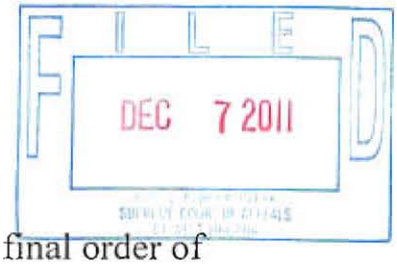
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0643



STATE OF WEST VIRGINIA,
RESPONDENT,

V.

JOSHAWA KEITH CLARK,
PETITIONER.

Appeal from a final order of the Circuit Court of Cabell County (10-F-6)

PETITIONER'S REPLY BRIEF

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I. This Court should find that West Virginians have a societal expectation of privacy in third party data.

The State inaccurately claims that Petitioner Clark's case "hinges on this Court's ruling in *State v. Mullens*...." (R.B. 4). This is a vast over-simplification of the Petitioner's position. Clark's position is that, based upon this Court's prior recognition of a citizen's right to privacy both at home and at work, he has a legitimate expectation of privacy in the phone numbers that he dials on his cellular phone while he is at work. See Syllabus Points 2 and 4, State v. Mullens, 221 W.Va. 70, 650 S.E.2d 169 (2007) (citizens have an expectation of privacy in the content of conversations that take place in their home); Syllabus Point 1, Roach v. Harper, 143 W.Va. 869, 105 S.E.2d 564 (1958) (citizens may recover damages for violation of an individual's right to be let alone and to keep secret his private communications, conversations and affairs); Bowyer v. Hi-Lad, Inc., 216 W.Va. 634, 646, 609 S.E.2d 895, 908 (2004) (employees in public spaces have a reasonable expectation of the privacy in their oral communications with customers and fellow employees). A corollary to this position is that the assumption of risk "third party doctrine" promoted by the Respondent is deeply flawed and not worth following. See Smith v. Maryland, 442 U.S. 735 (1979); United States v. Miller, 425 U.S. 435 (1976). Finally, if the Court rules that he does not have a reasonable expectation of privacy in his phone records, Clark should have standing to challenge the legality of the third party subpoena for those records.

Although the Fourth Amendment has been interpreted to allow warrantless seizures of phone records, this Court has stated on a number of occasions that "[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution."

Syllabus Point 1, Mullens; Syllabus Point 1, State v. Osakalumi, 194 W. Va. 758, 461 S.E.2d 504 (1995); Syllabus Point 1, State v. Bonham, 173 W.Va. 416, 317 S.E.2d 501 (1984); see Smith v. Maryland, 442 U.S. 735 (1979)[1]. The reason to depart from Federal jurisprudence in this instance is not, as the State asserts, because the undersigned "simply disagrees with the Supreme Court's holding in Smith and Miller." (R.B. 27). The Court should depart from these holdings because they do not take into account whether West Virginians have a societal expectation of privacy in the data that they are required to transmit to companies in order to participate in the personal and professional necessities of contemporary life.

A. The Smith-Miller "third party doctrine" is widely criticized as bad precedent.

The State's argument against the privacy of cellular phone records is premised on the "third party doctrine," which is a re-branding of the assumption of risk analysis used in Smith v. Maryland and United States v. Miller. See 442 U.S. 735 (1979); 425 U.S. 435 (1976). The rule is simply stated: "[b]y disclosing to a third party, the subject gives up all of his Fourth Amendment rights in the information revealed." Orin S. Kerr, The Case for the Third party Doctrine, 107 Mich. L. Rev. 561, 563 (2009). Respondent heavily relies on Kerr's article to justify this wrong-headed perversion of the Katz reasonable expectation test. See Katz v. United States, 389 U.S. 347, 361-62 (1967) (Harlan, J. concurring). Even Kerr admits that

> [t]he third party doctrine is the Fourth Amendment rule scholars love to hate. It is the Lochner of search and seizure law, widely criticized as profoundly misguided. Decisions applying the doctrine "top [] the chart of [the] most-criticized fourth amendment cases." Wayne LaFave asserts in

[1] Since 1986, the Stored Wire and Electronic Communications and Transactional Records Access Act, not Smith v. Maryland, has regulated Federal Government access to telephone records and other third party data. See 18 U.S.C. § 2703.

