New York*, 445 U.S. 573, 585-90, 100 S. Ct. 1371, 1379-82, 63 L. Ed. 2d 639 (1980). Vehicles are given less protection because people generally have a lesser

expectation of privacy over them. *See Carney*, 471 U.S. at 393. Moreover, people have a lesser expectation of privacy because, unlike searching one's home, the "search of an automobile is far less intrusive." *Cardwell* v. *Lewis*, 417 U.S. 583, 590, 94 S. Ct. 2464, 2469, 41 L. Ed. 2d 325 (1974). The fact that Austin was potentially living inside the vehicle at the time of the governmental search is irrelevant. Austin had an inherent lesser degree of privacy being in a vehicle, compared to being in a home as Austin was using the public roads to engage in criminal activity. Officer Kreuzburger made a valid stop due to a traffic violation wherein he noticed she was an unauthorized driver of the vehicle. R. at 2-3. The fact that Austin was stopped and subject to search of the vehicle compared to a home significantly limits her inherent reasonable expectation of privacy protection as prescribed by the Fourth Amendment.

C. Austin did not have a heightened expectation of privacy because of the relationship she had with the authorized driver.

Austin may contend she held a heightened expectation of privacy in the YOUBER vehicle because she had a close relationship with the authorized driver. “[This] Court has frequently emphasized the importance of the family [in society].” *Stanley* v. *Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551 (1972). However, Austin's relationship with Lloyd is not a form of familial connection. Lloyd described Austin as her "on and off again" partner. R. at 2. The two were never married, did not have children, and were on a "break" for over four months when the incident occurred. R. at 18. Lloyd's testimony further indicates that the two only had minimal contact, where Lloyd would "receive an occasional letter from her," to which she only responded once. R. at 19. Thus, this is not a relationship that society would recognizably give Austin an extension of Lloyd's Fourth Amendment protection. These societal expectations are displayed through the language of rental car agreements, notably requiring spouses of authorized drivers to be listed on the contract if they are going to drive the vehicle. Thus, Austin is unable to demonstrate

any special relationship with Lloyd that would afford her a heightened Fourth Amendment protection. In any event, "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Alderman* v. *United States*, 394 U.S. 165, 174, 89 S. Ct. 961, 966–67, 22 L. Ed. 2d 176 (1969). "[A] person aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas,* 439 U.S. at 128. Accordingly, Austin cannot invoke a Fourth Amendment right through Lloyd because she did not have a significant familial connection with Lloyd that society would recognize, nor is she permitted to assert a Fourth Amendment Constitutional right vicariously.

D. Austin did not have a property interest in the vehicle to be afforded protection under the Fourth Amendment.

This Court in *Rakas* established that property rights or possessory interests are factors when considering whether an individual has a reasonable expectation of privacy in their effects. "Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest." *Rakas*, 439 U.S. at 144. Still, "property concepts" are instructive in "determining the presence or absence of the privacy interests protected by that Amendment." *Id*. "The *Katz* reasonable-expectations test has been added to, not substituted for, the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." *Florida* v. *Jardines,* 569 U.S. 1, 11, 133 S. Ct. 1409, 1417, 185 L. Ed. 2d 495 (2013); *see, e.g., United States* v. *Jones,* 565 U.S. 400, 423, 132 S. Ct. 945, 960, 181 L. Ed. 2d 911 (2012)."The existence of a property right is but one element in determining whether expectations of privacy are legitimate." *Jones,* 565 U.S. at 423. Although a reasonable expectation of privacy "need not be based on a common law interest in real or personal

