



# PRIVACY CONCERNS IN THE DIGITAL ERA: AN ANALYSIS OF THE THIRD-PARTY DOCTRINE'S USAGE IN THE CRIMINAL COURT SYSTEM

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# PROJECT PURPOSE

This project is a judicial impact study of the United States Supreme Court decision in *Carpenter v US* (2018), which modified the judicially created “third party doctrine,” that allows law enforcement to seek information from third parties (banks, phone companies, internet providers, etc.) without the use of a search warrant.

A qualitative content analysis was conducted of 231 decisions of criminal cases. In these cases, law enforcement were able to obtain defendant information utilizing cell-site location data, camera surveillance, IP addresses, bank records, subscriber information, GPS, as well as through a variety of other software and databases, without the use of a warrant. Defendants in these cases have filed claims of fourth amendment violations under the decision granted through *Carpenter*.

This study uses legal decisions from litigated cases since 2018 to better understand the scope of third-party usage by law enforcement, focuses on both the primary question of how case outcomes have changed as a result of the *Carpenter* decision and a broader question of better understanding the population of cases utilizing the third-party doctrine; with additional examinations of criminal investigations involving third-party doctrine requests and what types of third-party doctrine tools were used

# UNITED STATES V. CARPENTER AND THE THIRD-PARTY DOCTRINE

The “Third-Party doctrine” (TPD) “allows law enforcement to seek information from third parties (banks, phone companies, internet service providers, etc.) without a search warrant. It is based on the principle that when an individual conducts business with a business or organization, like a phone company or bank, they have no privacy interest in the transaction records of the user’s business relationship. And as a result, they cannot make a claim to be protected under the Fourth Amendment to the U.S. Constitution against “unreasonable searches and seizures” and government actors are not required to seek a warrant” (Gizzi & Curtis, 2016).

In 2018, the Supreme Court decided a case that for the first time limited the government’s ability to conduct warrantless searches under the third-party doctrine. *Carpenter v. United States* which involved law enforcement requests to cell phone providers to provide “cell site location information” (CSLI) for specific phones.

Cell-site location information (CSLI) refers to a **cell** phone's **location** that can be detected through global positioning system (GPS) data. **CSLI** refers to the information collected as a **cell** phone identifies its **location** to nearby **cell towers** (NACDL, 2020).

These records provided a detailed set of breadcrumbs providing information as to the location of a user’s cell phone. The Supreme Court held that the privacy interests were so significant that the third-party doctrine would not be applied to this type of request. The Court’s decision was seen as the first step in reconsidering the third-party doctrine.

# METHODS



The legal analysis citation tool known as *Shepard's Citations* was used to complete list of citations for the case *Carpenter v. United States* were included from June of 2018 to September of 2020. Each case was downloaded, and imported into MAXQDA software, where cases were then read and coded for a variety of different variables in a qualitative content analysis. They were organized into state and federal courts, and several additional variables were added for later analysis.

We anticipated that many case outcomes would be influenced by the good faith exception to the exclusionary rule, which holds that if the officer's actions were legal at the time they occurred, then new precedents would not be applied. As a result, we were less interested in "who won?" but in better understanding the scope of the third-party doctrine itself.

A code book was developed three research questions:

- What was the alleged crime in the case?
- What third-party doctrine surveillance tools did the case use?
- What legal doctrines were utilized and what arguments did the court make to justify their decision?

- Code System
  - Crime groups
    - Homicide
    - Armed Robbery
    - Sexual Misconduct
    - Drugs
    - Property
    - Other Crimes
  - TPD groups
    - Cameras
    - CSLI
    - IP Address
    - Bank Records
    - Subscriber Information
    - GPS Surveillance
    - Other TPD
    - No TPD

- Legal Doctrines
  - Rationale for Not Applying Carpenter
  - Private Search doctrine
  - Third-Party Doctrine
  - Good Faith Exception
  - Plain-View Doctrine
  - Inadequate Legal Defense
  - Attenuation Doctrine
  - Independent Source Doctrine
  - Inevitable Discovery Doctrine
  - Harmless-Error Doctrine
  - Foregone Conclusion Doctrine
  - Qualified Immunity
  - Rationale for Subpeona/Warrant/Summons/C..
  - Warrantless Entry/Search/Installation

