

In the
Supreme Court of the United States

November Term 2019

Docket No. 4-422

Jayne Austin,

Petitioner

v.

United States of America,

Respondent

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT**

BRIEF FOR RESPONDENT,
UNITED STATES OF AMERICA

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QUESTIONS PRESENTED

1. Can Petitioner assert Fourth Amendment standing to a search by a police officer of a YOUNBER rental car that she had acquired by using her ex-girlfriend's YOUNBER account without permission from the ex-girlfriend?
2. Under the Fourth Amendment and *Carpenter*, was the acquisition of Petitioner's location data while in YOUNBER's rental car a search when the collection of location information was necessary for YOUNBER to make sure the correct user was driving its vehicle and Petitioner's location was tracked only when Petitioner was within the rental vehicle?

STATEMENT OF FACTS

The following sequence of events lead to the charges against Jayne Austin (“Petitioner”) for six counts of 18 U.S.C. Code § 2113 for the bank robberies of six different Darcy and Bingley Credit Unions. R. at 1.

Petitioner is a minimalist with no permanent residence who lives an immaterial lifestyle. R. at 1. Petitioner writes a blog titled *LET IT ALL FALL DOWN!* where she publishes short poems and blog posts with these underlying minimalist notions. In her blog posts, Petitioner also calls for the rebellion and downfall of the Darcy and Bingley Credit Union bank due to its alleged corruption. R. at 1. For example, in Petitioner’s Session 3 poem, she wrote, “I have no home, I claim no home. I claim no property.” R. at 26. Moreover, in Petitioner’s Session 5 poem, she wrote, “I’ll show you that property is NOTHING. Ownership is NOTHING.” R. at 27.

In order to travel, Petitioner uses YOUBER, a car rental software application (“YOUBER application”), which has around 40 million users across the United States. R. at 2. The YOUBER application is accessible through an individual’s cell phone, which connects to YOUBER rental vehicles through Bluetooth and GPS. R. at 2. YOUBER’s policy is to track each user using GPS technology and Bluetooth signals to ensure that the correct user is driving or operating the vehicle. R. at 22. YOUBER also tracks its vehicles for security purposes regardless of whether the car is rented and notifies its user about its monitoring during the initial sign up period. R. at 4, 23. Additionally, according to Mr. Chad David, a data and information specialist for YOUBER, rental car users are not allowed to sleep in the vehicles and are also informed of this during the initial sign up period. R. at 23.

The YOUBER application only activates once the YOUBER user's account registers as being within the vehicle. R. at 23. It is necessary that the user's location data is transferred through Smoogle because YOUBER needs Smoogle's GPS analytics to track and locate its vehicles. R. at 23. Without Smoogle, YOUBER could not track and locate its vehicles. R. at 23. YOUBER automatically collects and stores location information every two minutes and uploads it to YOUBER's mainframe with the timestamp. R. at 29.

Petitioner uses the YOUBER application through her on-and-off again partner Martha Lloyd's ("Ms. Lloyd") account because Petitioner "hates being on the grid." R. at 2, 18. For this reason, Petitioner uses Ms. Lloyd's account through the YOUBER application on her personal cell phone. R. at 2. The agreement was that Petitioner would reimburse Ms. Lloyd in cash after renting the YOUBER vehicle with Ms. Lloyd's credit card. R. at 18. While Petitioner is an authorized user on Ms. Lloyd's credit card account, she had not secured explicit permission from Ms. Lloyd to use her YOUBER account in the instances after the end of their relationship September of 2018.. R. at 2, 18, 19.

On January 3, 2019, Petitioner rented a 2017 black Toyota Prius with the license plate number R0LL3M through the YOUBER application on her phone. R. at 2. On that day, Officer Charles Kruezberger stopped Petitioner while driving in the 2017 black Toyota Prius for failing to stop at a stop sign. R. at 2. Petitioner showed Officer Kreuzberger her license and the YOUBER application on her cell phone. R. at 2. Officer Kreuzberger noticed that Petitioner's name was not listed in YOUBER's rental agreement and, as a result, searched the trunk where he found a BB gun resembling a .45 caliber handgun, a maroon ski mask and a duffle bag containing \$50,000 and blue dye packs. R. at 2-3. Officer Kreuzberger also found clothes, an

inhaler, three pairs of shoes, a collection of signed Kendrick Lamar records, bedding and a pillow, along with other personal food items, all giving rise to his belief that Petitioner lived in the car. R. at 3.

