

CERTIFICATE OF SERVICE

CHAPTER OFFICERS

President: Liz Hedrick
 President-Elect: Kelly Dagger
 Vice President: Caitlin Poe
 Treasurer: Carl Sanders
 Secretary: Elliot Abrams
 National Delegate: Jeff Whitley
 Immediate Past President: Meredith Hubbard

COMMITTEE CHAIRS

Appellate Law: Samuel Hartzell
 Budget & Finance: Carl Sanders
 CLE: Meredith Hubbard & Kat Shea
 Health Law: Matt Wolfe
 Intellectual Property: Erin Wills
 Membership: Kacy Hunt
 Program & Social: Jessica Vickers
 Publicity & Public Relations: Kat Shea
 Service & Community Outreach: Alyssa Hockaday & Dena King
 Pro Bono: Mike Dowling
 Younger Lawyers: Allison Cohan
 Newsletter Editor: Liz Stone

LIAISONS

Campbell Law School: Amanda Bryan
 U.S. District Court: Alyssa Hockaday



PRESIDENT’S WELCOME

Dear Fellow FBA Members, choose to represent *pro se* litigants or mentor other attorneys who are providing pro bono services. This is a great opportunity to hone your federal litigation skills, and I encourage you to visit <https://www.nced.uscourts.gov/attorney/probonopanel.aspx> for details on how you can get involved.

It is an honor to serve as your 2017-18 President of the Eastern District of North Carolina Chapter of the Federal Bar Association. I hope you will take full advantage of everything your membership offers in the coming year.

I encourage you to consider volunteering for the Eastern District Pro Bono Panel. This program matches interested attorneys with litigants in need of representation. Volunteers are particularly needed for civil rights and employment discrimination cases, and the Court offers opportunities for both full and limited representation. Volunteers can

Be on the lookout for information about our many programs planned for this year. If you have questions, suggestions, or comments, please do not hesitate to email me at elizabeth.hedrick@smithmoorelaw.com.

*Elizabeth Hedrick,
 Smith Moore, Raleigh, NC*

CAMPBELL LAW STUDENT CHAPTER UPDATE

The Campbell Law School’s FBA Chapter had a busy Fall. In September, the Chapter co-hosted a successful networking event with the EDNC Chapter. In November, the Campbell Chapter sponsored a speaking event on campus entitled “All About Bankruptcy.” The Honorable Stephani Humrickhouse, Chief United States Bankruptcy Judge for the Eastern

District of North Carolina and Dean Rich Leonard presented a primer for students on bankruptcy law. Next we will host Matt Leerberg of Smith Moore Leatherwood LLP, who will speak on forum selection.

*Christy Dunn,
 Campbell Chapter President*

ARGUMENT ANALYSIS: *CARPENTER V. UNITED STATES*

In November 2017, the Supreme Court heard oral argument in *Carpenter v. United States* (No. 16-402), possibly the most important Fourth Amendment case to date in the era of modern technology. At issue is whether the government violates the Fourth Amendment to the United States Constitution by collecting historical cell phone location records from third-party service providers without a warrant.

Background/Statement of the Case: Between December 2010 and March 2011 there was a string of armed robberies in and around Detroit, Michigan. During its investigation, the FBI obtained months of transactional records from cell phone carriers for 16 different phone numbers, including that of Petitioner Timothy Carpenter. That information included cell site information for the requested numbers at call origination and at call termination for incoming and outgoing calls – information that placed Carpenter’s cell phone within a two-mile radius of four of the robberies. Carpenter was indicted on six robbery counts and six firearm counts.

Before trial, Carpenter moved to suppress the cell site records, arguing that the government’s collection of the records constituted a warrantless search in violation of the Fourth Amendment. The district court denied the motion, ruling that the collection was not a “search” because there was no legitimate expectation of privacy in the records. Carpenter was convicted and sentenced to 1,395 months (116 years) in prison. The Sixth Circuit upheld the conviction and the Supreme Court granted certiorari.

