Supreme Court of Kentucky

Case No. 2020-SC-0116-DG

COMMONWEALTH OF KENTUCKY — *Appellant*

v.

On Motion for Discretionary Review from
the Court of Appeals
Case No. 2018-CA-1574-MR

Appeal from Woodford Circuit Court
Indictment No. 2017-CR-34

DOVONTIA REED — *Appellee*

BRIEF FOR THE COMMONWEALTH OF KENTUCKY

DANIEL CAMERON
Attorney General of Kentucky

S. CHAD MEREDITH (No. 92138)
Solicitor General
JEFFREY A. CROSS (No. 86412)
MATTHEW F. KUHN (No. 94241)
Deputy Solicitors General
BRETT R. NOLAN (No. 95617)
Special Litigation Counsel

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300

Counsel for the Commonwealth of Kentucky

Certificate of Service

I certify that a copy of this brief was served by U.S. mail on January 15, 2021, upon Adam Meyer, Assistant Public Advocate, Department of Public Advocacy, 5 Mill Creek Park, Section 100, Frankfort, Kentucky 40601; Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Jeremy M. Mattox, Circuit Judge, Scott County Justice Center, 119 N. Hamilton Street, Georgetown, Kentucky 40324; and Hon. Sharon Muse, Commonwealth's Attorney, 187 South Main Street, Versailles, Kentucky 40383.

INTRODUCTION

The police arrested the defendant in this case after using cellular location data to track his movements on a public road after he committed an armed robbery. The question before this Court is whether the evidence obtained after the arrest must be suppressed because the police did not obtain a warrant before tracking the defendant's location.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth requests oral argument. This case raises novel issues regarding the application of recent precedent from the United States Supreme Court about the meaning of the Fourth Amendment. Oral argument will aid the Court in resolving these important issues.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i
STATEMENT CONCERNING ORAL ARGUMENT i
STATEMENT OF POINTS AND AUTHORITIES ii
STATEMENT OF THE CASE 1
I. Factual background. 1
Carpenter v. United States, ~ U.S. ~ , 138 S. Ct. 2206 (2018) 2, 3
II. Procedural background 4
ARGUMENT 5
United States v. Knotts, 460 U.S. 276 (1983) 5
I. Using cellular location data to track a suspect in real time while traveling on a public road is not a "search" under the Fourth Amendment. 6
A. Individuals do not have a reasonable expectation of privacy while traveling on a public road for a short period of time. 6
Goben v. Commonwealth, 503 S.W.3d 890 (Ky. 2016) 6
Chavies v. Commonwealth, 354 S.W.3d 103 (Ky. 2011) 6
Roe v. Commonwealth, 493 S.W.3d 814 (Ky. 2015) 6
Easterling v. Commonwealth, 580 S.W.3d 496 (Ky. 2019) 6
Katz v. United States, 389 U.S 347 (1967) 6, 7, 8
Oliver v. United States, 466 U.S. 170 (1984) 7, 8
Air Pollution Variance Bd. of Colo. v. W. Alfalfa Corp., 416 U.S. 861 (1974) ... 7
Smith v. Maryland, 442 U.S. 735 (1979) 8
Traft v. Commonwealth, 539 S.W.3d 647 (Ky. 2018) 8
United States v. Knotts, 460 U.S. 276 (1983) 8, 9, 10, 11, 13
United States v. Karo, 468 U.S. 705 (1984) 10, 11
Kyllo v United States, 533 U.S. 27 (2001) 12
Jones v. United States, 565 U.S 400 (2012) 12, 13
Carpenter v. United States, ~ U.S. ~ , 138 S. Ct. 2206 (2018) 13