- Inevitable Discovery Doctrine 1
- Harmless-Error Doctrine 1
- Foregone Conclusion Doctrine 1
- Qualified Immunity 1
- Rationale for Subpeona/Warrant/Summons/Court O... 67
- Warrantless Entry/Search/Installation 39
- Software and databases utilized 9
- Information obtainment (source for investigation) 0
  - The Defendant 4
  - Law Enforcement 4
  - IRS 2
  - NCMEC 5
  - Mail Service (FedEx/UPS/USPS/Amazon) 1
  - Confidential Informant/Tip 15
  - General Informant/Tip (Non Conf./Another Def) 28
    - Jailhouse Informant 3
    - Third Party (website/witness) 31
    - Victim Turnover 5
  - Miscellaneous factors 19
    - Photo Lineup Usage 2
    - Traffic Stop Initiated 13
      - Dog Sniff 5
      - Interrogation/Interview 14
      - Individual on Probation/Parole 7
      - Defendant Won 13
- Sets 409
- Paraphrased Segments 670

# CODE BOOK



# RESULTS

Code System	Homicide	Armed Robbery	Sexual Misconduct	Drugs	Property	Other Crimes	SUM
> Crime groups	40	27	2	8	14	31	122
▼ TPD groups							0
Cameras	8	11		12	1	5	37
CSLI	54	45	4	36	10	27	176
IP Address		2	28	1	1	2	34
Bank Records	1		4	4	1		10
Subscriber Information	17	9	16	6	3	12	63
GPS Surveillance	2	6		7	2	1	18
Other TPD	5	3	6	5	1	3	23
No TPD		1		1		1	3
Σ SUM	0	127	104	60	80	33	486

- Law enforcement utilize a great number of various surveillance tools when investigating crimes.
- Historically the third-party doctrine covered such things as warrantless requests for bank and phone records. The cases examined here suggest that TPD is used with a variety of other tools.
- The data showed differences in surveillance techniques used by crime. For example, sexual misconduct cases (primarily child pornography/distribution cases) were much more likely to involve TPD tools like obtaining IP Addresses and subscriber information from internet
- CSLI was used especially in homicide, robbery, and drug cases

# LEGAL DOCTRINES

Defendants won in only a handful of cases.

Much of this was was attributed to:

- **The Good Faith Exception** – used when the factual dispute occurred before the Carpenter decision, triggering the court’s retroactivity rule. For many, had their cases occurred today, they might very well have won (As there were 176 cases in which CSLI was used).
- **Stare Decisis** - Judges were hesitant to expand the Carpenter decision to include other third- party doctrine tools—not wanting to be potentially over-turned on appeal

Code System	State Cases	Federal Cases	SUM
Legal Doctrines			0
Private Search doctrine	2	2	4
Third-Party Doctrine	4	39	43
Good Faith Exception	19	65	84
Plain-View Doctrine	2	2	4
Inadequate Legal Defense	17	13	30
Attenuation Doctrine	2		2
Independent Source Doctrine	1		1
Inevitable Discovery Doctrine	1		1
Harmless-Error Doctrine	1		1
Foregone Conclusion Doctrine	1		1
Σ SUM	50	121	171

# DIFFERENCES BETWEEN STATE AND FEDERAL COURTS

There were several notable differences between Federal and State decisions

Most **homicide** cases are adjudicated at the state level as they determine what constitutes the crime and define and outline the punishment for the offense. There is very specific criteria for murder offenses to become federal, of which only 12 of our cases met that criteria out of the 64 homicide offenses.

**Drug** cases are harder to explain, as drug crimes are offenses at state and federal levels. Most of these cases involved large scale drug distribution across state lines, which is commonly prosecuted in federal court. The same can be said for **sexual misconduct offenses**, due to the severity of the crime, many become aggravated when they involve sexual abuse and/or exploitation of children, human trafficking, child pornography and/or having multiple different offenses.

The prevalence of CSLI is likely an artifact of the fact that all of these cases involved analysis by lower courts of the *Carpenter* decision. It is difficult to assess how common CSLI is in comparison with other TPD tools.

Code System	State Cases	Federal Cases
Crime groups		
Homicide	52	12
Armed Robbery	22	34
Sexual Misconduct	8	32
Drugs	9	53
Property	9	8
Other Crimes	24	18
TPD groups		
Cameras	9	20
CSLI	63	75
IP Address	4	31
Bank Records	2	8
Subscriber Information	28	25
GPS Surveillance	5	11
Other TPD	11	10
No TPD		3
Legal Doctrines		
Rationale for Not Applying	58	103
Private Search doctrine	2	2
Third-Party Doctrine	4	39
Good Faith Exception	19	65
Plain-View Doctrine	2	2
Inadequate Legal Defense	17	13