The primary issue the Court is expected to address is the continued viability and appropriate contours of the third-party doctrine established in *United States v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 42 U.S. 732 (1979). In *Miller*, the Court held that government collection of bank records did not constitute a search because the bank records contained “only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.” *Smith* applied this voluntary disclosure doctrine to the government’s installation of a pen register—a device that tracks phone numbers dialed—and concluded that such installation is not a search because the caller

voluntarily conveyed the numbers dialed to a third party: the telephone company.

Carpenter’s Argument: Carpenter’s argument before the Court initially focused on the concurring opinions in *United States v. Jones*, 565 U.S. 400 (2012), in which five justices determined that long-term GPS tracking of a vehicle violates reasonable expectations of privacy and, therefore, required a warrant. On this basis, Carpenter suggested that the Court should draw a temporal distinction that would allow the police to look at cell-site records for shorter periods of time – for example 24 hours – instead of the 127 days-worth of data at issue in this case. The Justices, however, seemed to reject this argument as unworkable.

Carpenter then attempted to distinguish *Miller* and *Smith*. He argued that location information is more sensitive than bank records and numbers dialed, and that location information therefore deserves Fourth Amendment protection. Although some of the justices were concerned about finding a workable line to draw between sufficiently sensitive information such as location information and banking records at issue in *Miller*, other justices appeared to agree with the premise. Justice Breyer, for example, suggested a “personal information exception” for things like medical tests and location information. Justice Sotomayor suggested that drawing a distinction based on sensitivity would not be breaking new ground, since contents of communications (phone calls, emails, and text messages) are disclosed to the cell phone providers, but are nonetheless protected by the Fourth Amendment. Thus, she pointed out that the third-party doctrine “never was an absolute rule.”

Carpenter also challenged the concept of “voluntary disclosure” in this context, arguing that an individual does not necessarily know he is disclosing location information to service providers by making a call. He distinguished the issues in *Miller* and *Smith*, where people generally understand that check and credit card transactions are recorded by various banks (as in *Miller*) and cell phone companies record phone numbers dialed (as in *Smith*). As Justice Alito noted, cell phone companies will not necessarily disclose cell site location information even to the owner of the phone, which undercuts the suggestion that

Carpenter v. United States (continued from page 2)

individuals are aware that service providers keep detailed location records. Thus, Carpenter argued, location information is not disclosed voluntarily in the same manner as the information at issue in *Miller* and *Smith*.

The Government's Argument: The government, on the other hand, argued that its collection of location records was a direct application of *Smith* and *Miller*, noting: "What we're talking about here is the distinction between the government going and getting information from an individual and the government going to a business and asking the business to serve as a witness." Justice Gorsuch challenged this position, suggesting that, in 47 U.S.C. § 222, Congress established customers' proprietary interest in their network information, and that this property right is protected by the Fourth Amendment. Justice Alito disagreed that Section 222 created a proprietary interest of the customer in the records; he would interpret the statute as creating a *company's* proprietary interest in the records.

Justice Sotomayor, however, continued to question application of the third-party doctrine cases. In particular, Justice Sotomayor questioned why, under the government's theory, contents of conversations are protected, since they too are routed through the cell phone company. In response, the government referenced the "bedrock understanding" that people have an expectation of privacy in "contents of a one-to-one communication or a one-to-many communication." Ultimately, the government argued that "there is a difference between content and routing information," and that location information is equivalent to routing information.

Justice Kagan asked why the location information in this case was not covered by Justice Alito's concurrence in *Jones*, in which Justice Alito wrote that "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." The government responded that *Jones* involved direct tracking by the government, whereas cell site

location information is location tracking via business records of a non-governmental entity. However, the government conceded that obtaining location information for a person's lifetime would "be highly questionable under the Constitution."

Potential Outcomes: A straightforward application of the third-party doctrine to cell site location information without comment on the contours of the doctrine appears unlikely, as the Court has already recognized exceptions to the doctrine for conversation content. If the government is to succeed, the Court will likely discuss the limits or exceptions to the doctrine and an explanation why cell site location information does not meet those exceptions.