property, [this Court] has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by the Amendment." *Rakas,* 439 U.S. at 144. Property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable. *See Alderman,* 394 U.S. at 165-174; *see Rakas,* 439 U.S. at 128-153. A seizure of property occurs when there is "some meaningful interference with an individual's possessory interests in that property." *Jones,* 565 U.S. at 419. (Alito, J., concurring) (citing *United States* v. *Jacobsen,* 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984)). Further, in *Rakas,* this Court held passengers in a car did not have a legitimate expectation of privacy in the vehicle because, "they asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. *Rakas,* 439 U.S. at 148. In the instant case, Austin did not have a property nor a possessory interest in the vehicle. A person does not possess a reasonable expectation of privacy in an item in which he has no possessory or ownership interest. *See United States* v. *Miller,* 425 U.S. 435, 440, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). A possessory or ownership interest need not be defined narrowly as a reasonable expectation of privacy may be shown "either by reference to concepts of real or personal property law." *Minnesota* v. *Carter,* 525 U.S. 83, 88, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998) (citing *Rakas,* 439 U.S. at 142). Austin seeks a valid property interest in the rental vehicle despite her failure to receive explicit permission from the actual owner or renter. R. at 12. Austin's contention of a valid property interest in the vehicle was not convincing to the lower court, and rightfully so. Austin was in unlawful possession of the vehicle without the authorized renter's express knowledge or consent. Also, YOUBER, the actual owner of the vehicle, was never made aware of Austin's usage, thus did not provide her with a temporary property interest typically held by authorized drivers of rental cars.

Austin had personal effects in the vehicle, such as food, drinks, and instrumentalities of a crime, but she was unlawfully present in the vehicle. As such, she was unable to invoke a valid privacy interest of her property inside the vehicle because "a privacy interest is not reasonable when one's presence in a place is wrongful." *Rakas*, 439 U.S. at 143. “One of the main rights attaching to property is the right to exclude others [and] one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude.” *Byrd,* 138 S. Ct. at 1522 (citing *Rakas* 439 U.S. at 144). Accordingly, Austin did not have a valid property interest in the vehicle, that society would recognize as reasonable. Thus, Austin is unable to properly invoke the right to exclude the government from the search.

II. THE GOVERNMENT’S ACQUISITION OF GPS LOCATION RECORDS FROM A THIRD PARTY DOES NOT QUALIFY AS A SEARCH UNDER THE FOURTH AMENDMENT AND DOES NOT RISE TO THE LEVEL OF INFRINGEMENT AS MENTIONED IN *CARPENTER.*

For Austin to prevail on her claim, she must prove that the government's conduct amounted to a search of which she has standing to contest (i.e., that her Fourth Amendment rights were *infringed* upon by the governmental conduct). A party may establish a Fourth Amendment search by establishing that the challenged government conduct impinged on a reasonable expectation of privacy, s*ee Smith* v. *Maryland*, 442 U.S. 735, 739-40 99 S.Ct. 2577, 2579-80 (1979) (citing *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 l. Ed. 2d 576 (1967)). In addition, she must prove that the holding in *Jones* applies to the present case. Austin is unable to make these showings.

A. The third-party doctrine suggests that an individual has no reasonable expectation of privacy in information the individual has willingly exposed to a third party.

The Fourth Amendment is not applicable when the Government obtains information from a third party who has access to it for business purposes. This Court has long held that an individual

cannot invoke the Fourth Amendment to object to the Government's acquisition of a third party's records that contain information about the individual. *See Smith*, 442 U.S. at 735; *United States v. Miller*, 425 U.S. 435, 435, 96 S. Ct. 1619, 1620, 48 L. Ed. 2d 71 (1976). Austin did not have a reasonable expectation of privacy in her location data while operating YOUBER'S rental vehicle. One cannot have a reasonable expectation of privacy in their location when using an app that requires such data. It is only an intrusion by governmental officials into an individual's "zone of privacy," which implicates the Fourth Amendment. *Miller*, 425 U.S. at 440. Despite not agreeing to the Terms and Conditions herself, there was no implication of Austin's zone of privacy because all YOUBER users should be aware that they must have their GPS active to operate the rental vehicle. An online app such as YOUBER is useless if the third party company could not enable the GPS feature because users would be unable to locate their desired rental vehicle. Users must understand that YOUBER tracks their location to "direct" them to the nearest available vehicle. Therefore, Austin should have reasonably expected that YOUBER possesses real-time knowledge and records of users' locations. As such, any subjective expectation of privacy would not be objectively reasonable. YOUBER users voluntarily reveal their GPS location to rent YOUBER vehicles and should reasonably expect companies such as YOUBER to cooperate with authorities when business information is requested.