During this investigation, Officer Kreuzberger received a dispatch to look out for a 2017 Black Toyota Prius with a YOUBER logo driven by a suspect who allegedly robbed a nearby Darcy and Bingly Credit Union. R. at 3. The surveillance camera identified the first three digits of the license plate as R0L. R. at 3. The suspect was seen wearing a maroon ski mask while using a .45 caliber handgun. R. at 3. Because the items found in Petitioner's car and the license plate were similar to those that the dispatcher described, Officer Kreuzberger arrested Petitioner as a suspect in the bank robbery. R. at 3.

Detective Boober Hamm ("Detective Hamm") later took on Petitioner's case. R. at 3. After conducting further investigation, Detective Hamm discovered five other open bank robbery cases occurred between October 15, 2018 and December 15, 2018 that happened in a similar way as the robbery on January 3, 2019. R. at 3. Detective Hamm noticed the YOUBER logo on Petitioner's car and subpoenaed YOUBER in order to obtain the location information related to the account Petitioner used between October 3, 2019 through January 3, 2019. R. at 3. The records obtained from YOUBER showed that Ms. Lloyd's account was used to rent the same black 2017 Toyota Prius in the location and at the first, second, fourth and fifth robberies. R. at 3. The vehicle used in the third robbery was a yellow 2016 Volkswagen Beetle with the licence plate "FEEARLY" which was also a YOUBER vehicle. R. at 3. Detective Hamm then recommended charges with the U.S. Attorney's Office to have Petitioner charged with six counts of bank robbery under 18 U.S.C. Code § 2113 for bank robbery and incidental crimes. R. at 3.

At trial, Petitioner filed two motions to suppress evidence. R. at 1. The first motion regarded the evidence from the initial arrest and the second regarded the acquisition of the Petitioner's location data while in YOUBER's rental car. R. at 1. The district court denied both Petitioner's motions and the Thirteenth Circuit affirmed. R. at 1, 16.

SUMMARY OF THE ARGUMENT

Petitioner attempts to over-extend the protective mantle of the Fourth Amendment over a car she does not have standing in and location records she does not have a reasonable expectation of privacy over. Therefore, this court should affirm the Thirteenth Circuit's ruling and find Petitioner had no Fourth Amendment protections in either occasions.

The Petitioner had no Fourth Amendment right to standing of the YOUBER vehicle because although she may have had a subjective expectation of privacy over the vehicle, she did not have a possessory or property interest that would provide for a reasonable expectation of privacy that society would not be willing to recognize as reasonable. Petitioner did not have an expectation of privacy based on a source outside the Fourth Amendment. Further, Petitioner has not made any claim to having an interest in the vehicle which would be reasonable because she obtained the vehicle without consent or authorization from Ms. Lloyd and was using the vehicle to commit crimes. Petitioner was outspoken in claiming her negative view of the government, unequivocally showing her desire to neither own, nor attempt to claim any intention to own property. In addition, she had no expectation of privacy in the bag of money she stole from the bank because the law is not intended to provide expectations of privacy to things people have stolen. Thus, Petitioner's failure to show she had an objective expectation of privacy in the vehicle precludes her from having standing to contest the lawfulness of a search of the vehicle.

In addition, the acquisition of Petitioner's location records of her movements while in YOUNBER's rental vehicle were not protected under the Fourth Amendment. In order to trigger Fourth Amendment protections, an individual must have both a subjective and objective expectation of privacy. Petitioner did not have a subjective expectation of privacy over these location records because she did not make an affirmative action showing that she intended for her location records in the YOUNBER rental car to be private, such as turning off the Bluetooth or the GPS functions on her cellphone. Alternatively, she could have turned off her cell phone completely if she did not wish to be tracked. Even if this Court should find that Petitioner had a subjective expectation of privacy, this expectation of privacy is not one that society is prepared to recognize as reasonable.

The facts in this case do not give rise to the same privacy concerns as in previous matters with cell-site location records. First, the location records do not paint an intimate picture of Petitioner's whereabouts. YOUNBER only tracks the user's location records while in the rental car and not by compulsion every time the cell phone receives a call, text or email. This Court has held in the past that individuals have no expectation of privacy in their car movements on public roads because anyone would be able to track the car with visual surveillance. Accordingly, YOUNBER tracking Petitioner's location while in the rental car is synonymous to visual surveillance. Lastly, the location data compiled in this case was significantly less than that in previous cases. Here, the information was only gathered for three months and there is no indication from the record how long YOUNBER holds on to this information. YOUNBER may very well dispose of their location records after a year or even less than that.

Since the YOUBER rental car location records do not give rise to the same privacy concerns as cell-site location records, this case should be determined under the third-party doctrine. Accordingly, Petitioner did not have an objective expectation of privacy under the applicable third-party doctrine because Petitioner voluntarily exposed her location information when she chose to rent a car through YOUBER, rather than through another service, on her own volition. Furthermore, not only did Petitioner expose her rental car location records to YOUBER, she also exposed them to Smoogle when she used the YOUBER application. This further diminishes Petitioner's expectation of privacy. Thus, Petitioner had neither a subjective or subjective expectation of privacy.