> his influential treatise that the Court's decisions applying it are "dead wrong' and 'make [] a mockery of the Fourth Amendment." The verdict among commentators has been frequent and apparently unanimous. The third party doctrine is not only wrong, but horribly wrong. Even many state court judges have agreed. Over a dozen state Supreme Courts have rejected the doctrine under parallel provisions of their state constitutions. Remarkably, even the U.S. Supreme Court has never offered a clear argument in its favor. Many Supreme Court opinions have applied the doctrine; few have defended it.

107 Mich. L. Rev. at 563 (citations omitted); see (R.B. 24). In a footnote to this quote, Kerr further admits that "[a] list of every article or book that has criticized the doctrine would make this the world's longest law review footnote." Id. at fn. 5.

The most salient criticism of the third party doctrine is that it is out-of-step with today's technological advances. An individual's home and papers are no longer our "repositories of personal information; computers are more efficient." Wayne R. LaFave, 1 Search and Seizure: A Treatise on the Fourth Amendment § 2.7(c) (4th ed. 2011). The third party doctrine embodied by Smith-Miller, however, requires people to "suppress information or confine it to the home" in order to avoid waiver of their privacy expectation by third party disclosure. Id. Because of the prevalence and increasing popularity of internet commerce and social networking, it is "grossly inefficient and severely restrictive of social and financial intercourse" to require that any data a person wants to keep private cannot escape his castle. Id. Also, when doing business online, people choose "third party intermediaries whom [they] believe will protect [their] privacy." Id. Third party doctrine, however, does not take into account trusting relationships between businesses and consumers, even though they likely influence consumers' expectations of privacy in their third party data. See Susan W. Brenner &

Leo L. Clarke, Fourth Amendment Protections for Shared Privacy Rights in Stored Transactional Data, 14 J.L. & Pol'y 211, 273 (2006).

1. Adoption of the third party doctrine will allow unfettered data mining of information transmitted by West Virginia consumers when they use the internet.

The increasing popularity of internet-related communications and commerce make the slope of the third party doctrine especially slippery and steep. Every day, the internet is more widely used by West Virginia's citizens, and there has been a concomitant explosion of data produced by this internet use that resides in the hands of third parties. Unfortunately, West Virginia does not have any statute regulating government access to these stored communications and records. See 18 U.S.C. § 2701 et seq. (relating to stored wire and electronic communications and transactional records access). The danger of unregulated access to third party data is multiplied by West Virginians' expanding use of the internet for commerce and social networking, which

> has resulted in the creation of new relationships whereby we now use third parties to process or store information that we previously maintained ourselves. We are also replacing inefficient real-world relationships that have become too expensive, too slow or too imprecise. While these changes may enhance convenience and cost-saving efficiency, they do so at the expense of privacy. For example, many Internet users now rely on third party providers for the digital storage of private documents, correspondence (including e-mail), business and financial records, family photographs and hobby information. ... In the past when information was disclosed ... it was done either orally or in scattered paper documents. Now such information is stored in a digital format allowing that information to be collected, sorted and reported in ways never before possible. ... Law enforcement and intelligence services don't need to design their own surveillance systems, they only have to reach out to companies that already track us so well. ... It takes less and less effort each year to know what each of us is about. When we were at the coffee shop and where we went in our cars. What we wrote online, who we spoke to on the phone, the names of our friends and their friends and all the people they know. When we rode the subway, the candidates we supported, the books we read .... More than ever before, the details

about our lives are no longer our own. They belong to the companies that collect them, and the government agencies that buy or demand them...."

14 J.L. & Pol'y at 213-19. All the data we have online, from the books we buy on Amazon.com to our personal information on Facebook, is currently unprotected by state law. Therefore, government officials can, without suspicion and with impunity, snoop through these vast goldmines of third party data collected from innocent West Virginians when they use the internet. West Virginians' use of technology has out-paced the law that should be in place to protect our reasonable expectation that this data will be disclosed only to the people to whom we actively consent to receive it. We are now in the Wild West of internet privacy, and this Court should not accept the third party doctrine that will allow these vast reams of personal information to remain unprotected.