# STATE CASES

Code System	Cameras	CSLI	IP Address	Bank Records	Subscriber Information	GPS Surveillance	Other TPD																																																														
<ul style="list-style-type: none"> <li> <span style="font-size: 1em;">▼</span> <span style="font-size: 1.2em;">📁</span> Crime groups           <ul style="list-style-type: none"> <li> <span style="font-size: 1.1em;">📁</span> Homicide               <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 100px;">7</td> <td style="width: 100px;">44</td> <td style="width: 100px;"></td> <td style="width: 100px;">1</td> <td style="width: 100px;">16</td> <td style="width: 100px;">1</td> <td style="width: 100px;">5</td> </tr> </table> </li> <li> <span style="font-size: 1.1em;">📁</span> Armed Robbery               <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 100px;">5</td> <td style="width: 100px;">18</td> <td style="width: 100px;">1</td> <td style="width: 100px;"></td> <td style="width: 100px;">7</td> <td style="width: 100px;">2</td> <td style="width: 100px;">2</td> </tr> </table> </li> <li> <span style="font-size: 1.1em;">📁</span> Sexual Misconduct               <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 100px;"></td> <td style="width: 100px;">3</td> <td style="width: 100px;">3</td> <td style="width: 100px;"></td> <td style="width: 100px;">3</td> <td style="width: 100px;"></td> <td style="width: 100px;">1</td> </tr> </table> </li> <li> <span style="font-size: 1.1em;">📁</span> Drugs               <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 100px;">1</td> <td style="width: 100px;">4</td> <td style="width: 100px;"></td> <td style="width: 100px;">1</td> <td style="width: 100px;">2</td> <td style="width: 100px;">2</td> <td style="width: 100px;">1</td> </tr> </table> </li> <li> <span style="font-size: 1.1em;">📁</span> Property               <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 100px;"></td> <td style="width: 100px;">8</td> <td style="width: 100px;"></td> <td style="width: 100px;"></td> <td style="width: 100px;">1</td> <td style="width: 100px;">1</td> <td style="width: 100px;">1</td> </tr> </table> </li> <li> <span style="font-size: 1.1em;">📁</span> Other Crimes               <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 100px;">4</td> <td style="width: 100px;">16</td> <td style="width: 100px;"></td> <td style="width: 100px;"></td> <td style="width: 100px;">7</td> <td style="width: 100px;"></td> <td style="width: 100px;">3</td> </tr> </table> </li> </ul> </li> <li> <span style="font-size: 1em;">▼</span> <span style="font-size: 1.2em;">📁</span> Legal Doctrines           <ul style="list-style-type: none"> <li> <span style="font-size: 1.1em;">📁</span> Third-Party Doctrine               <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 100px;"></td> <td style="width: 100px;"></td> <td style="width: 100px;">2</td> <td style="width: 100px;">1</td> <td style="width: 100px;">2</td> <td style="width: 100px;"></td> <td style="width: 100px;">1</td> </tr> </table> </li> <li> <span style="font-size: 1.1em;">📁</span> Good Faith Exception               <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 100px;">4</td> <td style="width: 100px;">15</td> <td style="width: 100px;"></td> <td style="width: 100px;"></td> <td style="width: 100px;">3</td> <td style="width: 100px;"></td> <td style="width: 100px;">4</td> </tr> </table> </li> <li> <span style="font-size: 1.1em;">📁</span> Inadequate Legal Defense               <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 100px;"></td> <td style="width: 100px;">16</td> <td style="width: 100px;"></td> <td style="width: 100px;"></td> <td style="width: 100px;">1</td> <td style="width: 100px;"></td> <td style="width: 100px;">2</td> </tr> </table> </li> </ul> </li> </ul>	7	44		1	16	1	5	5	18	1		7	2	2		3	3		3		1	1	4		1	2	2	1		8			1	1	1	4	16			7		3			2	1	2		1	4	15			3		4		16			1		2						
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# FEDERAL CASES

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# DISCUSSION

## There are several useful findings from this study:

- The only cases where defendants prevailed were in state courts. This is consistent with other research. State judges feel less constrained by Supreme Court precedent than federal judges.
- The TPD subpoena for the use of cell-site location information was frequently treated by courts as the same as a warrant, as it was based on probable cause (novel concept, since, by definition, it isn't a warrant).
- The courts refused to extend *Carpenter* to real-time CSLI, or to distinguish between short-term and long-term surveillance. Most judges were reluctant to modify the TPD at all
- As expected, there was frequent use of the **good faith exception** to the exclusionary rule. Had these cases occurred post-*Carpenter* the outcomes would differ.
- We were able to gain a much clearer picture of the types of cases where the third-party doctrine is used, and the full scope of surveillance tools where TPD information is sought.
- While *Carpenter* is viewed as an advancement for individual privacy rights, the lower court decisions in the two years since it was decided have not advanced that much.
- Content analysis confirmed that the good-faith exception would be used to deny offenders positive outcomes on appeal



# REFERENCES

- Gizzi, M. C., & Curtis, R. C. (2016). *The Fourth Amendment in flux: The Roberts court, crime control, and digital privacy*. Lawrence, KS: University Press of Kansas.
- National Association of Criminal Defense Lawyers. (2020). Digital Tracking Location. *Fourth Amendment Center*.