Therefore, for the aforementioned reasons, the Court should affirm the Thirteenth Circuit's ruling that Petitioner did not have standing to contest a search of YOUBER's rental vehicle nor did she have a reasonable expectation of privacy over movements while in the YOUBER rental vehicle.

STANDARD OF REVIEW

This case involves two Fourth Amendment issues that arose from the trial court denying a motion to suppress, which have been ruled on and affirmed by the lower courts. Legal determinations made in a suppression hearing, such as the question of whether circumstances found by a district court meet the Fourth Amendment standard of reasonableness, are subject to *de novo* review. *U.S. v. Spears*, 965 F.2d 262, 269 (7th Cir. 1992). This type of review requires this court to review the case from the same position as the district court. *Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008). Under this standard, the court should consider the case as if no decision has been rendered. *U.S. v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988).

ARGUMENT

I. AN INDIVIDUAL DOES NOT HAVE STANDING TO CONTEST THE SEARCH OF A RENTAL VEHICLE THAT THE INDIVIDUAL RENTED ON ANOTHER'S ACCOUNT WITHOUT THE OTHER PERSON'S PERMISSION.

The Fourth Amendment provides “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” *U.S. Const. Amend. IV*.

This does not mean that someone may secretly use the YOUNBER account of another on a rental car application to obtain a vehicle and then claim a reasonable expectation of privacy. In order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable.

Minnesota v. Carter, 525 U.S. 83, 88 (1998). A reasonable expectation of privacy exists if: (1) the individual has exhibited a subjective expectation of privacy; and (2) society is prepared to recognize that this expectation is objectively reasonable. *Katz v. U.S.*, 389 U.S. 347, 361 (1967) (Harlan, M., concurring). Under what is known as the “standing” doctrine, the defendant carries the burden of making a threshold showing that he has a reasonable expectation of privacy in the area searched and in relation to the items seized. *U.S. v. Stokes*, 829 F.3d 47, 51 (1st Cir. 2016).

While the traditional test for standing requires following the two-step test from *Katz*, the government is willing to concede Petitioner may have a subjective expectation of privacy in the YOUNBER vehicle. However, there is no claim she may have to show that her expectation of privacy was one that society would recognize as reasonable. In this case, Petitioner did not own the vehicle, did not claim to have an interest in it, and claimed no ownership to any property at all. Thus, this court should find that Petitioner had no property interest in the YOUNBER rental vehicle and that no societal understandings would have provided Petitioner any reasonable

expectation of privacy over it. Therefore, the Thirteenth Circuit’s ruling that Petitioner did not have standing sufficient to challenge a search of the YOUBER vehicle should be affirmed

A. Petitioner Had No Valid Possessory Or Property Claim In The YOUBER Vehicle Nor The Bag Of Money She Stole Because She Neither Had A Right To Rent the YOUBER Vehicle Nor Did She Have An Intimate Enough Relationship With Ms. Lloyd To Claim An Interest In It.

Legitimate expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” *Byrd v. U.S.*, 138 S. Ct. 1518, 1527 (2018) (citing *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)). 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. *Rakas*, 439 U.S. at 143 n.12. A defendant who lacks an ownership interest may still have standing to challenge a search, upon a showing of “joint control” or “common authority” over the property searched. *U.S. v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006). An unauthorized driver who received permission to use a rental car and has joint authority over the car may challenge the search to the same extent as the authorized renter. *Id.* at 1199. This approach is in accord with precedent holding that indicia of ownership-including the right to exclude others-coupled with possession and the permission of the rightful owner, are sufficient grounds upon which to find standing. *Id.*

In *Rakas*, after receiving a robbery report, the police stopped the suspected getaway car, which the owner was driving and in which the defendants were passengers. *Rakas*, 439 U.S. at 148. In their search of the car, the police found a box of rifle shells in the glove compartment and a sawed-off rifle under a passenger seat. *Id.* The court held the defendants lacked standing to contest the lawfulness search because “they asserted neither a property nor a possessory interest

in the automobile, nor an interest in the property seized.” *Id.* While *Rakas* dealt with the standing rights asserted by passengers, and not the driver of a vehicle, a lack of property and possessory interest in the thing search can still be applied to the facts at hand.