This Court in *Smith* and *Miller* found that that the individuals had voluntarily conveyed information about themselves to third parties even though they could not avoid exposing the information short of discontinuing use of the third party's services. *See Smith*, 442 U.S. at 744; *see Miller*, 425 U.S. at 442. *Miller* concerned government access to financial records possessed by a bank and *Smith* involved government access to phone records maintained by a phone company. *See id*. Here, Austin may contend that she could not avoid the use of YOUBER'S vehicles because

she did not possess one of her own, and renting one was her only viable transportation option. However, there are other modes of transportation affording individuals to get to their destinations or in her case, "work and protests". R. at 2. Austin could very well use services such as public buses or trains in her area. Both of these affordable options do not require the sharing of GPS data location, and they are readily available throughout the city.

In *Miller,* Justice Powell explained, "[the] respondent can assert neither ownership nor possession" of the records; rather, they were "business records of the bank." *Miller,* 425 U.S. at 440. Because the respondent's records "contained only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business," this Court concluded that the respondent had "taken the risk, in revealing his affairs to another, that the information would be conveyed by that person to the government." *Id.* at 442-43. In the instant case, by driving the YOUBER rental vehicle, Austin could assert neither ownership nor possession over the location records of the vehicle because the vehicle was not hers to possess. The records revealing location information of the vehicle were voluntarily given and collected solely in connection with YOUBER'S ordinary course of business. This Court has repeatedly held that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. *See Miller,* 425 U.S. at 443. Accordingly, Austin assumed the risk that the location information would be divulged to the police, considering the criminal nature of her use of the YOUBER vehicle.

The third-party doctrine does not turn on what information the government acquires and how sensitive the data is, but rather how the information was obtained. It is "the nature of the

particular documents sought" and limitations on any "legitimate ‘expectation of privacy' concerning their contents." *Miller*, 425 U.S. at 442. Obtaining data records concerning an individual from a third party company does not amount to Fourth Amendment search of that individual, no matter how sensitive that information may be. Phone records, for example, "easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.” *Smith*, 442 U.S. at 748. Also, records that detail every banking transaction an individual conducts likewise may contain sensitive information. "In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits, and associations. Indeed, the totality of bank records provides a virtual current biography.” *Miller*, 425 U.S. at 451. In the instant case, Austin was not inactively revealing such location information simply by placing a call, making a bank transaction, or powering up her phone, which is an "insistent part of daily life". Instead, Austin made an affirmative action by choosing to utilize YOUBER'S rental car services and by doing so, agreed to have her location collected and recorded. Austin accordingly does not have a viable way to differentiate *Miller* and *Smith* in the instant case.

B. The data collected was neither protected by an established property interest nor a reasonable expectation of privacy.

The Fourth Amendment provides that an individual may claim protection against a Fourth Amendment search in two circumstances, either by establishing a search if “the government violates a subjective expectation of privacy that society recognizes as reasonable” or by establishing a search as being subject to a “physical intrusion of a constitutionally protected area,” in a manner that would constitute a common-law trespass.” *United States v. Jones*, 565 U.S. 400, 407, 132 S. Ct. 945, 950, 181 L. Ed. 2d 911 (2012).