2. The third party doctrine is a dystopian philosophy that views all citizens as potential criminals that must be controlled.

The privacy concerns of innocent citizens dictate that governmental actors are constrained from conducting unreasonable searches and seizures. See Cardwell v. Lewis, 417 U.S. 583, 589 (1974). The State, however, urges this Court to view all citizens as "potential criminals" who should not be allowed to use technology "to conceal criminal activity which previously would have been conducted in the open." (R.B. 23, citing 107 Mich. L. Rev. at 580-81). The Respondent uses this perspective to incorrectly frame the issue: "whether a criminal defendant has a reasonable expectation of privacy in his cell phone records." (R.B. 28).

The genesis of the Fourth Amendment protection against unreasonable searches and seizures arises from the English Crown's invasion of the homes of innocent subjects to look "for evidence of customs violations, religious heresy, and political dissent."

David E. Steinberg, The Original Understanding of Unreasonable Searches and Seizures, 56 Fla. L. Rev. 1051, 1062-69 (2004). The framers of the United States Constitution intended the Fourth Amendment to protect innocent citizens from this type of arbitrary, intrusive Government act. See LaFave, 1 Search and Seizure § 2.7 (c), fn. 83. It is not just the physical intrusion that disturbed our legal predecessors, it is the fear that "the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection," resulting in an individual's loss of control of his private information. Id., citing Entick v. Carrington, 19 How.St.Tr. 1029 (C.P. 1765).

With this context in mind, Article III, § 6 of the West Virginia Constitution reads:

> The rights of the citizens to be secure in their houses, persons, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

It is apparent after a plain reading of this section and a consideration of our legal history that the proscription of unreasonable searches and seizures is intended to protect innocent citizens from arbitrary invasions of their privacy. "Criminals," as the State so blithely puts it, are not the intended beneficiaries of the search and seizure clause and privacy rights should not be viewed through that prism. (R.B. 23); see Arnold H. Loewy, The Fourth Amendment as a Device for Protecting the Innocent, 81 Mich. L. Rev. 1229, 1230 (1983).

This Court has agreed with this perspective, stating that the proper way to view the reasonableness of a privacy expectation is not in terms of "wrongdoers or [those] contemplating illegal activities. [The] [i]nterposition of a warrant requirement is not to shield 'wrongdoers,' but to secure a measure of privacy and a sense of personal security

throughout our society." (R.B. 23); Mullens, 221 W.Va at 77, 650 S.E.2d at 176, quoting United States v. White, 401 U.S. 745, 789-90 (1971) (Harlan, J., dissenting). The third party doctrine, however, allows the government to use technology to indiscriminately spy on and control our citizens; which may well signal the beginning of a paradigm shift toward an Orwellian society. To view all citizens as potential criminals in need of control is to subvert the fundamental tenet that men are endowed with "certain inalienable Rights . . . among these are Life, Liberty, and the pursuit of Happiness [and] [t]hat to secure these rights, Governments are instituted among Men, deriving their powers from the consent of the governed." The Declaration of Independence para. 1 (U.S. 1776). The third-party doctrine is not derived from the consent of the governed; it is a fallacious legal construct that will result in a high tech version of the English Crown's suspicionless searches of citizens' private affairs. The third party doctrine is fundamentally out of step with centuries of American legal heritage and current precedent regarding the purpose of the search and seizure clause; therefore, this Court should not accept it as our law.

B. Because the third party doctrine is a legitimate threat to reasonable privacy concerns, this Court should instead apply Justice Harlan's Katz reasonableness test.