The Petitioner in this case presents no evidence that she owned or had a valid claim to the possession of the YOUNBER vehicle, nor the bag of money found in the trunk during the search which connected her to the crimes for which she was charged, that would permit her to claim a valid property interest. This is the case for several reasons. First, the car used was owned by YOUNBER and the official renter was Ms. Lloyd. R. at 19. These facts are not in dispute. Without such a claim of an ownership interest or proper authorized usage, the hurdle to claim an actual property interest grows higher. Second, Petitioner was not granted permission by the owner of the YOUNBER account – Ms. Lloyd – that she was permitted to be using the YOUNBER. This goes to the valid connection Petitioner has to the vehicle as implied form of consent based on passed instances of using the YOUNBER app to rent vehicles through Ms. Lloyd’s account. Despite the previous, provided permission Petitioner had to use the YOUNBER account to rent the vehicles with Ms. Lloyd’s credit card, the circumstances here are different.

The agreement established between the two then was for Ms. Lloyd to provide the means for Petitioner to access and use the YOUNBER account, and thereafter Petitioner would reimburse Ms. Lloyd for any expenses associated with the rental of a YOUNBER vehicle in cash to avoid a cyber footprint. R. at 18. As the record reflects, Ms. Lloyd had no knowledge of Petitioner’s use of the YOUNBER account in this instance and claimed the interactions she had had with Petitioner since their relationship ended was limited to a single instance pertaining to the exchange of a single letter between the two where no indication of consent to continue the agreement was

shown. R. at 19. Thus, Petitioner did not have the ability to claim that the prior agreement between herself and Ms. Lloyd was still valid because in this instance there was no indication Petitioner had any intention of following the parameters of the agreement to provide the reimbursement which was the basis for the functioning of the agreement previously.

Finally, Petitioner can make no legal claim of possession and property interest to the money. The Ninth Circuit held in *United States v. Caymen*, 404 F.3d 1196, 1200 (9th Cir. 2005), “[t]he Fourth Amendment does not protect a defendant from a warrantless search of property that he stole, because regardless of whether he expects to maintain privacy in the contents of the stolen property, such an expectation is not one that “society is prepared to accept as reasonable.” In *Caymen*, the defendant purchased a laptop which contained evidence of his possession of child pornography that the police ultimately searched without a warrant. *Id.* at 1197. To purchase the laptop, Caymen acquired credit card numbers of other people which he used to make the purchase. *Id.* at 1198. When police obtained the laptop, they called the business where the laptop had been purchased and the business owner provided consent for the police to search the laptop against objections by Caymen. *Id.* Quoting *United States v. Wong*, 334 F.3d 831 (9th Cir. 2003), the court found that a person lacks a reasonable expectation of privacy in the contents of a laptop computer he stole. Following the logic of *Caymen*, Petitioner can claim no interest in the bag of money she stole from Darcy and Bingley. Whether or not she tried to claim a property interest in the bag, she could not have subjectively or objectively believed that she had a right to privacy simply because she placed stolen property in the trunk of a car.

The true failure in Petitioner’s ability to claim property rights arise from the fact that both YOUNBER and Ms. Lloyd would have been able to provide police with consent to search the car,

thereby stripping Petitioner of any right to exclude police from the vehicle. If it is true that 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, *Rakas*, 439 U.S. at 143 n.12, then there should be no hesitation to find Petitioner not only had no real possessory or property interest in the YOUBER vehicle, but either in the bag of money she stole from Darcy and Bingley.

B. Society Would Not Accept Petitioner’s Expectation Of Privacy As Reasonable Because Petitioner Did Not Have Ms. Lloyd’s Permission To Use Her YOUBER Account And Her Conduct Was In Clear Violation Of What A Reasonable YOUBER Renter Would Engage In.

Legitimate expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” *Byrd*, 138 S. Ct. at 1527. (Citing *Rakas*, 439 U.S. 128, 143 n.12. (1978)). “A burglar plying his trade in a summer cabin during the off season,” for example, “may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as ‘legitimate.’” *Rakas*, 439 U.S. 128 at 143 n.12.

The inquiry into whether society would justify Petitioner’s claim to a reasonable expectation of privacy rests on the notion of whether a reasonable person would consider Petitioner’s state of mind to be a reasonable one. There are two main reasons why society would not be prepared to accept that Petitioner has a reasonable expectation of privacy in the YOUBER vehicle.

First, Petitioner violated the terms of YOUBER’s renter’s policy through the evidence of her sleeping, and what can reasonably be inferred as living, in the car. This is a clear violation of YOUBER’s policy of use for the vehicle which Petitioner is in breach of. R. at 23. It is not just the presence of the blanket and pillows that go to the showing that Petitioner was using the vehicle in such a manner, but the items in plain view such as the clothes, shoes, and various

foods that were present in the vehicle. R. at 3. While this apparent breach of the vehicle's permissible usage may not be a dispositive showing that Petitioner lacks an expectation of privacy in the YOUBER vehicle, it is a clear violation of the user agreements set forth by YOUBER as shown by the testimony of Mr. David. Such a contractual violation, while not by itself, provides valid consideration to the loss of a reasonable expectation of privacy that society would recognize as reasonable.