In *Jones*, this Court held that installation of a GPS tracking device for monitoring purposes constituted a search and was afforded protection under the 4th Amendment. *See Jones*, at 407. *Jones* involved police placing a GPS tracking device to the underside of the defendant's wife's vehicle. *Id*. This Court proceeded on the assumption that respondent would not have the property rights of a bailee and therefore no claim for trespass and presumably, no Fourth Amendment claim either. *Id.* at 415. In the instant case, the Government was not attempting to monitor a suspect actively, but instead obtained information that was already collected and held by a third party. The GPS was voluntarily installed on Austin's mobile phone and not the vehicle. She was aware or should have been aware of the active monitoring of the vehicle's location. Because of this knowledge and the presumption of no actual property rights, the information obtained in the records would not constitute a search. Justice Alito's concurrence in *Jones* also adds that to date, Congress and most states have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes. *See id.* at 429 (Alito, J., concurring). Therefore, the best this Court can do is apply the existing Fourth Amendment Doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated. *See id.* at 423.

There is a clear distinction between *Jones* and the instant case. Contrary to *Jones*, the GPS location data here does not provide an "intimate window into a person's life, revealing not only particular movements, but through them familial, political, professional, religious, and sexual associations." *Jones*, 565 U.S. at 415. The data itself does not reveal the private details of an individual's daily life; instead, it shows the movement of the vehicle for the owner to track their property. Five justices in *Jones*, opined that "longer-term GPS monitoring in investigations" is not the same thing as "long term location tracking". *Id*. at 418 (Alito, J., joined by Ginsburg, Breyer,

and Kagan, JJ., concurring in the judgment); *id*. at 413 (Sotomayor, J., concurring) (agreeing with that statement).

Moreover, the historical GPS location data, in this case, is not the real-time GPS tracking device in *Jones.* YOUBER'S collection of GPS location data was not an attempt by the government to monitor a suspect, but rather a company's action in the ordinary course of business. There was no active monitoring of "Austin's" rental vehicle, but rather an inquiry into the location data of the account, looking to specific locations where the robberies took place. The inquiry of the records revealed Austin had been in the vicinity of those exact locations at the correlating times. A peek into a specific time frame's data, which had already been collected by a third-party, does not compare to an active GPS monitoring by the government. Accordingly, there was no search, as outlined in *Jones.*

"Fourth Amendment rights are personal rights which may not be vicariously asserted," *Alderman v. United States,* 394 U.S. at 174. A person aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. The rule of standing to raise vicarious Fourth Amendment claims should not extend to a so-called "target" theory whereby any criminal defendant at whom a search was "directed" would have standing to contest the legality of that search and object to the admission at trial of evidence obtained as a result of the search. *Id.* at 425-27. Austin may argue the government infringed upon her rights, however, the subpoenaed records obtained by Detective Hamm belonged to the account of one Martha Lloyd, not Jayne Austin. The Fourth Amendment protects "[t]he right of the people to be secure in *their*. . . papers," not in the papers of *others*. *See* U.S. Const. Amend. IV § 1 (emphasis added). As such, even if the review of the records did amount to a search, Austin herself would

not have been personally aggrieved, thus the GPS location data would be admissible. Considering the case did not rest solely on the admission of the records themselves, but merely allowed for the corroboration of additional evidence, this Court may soundly affirm the ruling of the lower court's decision.

C. Any "search" arising from the facts of this case was constitutionally reasonable.

Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the. . . action was justified at its inception," *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct 1868, 1879, 20 L. Ed. 2d 889 (1968). Second, one must determine whether the search "was reasonably related in scope to the circumstances which justified the interference in the first place," *New Jersey* v. *T.L.O.*, 469 U.S. 325, 326, 105 S. Ct. 733, 735, 83 L. Ed. 2d. 720 (1985) (citing *Terry*, 392 U.S. at 20). Under ordinary circumstances, a search of a suspect's GPS location records by a detective will be "justified at its inception" when there are reasonable grounds for suspecting that such a search will turn up evidence that the suspect has violated the law. Such a search will be permissible in its scope when the search itself is reasonably related to the objectives of the search. *See id.* at 325-26. Here, the GPS location records were reasonably related in that the records revealed that the suspect was, in fact, at the location of the various robberies, at the correlating times.