A better test for the reasonableness of an expectation of privacy in third party phone records is derived from the Katz two-prong test, which assesses not only whether a person has a subjective expectation of privacy but also examines whether society is prepared to recognize this expectation as objectively reasonable. See Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring). The third party doctrine ignores the societal expectation factor of the Katz test, which is traditionally the key factor for

determining the reasonableness of a privacy expectation in other areas of search and seizure. See 1 LaFave, Search and Seizures § 2.1(c) (most courts readily find that a subjective expectation of privacy exists and focus instead on the second prong; that is, whether society is willing to recognize that expectation of privacy as reasonable). The Katz reasonableness test is used by states across the country to evaluate the reasonableness of a citizen's privacy expectation in the context of search and seizure. See, e.g., State v. Peacher, 167 W.Va. 540, 280 S.E.2d 559 (1981); Hastetter v. Behan, 639 P.2d 510 (Mont. 1982); State v. Lopez, 896 P.2d 889 (Hawaii 1995); Whiting v. State, 885 A.2d 785 (Md. 2005); State v. Bauer, 379 N.W.2d 895 (Wis. 1985); State v. Crane, 254 P.3d 117 (N.M. 2001); State v. Hempele, 576 A.2d 793 (N.J. 1990); State v. McMillian, 557 S.E.2d 138 (N.C. Ct. App. 2001); State v. Daniel, 589 P.2d 408 (Alaska 1979); State v. No Heart, 353 N.W.2d 43 (S.D. 1984); People v. A.W. 982 P.2d 842 (Colo. 1999); Commonwealth v. Robbins, 647 A.2d 555 (Pa. 1994); State v. Foreman, 662 N.E.2d 929 (Ind. 1996).

This Court should not evaluate the privacy of third party data without considering our societal privacy expectations because "even reasonable Government action is subordinate to society's interest in honoring generally accepted expectations as to what is, and what is not, private." Brenner & Clarke, Fourth Amendment Protections for Shared Privacy Rights in Stored Transactional Data, 14 J.L. & Pol'y at 248. Fortunately, we are not bound by the United States Supreme Court's ill-considered decisions regarding the privacy of third party data. See Smith v. Maryland; United States v. Miller. Presently, vast amounts of data transmitted by West Virginians to third parties over the phone and online are unprotected by state law. Under the third party doctrine, there will

continue to be no protection. Without antecedent justification, all third party data may be searched at any time by a state law enforcement agency on a fishing expedition, without reasonable cause. Certainly it is reasonable for a person to expect that the phone numbers he dials, the books he buys on Amazon.com, or the information on his Facebook page will not be turned over to the Government without a showing of probable cause. Adoption of the third party doctrine, on the other hand, will open the floodgates to unprecedented, massive, and indiscriminate violations of our citizens' reasonable expectations of privacy. This Court should not ignore this concern, as the third party doctrine would require, but instead evaluate society's expectation of the privacy of third party data. Common sense should then dictate that suspicionless searches of third party data are not consistent with our privacy expectations under Article III, § 6 of the West Virginia Constitution.

II. Clark's phone records were seized with an illegal subpoena.

The DEA subpoena used to obtain Clark's phone records was not lawfully issued and this taints the entire investigation. The State's bald assertion that "[t]he face of the subpoena strongly suggests that the DEA was conducting an investigation" and that "[t]here is no reason to doubt the prosecutor's statement that the city police believed that drugs played a role in the robberies" is *prima facie* unreasonable. (R.B. 28, 31). There is no credible evidence in the record that Clark was involved with drugs; this theory was fabricated by the State. The Prosecutor conducted improper *ex parte* communications with the Court and inserted these allegations into the order denying the motion to suppress in flagrant violation of Clark's right to confrontation. (A.R. 137-44) see Syllabus Point 6, State v. Mechling, 219 W.Va. 366, 633 S.E.2d 311 (2006).

The State claims, however, that "there is no evidence" that the State had *ex parte* communications with the Court when the pretrial order denying the motion to suppress was drafted. (R.B. 2, fn. 4). This is a plain misunderstanding of the record. The defense objected to the additional factual allegations in the order and had a hearing to complain about their presence in the order. During this hearing, defense counsel stated that Prosecutor Howard embellished the order "with a number of statements" from officer J.T. Combs relating to Clark having "new things" such as

> "a new motorcycle, a new motorcycle jacket and helmet." And it goes on farther down in that same paragraph when "Sergeant Combs talked to the manager of the Cinema about his newly acquired items" ... [and] "her response was that he had received a check from the Marines because he was going to enlist and [] HPD looked into this assertion and determined it was not true. As a result of these occurrences, the phone records were investigated."