Second, Petitioner was not only using the YOUBER vehicle without the permission of Ms. Lloyd, she did so through the use of Ms. Lloyd's credit card also without her knowledge. R. at 20. In *Byrd*, the defendant was an unauthorized driver of a rental vehicle that had been leased by his girlfriend in which she had not only given him permission to use, but had physically handed him the keys to the vehicle; an unequivocal showing that he had her permission as the authorized renter to use the vehicle. *Byrd*, 138 S. Ct. at 1524. Lower courts addressing this issue have concluded that permission of use provides the greatest weighing factor in determining a reasonable expectation of privacy. This can be illustrated by the holding in *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995), that "without the permission of the renter, the claimant has no ground to state they have a subjective or objective expectation of privacy... the defendant must present at least some evidence of consent or permission from the lawful owner/renter to give rise to an objectively reasonable expectation of privacy."

Petitioner may argue that her relationship with Ms. Lloyd provided a reasonable belief that she was not prohibited from using Ms. Lloyd's credit card to use the YOUBER application to obtain the vehicle as she had done several times in the past. She may point to the record that she and Ms. Lloyd had been dating and living together for a few years and that Ms. Lloyd

initially set up her account on Petitioner's phone to allow her to use the services of YOUNBER. R. at 18. This allowed Petitioner to use the YOUNBER application services without providing her own information due to her reluctance to have her personal information exposed to the government.

The problem with Petitioner's argument is that not only was Petitioner not an authorized user of the car, she does not even attempt to obtain permission for this instance, unlike the permission she was granted for prior uses. Instead, Petitioner assumes the past permission sufficiently showed present implied permission; since she was able to use the account in the past, it must be the case she be allowed to do so again. This means she is charging Ms. Lloyds credit card for the rental of the YOUNBER and has no intention of actually confirming that she has the consent of Ms. Lloyd to use the vehicle that was rented on her account. The main difference between the holding in *Byrd* and the facts of this case is that Byrd was permitted by his girlfriend to use the rental car. *Byrd*, 138 S.Ct. at 1524. It was purely a question of whether Byrd not being authorized on the rental contract, but having been granted permission, provided no basis for him to have a reasonable expectation of privacy within the vehicle. *Id.* Society would not be willing to recognize Ms. Lloyd not removing Petitioner's authorization from her credit card on the YOUNBER account as providing Petitioner free range to use the account as she pleases.

Therefore, it is reasonable that a person, such as Petitioner, who has acquired a rental vehicle through means of deceit from the named renter, and does not have permission whatsoever to be driving or in possession of that vehicle, cannot have standing to contest the lawfulness of a search of the vehicle.

II. THE ACQUISITION OF THE LOCATION DATA OF A RENTAL VEHICLE IS NOT A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT AND *CARPENTER*.

Petitioner attempts to breath new life into *Carpenter* and over-extend the protective mantle of the Fourth Amendment. Fourth Amendment protections are triggered only when the suspect proves that she had an expectation of privacy over the items searched. A reasonable expectation of privacy exists if: (1) the individual has exhibited a subjective expectation of privacy; and (2) society is prepared to recognize that this expectation is objectively reasonable. *Katz*, 389 U.S. at 361.

Petitioner had neither a subjective or objective expectation of privacy. *Carpenter* specifically addresses the objective prong of this analysis, however, our case does not give rise to the same privacy concerns as in *Carpenter*. Accordingly, the proper analysis would be that under the third-party doctrine, where Petitioner's objective expectation of privacy argument fails. Therefore, the Fourth Amendment did not protect Petitioner's location records while in the YUBER vehicle and the Thirteenth Circuit's ruling should be affirmed.

A. Petitioner Did Not Have A Subjective Expectation of Privacy Over Her Location Data While In YUBER's Rental Vehicle Because She Knew Her Location Information Must Be Conveyed to YUBER and She Did Not Turn Off Her Bluetooth, GPS, Or In the Alternative, Her Phone All Together.

Petitioner did not have a subjective expectation of privacy. A defendant maintains a subjective expectation of privacy when he or she has shown that she sought to preserve something as private. *Bond v. United States*, 529 U.S. 334, 338 (2000).

In *Smith v. Maryland*, this Court held that if a defendant is aware that he was giving his records over to a third party, he lacks subjective expectation of privacy over them. *Smith v. Md.*, 442 U.S. 735, 742-43 (1979). There, the government installed a pen register on defendant's phone to record the numbers dialed on his telephone line. *Id.* at 737. The court reasoned that

people do not have a subjective expectation of privacy in numbers that they dial because they “realize that they must ‘convey’ phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed.” *Id.* at 742.