Success for Carpenter could take many forms. One result could be a determination that location data is akin to contents of conversation and the results of medical tests—that is, that location information is sufficiently sensitive to warrant Fourth Amendment protection. A second result in favor of Carpenter could be a determination, as Justice Gorsuch suggested, that customers have a proprietary interest in their cell phone records and therefore a property interest protected by the Fourth Amendment under the trespass line of Fourth Amendment cases.

Of note, the government appeared to concede that precision cell phone tracking (i.e. GPS tracking of an individual phone) constitutes a search. Ultimately, with this concession, the litigation may have already settled a major question in the area of modern Fourth Amendment surveillance law. The Court's eventual opinion likely will have dramatic impacts for the future of the third-party doctrine as well. A decision is expected by June 2018.

Elliot Abrams – CHESHIRE PARKER SCHNEIDER & BRYAN, PLLC – Raleigh, NC

Sam Hartzell – WOMBLE BOND DICKINSON – Raleigh, NC

YOUNGER LAWYER DIVISION UPDATE

The 2017-18 term brings an exciting program to the Eastern District of North Carolina, as well as the return of a program that has quickly become a tradition for the Chapter.

The FBA's law student mentorship program is a new initiative in the Eastern District but has become an integral part of FBA chapters nationwide. The program provides mentors with an opportunity to make a difference in law students' lives and provides mentees with an opportunity for broader exposure within the FBA and the chance to talk through career decisions and life after law school. Both mentors and mentees receive many benefits from participating in this program. This year, attorneys from the Eastern District are mentoring Campbell Law School student. Everyone involved is raving about the program. If you wish to get involved as a mentor or mentee, please contact Allison Cohan at acohan@williamsmullen.com

On April 13, 2018, the Chapter will again host the **YLD Luncheon**. United States District Judge Louise Flanagan has graciously agreed to speak to younger

lawyers about developments in the Court and useful practice tips, as well as any anecdotes she wishes to share. We are so grateful to Judge Flanagan for providing our younger members with this unique opportunity. Stay tuned for additional information on this exciting program.

Our Chapter's young lawyers are also encouraged to get involved with the FBA through participation in the programs. Please contact Allison Cohan with any questions or programming suggestions.

Allison Cohan

Williams Mullen, Raleigh

FOUNDATION OF THE FEDERAL BAR ASSOCIATION ANNOUNCES SCHOLARSHIP OPPORTUNITY

The Foundation of the Federal Bar Association recently announced that it is accepting applications for the Federal Bar Foundation Public Service Scholarship. The scholarship provides \$5,000 as assistance to a graduating high school senior planning to attend a four-year college or university. At least one of the parents (or guardians) of the student must be a current federal government attorney or federal judge and a member of the Federal Bar Association.

The scholarship is funded by the Earl W. Kinter Memorial Fund. Earl W. Kinter was a distinguished member of the Federal Bar Association and two-time national president. His professional and civic leadership and dedication serve as a model to any aspiring academic. A scholarship application may be downloaded from the Foundation of the Federal Bar Association's website at: http://www.fedbar.org/Foundation/Foundation-Public_Service-Scholarship-Award.aspx.

Completed applications must be mailed to the Foundation by April 30, 2018. If the student's parent or guardian is not currently a member of the Federal Bar Association, a Federal Bar Association membership application must be completed online by April 30, 2018 as well.

The Foundation of the Federal Bar Association is a chartered non-profit foundation with a mission to promote and support legal research and education, advanced the science of jurisprudence, facilitate the administration of justice, and foster improvements in the practice of federal law. Should you have any questions about the Foundation or the Public Service Scholarship, please do not hesitate to contact the Foundation of the Federal Bar Association at (571) 481-9100 or via email at foundation@fedbar.org.

YOU BE THE JUDGE: EDNC HOSTS SERVICE DAY FOR NEW HANOVER COUNTY HIGH SCHOOL STUDENTS

Many judges have said that sentencing is one of the most challenging parts of serving on the bench. Recently, the Eastern District of North Carolina Chapter of the Federal Bar Association, with the help of the Court, gave several students from New Hanover High School in Wilmington the opportunity to experience the difficult task of sentencing while serving as “judges” in a simulated “You Be the Judge” sentencing hearing designed by the Administrative Office of the Courts.