(A.R. 138). If proven, these facts would have been important to justify issuance of a DEA subpoena, however, none of these facts came out during the pretrial hearing. Id. In fact, the State called no witnesses at the pretrial hearing on Clark's motion to suppress the phone records. (A.R. 85-96). Judge Ferguson questioned prosecutor Howard about the source of the disputed information in the order and she admitted that she provided the disputed information to the Court's law clerk after the hearing. (A.R. 143). A fair interpretation of the State's conduct is that Prosecutor Howard was aware of the problem with using a DEA subpoena to investigate a robbery. Rather than calling J.T. Combs or Tom Bevins to testify at the pretrial hearing about the alleged drug investigation that led to the issuance of the subpoena for Clark's phone records, Howard manufactured facts outside the adversarial system and inserted them in the order to justify the use of the DEA subpoena in a state robbery investigation. This is harmful error because the entire

investigation hinges on Clark's phone records. Without them, the State has no case against Clark. See Petitioner's Brief 13-18.

Further, this Court should lend no credence to the State's argument about the phantom drug investigation that justifies the use of a DEA subpoena to investigate the robbery, because the State abandoned this argument at trial. The State never produced any witnesses, either pretrial or at trial, to testify about the alleged drug investigation that led to issuance of the DEA subpoena. McMillian is the State's only witness to testify about the factual basis for the subpoena and he swore under oath that a DEA subpoena was used to get Clark's phone records because the cinema is a "multi-state business," and because of this, federal authorities may want to investigate the robbery. (A.R. 471-72). Understandably, the Respondent ignores this inconvenient fact in its brief. It is difficult enough to justify the use of the DEA subpoena without credible evidence of a drug investigation. It is much more difficult to justify the use of a DEA subpoena to investigate a robbery because it is a "multi-state business" since this is completely outside the scope of allowable uses of DEA subpoenas.[2] Id.; see 21 U.S.C. § 876(a). This conflict regarding the factual basis for the subpoena casts serious doubt upon its legality.

In addition, the State is wrong that Clark waived any objection to the State's "failure to produce Agent Bevins" to testify about the factual basis for the subpoena. (R.B. 33, fn. 38). This issue was litigated prior to trial and Clark's objection to the telephone records was preserved during pretrial hearings. Further, the defense cannot be

[2] The Respondent's position that "the appropriate venue to determine whether Agent Bevins overstepped his authority would have been a federal court in Southern West Virginia" is also wrong because States possess concurrent sovereignty with the Federal Government. (R.B. 9, fn. 13); see Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.")

faulted for the State's failure to produce any witnesses to prove the factual basis for the subpoena. See Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2530 (2009) (defendant's power to subpoena witness is no substitute for right of confrontation).

Moreover, there are two problems with the State's reliance on West Virginia Code § 62-1D-9(f) to justify the transfer of the phone records from the DEA to the Huntington police. (R.B. 32). First, this statute applies to information obtained via wiretap, and this is not a wiretap case. Second, Clark's phone records were not "lawfully received" as required by statute because Bevins and McMillian gained access to them with a fraudulently issued DEA subpoena. West Virginia Code § 62-1D-9(f). There is simply no authority for the State's proposition that a DEA subpoena may be used to investigate a robbery under State law, and that is what happened in this case. The Huntington Police Department's abuse of administrative subpoena power in this case also illustrates why citizens should have the ability to challenge the legality of a third party subpoena. See State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996) (meaningful judicial oversight of administrative subpoena power is necessary to prevent a "judicial fishing enterprise" that amounts to a meddling curiosity concerning a person's private affairs).

For all of the foregoing reasons, it is inescapable that there is no evidence in the record to support the use of a DEA subpoena in this case. This is harmful error because the subpoena is the keystone of the State's case. Also, this Court should not adopt the third party doctrine and instead find that West Virginians value the privacy of their third party data.

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CERTIFICATE OF SERVICE

I, Jason D. Parmer, hereby certify that I have served the foregoing reply brief by first class mail on the 7th day of December, 2011 upon:

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