Petitioner’s actions do not show that she subjectively had an expectation of privacy over her location records while in the rental car. Similar to the defendant in *Smith* who knew he must convey phone numbers to the telephone company in order for his calls to go through, Petitioner knew that she must convey her location records to YOUBER in order to receive the rental car. Petitioner could not have rented a rental car through YOUBER without conveying her location information to it.

Had Petitioner verbally expressed her intention to maintain her location records while in the rental car private or engaged in another affirmative action that would otherwise proven her expectation of privacy, that may have sufficed for a subjective expectation of privacy. Petitioner could have turned off the Bluetooth or GPS functions on her cell phone off, or turned off her cell phone completely so that YOUBER could not track her location. Petitioner, however, cannot point to any such actions, and therefore, she did not have the requisite subjective expectation required in order to trigger Fourth Amendment protections.

B. Even If Petitioner Had A Subjective Expectation Of Privacy, It Is Not Objectively Reasonable Because The Same Privacy Concerns In *Carpenter* Are Not Implicated, And Therefore, The Third-Party Doctrine Applies.

Carpenter was a narrow holding with increased privacy concerns that do not apply to the facts in our case. *Carpenter v. United States*, 138 S.Ct. 2206, 2220 (2018). Because the same privacy concerns are not implicated here, and *Carpenter* did not explicitly overrule the third-party doctrine, the proper analysis would be that under the third-party doctrine. *Id.* Under

the third-party doctrine, the government's acquisition of Petitioner's location information is not protected under the Fourth Amendment. Therefore, the Court should affirm the Thirteenth Circuit's ruling that Petitioner's Fourth Amendment rights were not violated.

1. **Petitioner lacked an objectively reasonable expectation of privacy of her location records because the content of the records do not paint an "intimate portrait" of Petitioner's whereabouts as they did in *Carpenter*.**

This Court should find that Petitioner did not have an objective expectation of privacy because the location records do not paint an intimate portrait of Petitioner's whereabouts like they did in *Carpenter*.

In *Carpenter*, the government obtained cell-site location information ("CSLI") from wireless carriers to collect defendant's location information throughout a 127-day span. 138 S. Ct. at 2212. The Court held that the government's method of obtaining the CSLI records was a search because a cell phone tracks nearly exactly the movements of its owner. *Id.* It takes no affirmative action from the user for its tracking to begin or cease and because people carry phones around all the time. *Id.* at 2220. Moreover, the wireless carriers held on to the CSLI for five years, potentially allowing the government to view the defendant's movements on a consistent basis for a total span of five years. *Id.* at 2218. Therefore, the Court held that defendant's expectation of privacy over the CSLI was one that society is willing to recognize as reasonable, and accordingly found a Fourth Amendment violation. *Id.* at 2220. It is important to note, however, that the holding in *Carpenter* was a narrow one that did not explicitly overrule the third-party doctrine, but merely stated that when CSLI is involved, the court should proceed with caution due to the intimate nature of the information. *Id.*

In order to understand why our facts do not fit comfortably within *Carpenter*, we must also look to its roots and its progeny. Prior to *Carpenter* in *United States v. Knotts*, the defendant alleged that his Fourth Amendment rights were violated when the government placed a beeper in a chloroform bin inside defendant's car in order to track defendant's movements. 460 U.S. 276, 279 (1983). The Court held that a car does not have a reasonable expectation of privacy in the movements of a car because it is in public view. *Id.* at 281-82. The Court reasoned that the government, and anyone else, would be able to track the car through visual surveillance without using the beeper. *Id.* Therefore, the Court found that defendant did not have the objective expectation of privacy and as a result, the defendant's Fourth Amendment rights were not violated. *Id.*

Also before *Carpenter*, the Ninth Circuit in *United States v. Forrester* held that e-mail to/from addresses and internet protocol ("IP") addresses constitute merely addressing information and do not necessarily reveal any more about the underlying contents of communication than do phone numbers. 512 F.3d 500, 510-11 (9th Cir. 2007). When the government obtains this information, it does not find out the contents of the messages or know the particular pages on the websites the person viewed. *Id.* At best, the government may make educated guesses about what was said in the messages or viewed on the websites based on its knowledge of the e-mail to/from addresses and IP addresses. *Id.* This is no different from speculation about the contents of a phone conversation on the basis of the identity of the person or entity that was dialed. *Id.*