"[What] is reasonable depends on the context within which a search takes place." *Id.* at 337. As such, the appropriate standard of reasonableness must apply to the particular search. Generally, to determine whether to exempt a given type of search from the warrant requirement, courts must assess the degree to which it intrudes upon an individual's privacy and the degree to which it is needed for the promotion of legitimate governmental interests. *See Riley* v. *California* 573 U.S. 373, 408, 134 S. Ct. 2473, 2477, 189 L. Ed. 2d 430 (2014). Here, the government's inquiry

into the GPS location data was not intrusive beyond reasonable necessity. Given the extent of information already in possession of law enforcement, the records assisted in pinpointing the specifics of Austin's whereabouts during the time of the robberies, details revealing Austin's continued use of YOUBER'S services for illegal purposes.

The text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness". *Riley*, 573 U.S. at 381-82 (citing *Bringham City* v. *Stuart*, 547 U.S 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)). It is important to note that the Fourth Amendment protects against unreasonable searches, not warrantless searches. "[W]arrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement." *E.g*., *Kentucky* v. *King*, 563 U.S. 452 462 131 S. Ct. 1849, 1858, 179 L. Ed. 2d 865 (2011). Applying those principles here, any warrantless governmental search arguably arising out of YOUBER'S production of its records was constitutionally reasonable. Detective Hamm or other law-enforcement authorities did not obtain the records at issue by invading Austin's house or raiding YOUBER'S premises. Instead, Detective Hamm served a subpoena duces tecum to the company's custodian of records. YOUBER chose to comply with the subpoena, but that need not be the case. A third-party recipient is authorized to file a motion to quash in which case further judicial proceedings must be had. Thus Detective Hamm's subpoena duces tecum could not serve to forcibly search or seize the records, even if YOUBER had improperly resisted production.

A subpoena duces tecum is a judicial subpoena that directs a party to disclose relevant documents in their possession, unlike a warrant. The Fourth Amendment to the United States Constitution requires search warrants to be issued based on probable cause by a neutral and detached magistrate. *See* U.S. Const. amend. IV, § 1. As such, warrants and subpoenas are

governed by different standards of constitutional reasonableness. *See Miller*, 425 U.S. at 446. "[When a] warrant is issued without prior notice [it] is executed, often by force, with an unannounced and unanticipated physical intrusion," *Id.* "A subpoena [on the other hand] commences an adversary process during which the person served with the subpoena may challenge it in court before complying with its demands," *Id.* "[T]he general rule [is] that the issuance of a subpoena to a third party to obtain records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated that the time the subpoena is issued." (*Miller*, 425 U.S. at 444) (citing *California Bankers Assn*. v. *Schultz*, 416 U.S., 52-3, 94 S. Ct. 1512-13, 39 L. Ed. 2d 835)).

In the instant case, Detective Hamm's subpoena duces tecum for the location data records corroborated other evidence of Austin's participation in the robberies. The Police also obtained the bank's surveillance footage of the vehicle leaving the scene of each of the robberies, revealing partial plates matching those of YOUBER'S vehicle, rented to Lloyd (i.e., Austin) at the time. Also, items found in the rental vehicle matched the description of things used in connection with the robberies. The overall reasonableness of the request and less intrusive nature of a subpoena duces tecum justify the validity of Detective Hamm's issuance of a subpoena duces tecum to YOUBER for Austin's location records.

Further, any contention by Austin that a subpoena duces tecum is unreasonable when highly sensitive information is at stake would also create troublesome line-drawing problems. If this were the case, it would be impossible for Police to apply the third-party doctrine on a case by case basis without knowing the contents of the record in advance. Accordingly, if the subpoenaed records utilized by the government pertain only to the dates of the robberies and only relating to

the GPS locations while Austin was operating YOUBER'S vehicle (i.e., within the course of ordinary business), then such use was reasonable, and no warrant was required.

CONCLUSION

This Court should affirm the decision of the United States Court of Appeals for the Thirteenth Circuit and find that Austin did not have standing to contest the search of the vehicle and acquisition of the location data did not constitute a search within the Fourth Amendment.