B. There is nothing unique about real-time cellular location data that requires departing from *Knotts*. 14

Carpenter v. United States, — U.S. —, 138 S. Ct. 2206 (2018) 14, 16, 17, 18

United States v. Knotts, 460 U.S. 276 (1983) 14, 15, 16, 17

United States v. Karo, 468 U.S. 705 (1984) 15, 16, 17

Kyllo v. United States, 533 U.S. 27 (2001) 15, 16

Commonwealth v. Almonor, 120 N.E.3d 1183 (Mass. 2019) 18

Commonwealth v. Pacheco, 227 A.3d 358 (Pa. 2020) 18

State v. Muhammad, 451 P.3d 1060 (Wash. 2019) 18

Tracey v. State, 152 So.3d 504 (Fla. 2014) 19

Sims v. State, 569 S.W.3d 634 (Tex. Crim. App. 2019) 19

C. *Carpenter's* application of the third-party doctrine to historical location data does not apply here. 19

Carpenter v. United States, — U.S. —, 138 S. Ct. 2206 (2018) 19, 20, 21, 22

Deemer v. Commonwealth, 920 S.W.2d 48 (Ky. 1996) 20

Smith v. Maryland, 442 U.S. 735 (1979) 20

United States v. Miller, 425 U.S. 435 (Ky. 1976) 20

United States v. Knotts, 460 U.S. 276 (1983) 21, 22

II. The good-faith exception to the exclusionary rule applies. 23

Illinois v. Krull, 480 U.S. 340 (1987) 23

United States v. Leon, 468 U.S. 897 (1984) 23, 24

Davis v. United States, 564 U.S. 229 (2011) 23, 24, 25, 26, 27

Parker v. Commonwealth, 440 S.W.3d 381 (Ky. 2014) 24, 25, 26, 27

United States v. Knotts, 460 U.S. 276 (1983) 25

Hedgepath v. Commonwealth, 441 S.W.3d 119 (Ky. 2014) 25

Smith v. Maryland, 442 U.S. 735 (1979) 26, 27

Carpenter v. United States, — U.S. —, 138 S. Ct. 2206 (2018) 26, 27

Deemer v. Commonwealth, 920 S.W.2d 48 (Ky. 1996) 27

Williams v. Commonwealth, 213 S.W.3d 671 (Ky. 2006) 27

Hause v. Commonwealth, 83 S.W.3d 1 (Ky. App. 2001) 27

State v. Weakland, 434 P.3d 578 (Ariz. 2019) 28
Valesquez v. Commonwealth, 362 S.W.3d 346 (Ky. App. 2011) 29
CONCLUSION 29
APPENDIX 31

STATEMENT OF THE CASE

Dovontia Reed robbed Kirby Caldwell just after midnight on April 26, 2017 and sped away in a dark Nissan Altima. The police apprehended him in short order after monitoring his movement using the electronic signals from his cellular phone as he drove along the highway. The Commonwealth then charged Reed with an assortment of crimes, including first-degree robbery and possession of a stolen firearm. But before pleading guilty, Reed moved to suppress the evidence against him on the grounds that the Fourth Amendment prohibited the police from tracking his movement without a warrant. The circuit court denied the motion, but the Court of Appeals reversed in a decision that departed from longstanding precedent. This Court should reverse and reinstate the circuit court's judgment below.

I. Factual background.

1. Late one night in April 2017, Dovontia Reed called an acquaintance, Kirby Caldwell, using his cell phone. [*See* VR 2/2/18 2:42:39–52]. Reed told Caldwell that he had run out of gas and needed money. [*Id.* at 2:42:54–2:43:06]. So Caldwell agreed to meet him at a gas station in Versailles. [*Id.* at 2:43:07–24]. But when he arrived, Reed pulled out a gun and demanded all of Caldwell's cash. [*Id.* at 2:44:23–55]. Caldwell handed over $500. [*Id.*]. After that, Reed hopped into the passenger seat of a Nissan Altima and rode away. [*Id.* at 2:45:10–20].

Caldwell called the police. He told dispatch about the robbery, and a few minutes later Office Jordan Lyons arrived at the scene. Caldwell explained to Officer

Lyons what happened, [*id.* at 2:45:20–24], and described both Reed and the dark Nissan Altima, [*id.* at 2:43:28–35; 2:54–59; 2:46:30–37]. Officer Lyons then confirmed Caldwell's description of the car using video footage from the gas station's security camera, which showed the Altima "leaving the parking lot." [*Id.* at 2:51:58–2:52:34].

Caldwell also gave Officer Lyons the phone number Reed used to call him earlier that night. [*Id.* at 2:45:30–41]. This ended up being Reed's undoing. Officer Lyons gave the phone number to dispatch, after which dispatch contacted Reed's cellular carrier and "pinged" the phone to obtain a rough estimate of its location. [*Id.* at 2:45:30–44]. When dispatch pinged Reed's phone, it showed that he was still traveling on the Bluegrass Parkway. [*Id.* at 2:45:45–59]. So dispatch continued to ping his phone over the next hour and a half to track his movement along the highway. [*Id.*]. Eventually, Reed turned around and headed back toward Versailles. Officer Lyons readied himself for the return and, sure enough, observed a dark Nissan Altima pass by. [*Id.* at 2:45:54–2:47:12]. He pulled over the car and found Reed in the passenger seat just as Caldwell described. [*Id.* at 2:47:13–15, 2:48:42–48].

2. Cellular location data is not a new phenomenon. Most "[c]ell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called 'cell sites.'" *Carpenter v. United States*, ~ U.S. ~ , 138 S. Ct. 2206, 2211 (2018). The phones "continuously scan their environment looking for the best signal, which generally comes from the closest cell site." *Id.* When that happens, the phones

connect to the cell site and generate data for the cellular carriers. *Id.* at 2211–12. The carrier, in turn, uses that information "for their own business purposes." *Id.* at 2212. While the data is often stored for long-term use, *see id.* at 2212, it can also be reviewed in real time.