After *Carpenter* in *United States v. Hood*, the government acquired IP information from defendant's Kik application without a warrant. 920 F.3d 87, 89 (1st Cir. 2019). The defendant

claimed that *Carpenter* should apply because when the government acquired his IP information, they were able to pinpoint his exact location, time and date when he logged onto the Kik application. *Id.* at 90. The court, however, declined to extend *Carpenter* to their case and held that the defendant did not have a reasonable expectation of privacy over the IP data. *Id.* at 91-92. The court noted that “[a]n internet user generates the IP address data that the government acquired from Kik in this case only by making an affirmative decision to access a website or application.” *Id.* at 92. The court further distinguished this case from *Carpenter*, reasoning that every time a cell phone receives a call, text message, or email, the cell phone pings CSLI to the nearest cell site tower without the cell phone user lifting a finger, which was not the case with IP data. *Id.*

First, this case does not paint an intimate portrait as in *Carpenter* because YOUBER rental car location records are tracked only with an affirmative action from the user. CSLI is tracked with no affirmative action and may ping to towers on its own as a result of email, texts, and any other updates on the cell phone. The concern in *Carpenter* was that a cell phone in this age become an extension of human anatomy, and therefore there is a risk that CSLI could track an individual’s movements all day, everyday. The same concerns are not present here. YOUBER only tracks while the user is in the YOUBER rental car with their phone. R. at 23. It presumably disconnects when the user is not within the vicinity of the car. While YOUBER automatically collects location information every two minutes, the information is ultimately only collected while the person is in the car. The location tracking ceases so long as the user is not within the rental vehicle. R. at 29. Our case is more analogous to the collection of IP addresses in *Forrester* and *Hood* because the data in this case was only collected while she was in the rental car, rather

than all movements. R. at 29. At best, the government may make educated guesses about the whole of Petitioner's whereabouts since the location records only reveal Petitioner's movements while in the car.

Moreover, the concern in *Carpenter* that the location data revealed "the whole of [one's] physical movements," not just on public streets, but "*beyond public thoroughfares* and into private residences, doctor's offices, political headquarters, and other potentially revealing locales" is not present here. 138 S. Ct. at 2218. The location data here merely tracked Petitioner's location records while in the YOUBER rental car and does not track her beyond public thoroughfares. R. at 29. The Court has held in *Knotts* that a defendant has no expectation of privacy in their car movements because a car is in the public's view and can be tracked without needing an electronic tracking device. 460 U.S. at 281-82. Petitioner had no expectation of privacy in her movements in the rental car because anyone could have seen and tracked her movements by simply driving behind her. Since YOUBER only tracked Petitioner's location while in the rental vehicle, the same privacy concerns in *Carpenter* are not implicated here.

Next, the location data compiled in this case is considerably less than that under *Carpenter*. The YOUBER rental car location information was collected from October 3, 2018 through January 3, 2019, a total of 93 days, whereas the CSLI in *Carpenter* was collected for a span of 127 days. R. at 3; 138 S. Ct. at 2212. This is a month less than *Carpenter*. One month's worth of location information is capable of revealing much more information about an individual's movements because it paints a more intimate portrait of the individual's whereabouts.

Lastly, the carriers in *Carpenter* held on to the location records for five years, potentially allowing the government to track the defendant's every move, including those beyond public thoroughfares, for five years. *Id.* at 2218. While YOUNBER uploads its location information onto its mainframe, there is no indication in the record whether it maintains those records for five years as the cellular carrier did in *Carpenter*. YOUNBER may very well dispose of these records within a year, or even less than that. Should this be the case, it cannot be said that the same privacy concerns are implicated because this does not paint the same intimate portrait as in *Carpenter*.

Thus, the acquisition of the location data of a rental vehicle was not protected under the Fourth Amendment *Carpenter* because the location data in our case does not reveal an intimate portrait of Petitioner's whereabouts. Accordingly, the proper analysis would be that under the previously existing third-party doctrine.

2. Under the third-party doctrine, Petitioner lacked an objectively reasonable expectation of privacy of her location records because Petitioner voluntarily exposed her location to YOUNBER and Smoogle.

Under the third-party doctrine, Petitioner did not have an expectation of privacy society is prepared to recognize as objectively reasonable because the Court has established that there is no legitimate expectation of privacy in the information defendant voluntarily turns over to a third-party. *U.S. v. Miller*, 425 U.S. 435, 443-444 (1976).

The third-party doctrine has its earliest roots in *United States v. Miller*. The issue in *Miller* was whether the government's acquisition of defendant's bank records constituted an unlawful search under the Fourth Amendment. *Id.* This Court held that there was no search within the meaning of the Fourth Amendment because defendant did not have a reasonable

expectation of privacy in that information. *Id.* The Court reasoned that the documents obtained contained information voluntarily conveyed to the banks and naturally, these documents were exposed to their employees in the ordinary course of business. *Id.* at 442. As a result, defendant assumed the risk that the government could then access said documents from the third party - the employees of the bank – without needing a warrant. *Id.* at 443.