On April 28, 2017, the students attended a Service Day event at the Alton Lennon Federal Building and United States Courthouse where they were introduced to everything from CM/ECF filing, the work of the United States Marshal Service, and the Clerk’s Office. Following a tour of the courthouse, the students tested their knowledge of the federal courts in a “Constitution Quiz Bowl” run by law clerk Amanda Bryan and former law clerk Jessica Vickers.

Prior to the start of the mock sentencing hearing, Assistant United States Attorney Leslie Cooley, Assistant Federal Public Defendant Joseph Ross, and Senior United States Probation Officer Mandy DiFelice spoke to the students about their careers in the federal criminal justice system, and how the typical criminal case progresses through the courts. United States Magistrate Judge Robert B. Jones, Jr. then commenced the sentencing hearing, and explained the factors under 18 U.S.C. § 3553 that judges consider when imposing a sentence. Judge Jones and the students then heard arguments from the Government and defense counsel, as well as statements from the victim and the defendant. After examining additional facts and determining whether the factors were aggravating or mitigating, the students jointly reached a decision on the sentence for the defendant. Following the sentencing hearing, the students enjoyed a lunch catered by the Federal Bar Association with members of the local bar and court staff, including law clerks Brandy Baird and Ashley Maddox.

The scenario and additional factors considered by the students is set forth below. What sentence would you impose?

Ken Williams is a senior at State College. He is arrested for producing and selling fake IDs, specifically, driver’s licenses. He crosses state lines to sell the IDs in a three-state area. Ken ultimately is charged with and convicted of producing and selling false identification documents in violation of federal law. He could face prison time.

Ken. Sold fake IDs to underage high school students who used them to get into clubs. This is not a one-time offense — he sold more than 500 fake IDs in nine months. Ken has a promising future. He has a 3.8 GPA and plans to go to medical school. A high school girl used one of Ken’s fake IDs to drink and drive. She crashed her car, injuring her best friend. Ken produced old fake IDs to fund his college education. Ken made more than \$10,000. His tuition for the semester was less than \$5,000. Ken helped his parents out of a financial crisis. He does not have any previous criminal history—not even a traffic ticket.

SENTENCE REACHED BY THE STUDENTS? Six to twelve months of probation with an 11 pm curfew.

The Chapter extends a special thanks to all of the Court personnel who worked so hard to make this day a success! We look forward to bringing a similar program to another area this year.

Alyssa Hockaday

Attorney Advisor to the Clerk of Court, Eastern District of North Carolina

THE CHAPTER'S YEAR IN REVIEW

FEDERAL DISTRICT COURT PRACTICE CLE

On February 3, 2017, our Chapter hosted a three-hour CLE on Federal District Court Practice that was comprised of three panels. The first panel on “The History of the Court” featured Chief U.S. District Judge James C. Dever III and U.S. District Court Judge Terrence W. Boyle. The second panel on “Discovery, Mediation, Trial, & Everything in Between” featured U.S. Magistrate Judges James E. Gates and Robert T. Numbers II. The final panel presented a “Local Rules Primer” featuring Alyssa Hockaday, Attorney Advisor to the Clerk of Court for the Eastern District of North Carolina, Christian Dysart, a member of the Local Criminal Rules Committee, and Chris Graebe, a member of the Local Civil Rules Committee.

SERVICE DAY

In conjunction with the FBA's National Community Outreach Project, on April 28, 2017, the Chapter organized an event at the Wilmington courthouse for students and teachers from New Hanover High School. The students and teachers enjoyed a tour of the courthouse and participated in a discussion with Magistrate Judge Robert Jones and members of the U.S. Probation Office, U.S. Attorneys' Office, and the Federal Public Defenders Office. Students were able to participate in a mock sentencing hearing wherein they played the role of the judge. Students had lunch with the attorneys after the program. The Chapter thanks all participants for making this program a success.