Later in *Smith v. Maryland*, the Court reinforced the third-party doctrine in instances of telephone communications. There, the Court found that defendant did not have a reasonable expectation of privacy in information he turned over to the phone company because he voluntarily conveyed numerical information to the telephone company. *Smith*, 442 U.S. at 744-45. By using the phone, defendant exposed that information to the point where he no longer had an objectively reasonable expectation of privacy. *Id.* The Court found that defendant assumed the risk that the company could potentially reveal that information to the police officer. *Id.*

Pursuant to the progression of technology, the Ninth Circuit also applied the third-party doctrine to IP addresses collected in *Forrester*. The Ninth Circuit held that email and internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit because they should know that this information is provided to and used by internet service providers for the specific purpose of directing the routing of information. *Forrester*, 512 F. 3d at 511. The court analogized with the *Smith* case reasoning that similar to telephone numbers, which provide instructions to the “switching equipment that processed those numbers,” e-mail to/from addresses and IP addresses are not merely passively

conveyed through third party equipment, but rather are voluntarily turned over in order to direct the third party's servers. *Id.* at 510.

Petitioner did not have an expectation of privacy society is prepared to recognize as objectively reasonable under the third-party doctrine because she voluntarily conveyed her information YUBER. By renting a car through the YUBER application – similar to the defendant using a telephone in *Smith* and the defendant using the internet in *Forrester* – Petitioner exposed her location records to YUBER. Petitioner used YUBER's location-based application on her phone through her own volition, by clicking on the application and renting a vehicle, thereby voluntarily conveying her information to YUBER. As a result, she assumed the risk that YUBER would then hand her location records to the police.

In addition, not only did Petitioner expose her location records to YUBER, she also exposed them to Smoogle, which further diminishes and ultimately disposes of Petitioner's expectation of privacy. Similar to *Miller* where the bank information was exposed not only to the bank, but also to its employees, the information here was not only exposed to YUBER, but also necessarily through Smoogle. The assumption of risk is higher in this case because Petitioner exposed her location record two entities, doubling the chances that they could then turn these records over to the police.

Petitioner may argue that she did not know that she was being tracked by YUBER because she did not initially sign in to the application, did not read YUBER's privacy policy, and did not know that the information was also being transmitted to Smoogle. This contention, however, is meritless. While at most, Petitioner can argue that she was not subjectively aware that she was turning her location records to YUBER, a reasonable smartphone user using an

application such as YOUBER would expect that their expectation of privacy is diminished in exchange for the services. *United States v. Jones*, 465 U.S. 400, 417 (2012) (Sotomayor, S., concurring) (finding that “[p]eople may find the ‘tradeoff’ of privacy for convenience ‘worthwhile,’ or come to accept this ‘diminution of privacy’ as ‘inevitable.’”). A reasonable smartphone user in this day and age understands that most applications which provide direct services, such as rental cars, must track the user’s location for safety reasons and to recover their property. This is the tradeoff Petitioner must to accept in order to reap the benefits of advanced technology that allows her to rent a car through the tip of her fingers on a cell phone. If Petitioner did not want her location to be tracked, she could have easily sought a rental car provider that is not serviced through an application and does not need to track its cars.

Furthermore, this was not Petitioner’s first encounter with the application. She used it many times before and should have reasonably known that tracking is an essential function of the application and of the YOUBER business. R. at 3. Petitioner could have clicked and read the privacy disclosure on the application at any time if she had any doubts or concerns about her location being tracked. Turning a blind eye should not give rise to an expectation of privacy.

Thus, under the third-party doctrine, Petitioner did not have the objective expectation of privacy necessary to trigger Fourth Amendment protections.

Overall, it is urged that this Court find Petitioner was not protected under the Fourth Amendment and affirm the circuit court’s holding because Petitioner neither had standing to contest a search of the YOUBER rental vehicle or a reasonable expectation of privacy over her movements while in the YOUBER vehicle.

CONCLUSION

The Court should uphold the Thirteenth's Circuits rulings and find that both pieces of evidence are admissible because Petitioner's Fourth Amendment rights were not violated. First, Petitioner cannot show she maintained a reasonable expectation of privacy within the YOUBER vehicle because she did not have a possessory or property interest in the vehicle due to her lack of permission, nor within the bag of money seized which was stolen, and moreover, any expectations she may have had are not one those which society is prepared to recognize as reasonable. Second, the Fourth Amendment did not protect the government's acquisition of Petitioner's location data while in YOUBER's rental vehicles because they do not paint an intimate portrait of her whereabouts, and the third-party doctrine disposes of Petitioner's reasonable expectation of privacy. Accordingly, the rulings of the lower courts should be affirmed.