Location data is not the "property" of a cell phone user in any sense of the word. Rather, the information is generated (and often stored) by a third party—the cellular carrier—when it registers a signal from the device. So in a case like this, law enforcement officials do not intercept a private signal or reach into the property of an individual. Rather, they access the location data for a particular phone by asking the carrier for it. When looking for real-time information, the carrier obtains that data by sending an electronic signal to the phone (a "ping"), which must be turned on and connected to the carrier's service to respond. If an individual disconnects his phone from the service, the carrier cannot ping it.

All of this is important for understanding the Fourth Amendment implications of what law enforcement did in this case. The police officers did not acquire information stored on Reed's phone. The officers did not physically access Reed's phone in any way. Rather, the officers obtained information from a third party—the cellular carrier—about the general location of Reed's phone while he traveled on the highway. Reed, in turn, could have turned his phone off or disconnected it from the network. So long as he kept it on, however, he allowed his phone to stay connected to his carrier's cell towers.

II. Procedural background.

The Commonwealth charged Reed with first-degree robbery, possession of a handgun by a convicted felon, and receiving stolen property (the firearm). Reed moved to suppress the evidence against him on the grounds that the police unlawfully searched his location by obtaining real-time location data from his cell phone without a warrant. After a hearing, the Woodford Circuit Court denied the motion. It concluded that accessing the location data was not a search under the Fourth Amendment and so no warrant was needed. Reed pleaded guilty (conditionally) to the charges[1] and appealed the circuit court's decision.

The Court of Appeals reversed. It held that the "acquisition of real-time [cellular location data] implicates significant privacy concerns" that trigger the Fourth Amendment's warrant requirement. [Slip Op. at 9]. The problem, the court explained, is that "the police are able to ping a cell phone in order to discover its location" even when individuals carrying the phone are in private locations. [*Id.* at 9–10]. Thus, the court distinguished cellular location data from other cases in which the United States Supreme Court has held that individuals have no expectation of privacy in their movements across public roads or in information shared with third parties. [*Id.*].

The Commonwealth moved for discretionary review on March 23, 2020,

[1] The first-degree robbery charge was amended down to second-degree robbery when Reed pleaded guilty. *See* Jdgmt. & Sentence, ROA 124.

which the Court granted on September 16, 2020.

ARGUMENT

The question in this case is whether an individual traveling on a public highway has a reasonable expectation of privacy as to his whereabouts simply because law enforcement obtains that information using signals from a cell phone rather than by visual surveillance. The answer is no. The Fourth Amendment does not require a warrant before visually observing individuals who are driving on public roads. *United States v. Knotts*, 460 U.S. 276, 281 (1983). And the Fourth Amendment does not require a warrant when law enforcement uses "scientific devices" to obtain that same, publicly available information "more effective[ly]." *Id.* at 284.

That's all this case is about. Even if law enforcement could use cellular location data for "dragnet type" surveillance, it did not do so here. *See id.* at 283–84. Rather, the Commonwealth made "limited use" of its technological tools to "reveal information" that was otherwise "visible to the naked eye" for anyone driving on a public highway. *See id.* at 284–85. And it obtained that information from a third party, without ever accessing Reed's phone or other property. Because of that, there was "neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment," *see id.* at 285, and the conclusion by the Court of Appeals otherwise was wrong.

Even if the Court disagrees, it should reverse the decision below because the good-faith exception to the exclusionary rule applies. For decades, courts have allowed

the police to use "sense-enhancing" technology to obtain information about a person's movements along a public highway without a warrant. And for decades, courts have allowed the police to obtain business records from third parties even when that information is personal. So while the facts of this particular case might be modestly novel, at the time of the search the law was not. And so the good-faith exception to the exclusionary rule applies.

I. Using cellular location data to track a suspect in real time while traveling on a public road is not a "search" under the Fourth Amendment.[2]

A. Individuals do not have a reasonable expectation of privacy while traveling on a public road for a short period of time.

1. The Fourth Amendment[3] protects only "legitimate expectations of privacy" that "society is prepared to recognize as reasonable." *Easterling v. Commonwealth*, 580 S.W.3d 496, 503 (Ky. 2019) (quoting *Katz v. United States*, 389 U.S 347, 361 (1967) (Harlan, J., concurring)). Such protection does not ordinarily extend to information an individual exposes to public view. *See Katz*, 389 U.S. at 351. That's because no one

[2] This issue is preserved for appellate review: *See* Court of Appeals Slip Op. at 5–10; Order Denying Defendant's Motion to Suppress, ROA at 82–85.

[3] This Court has held that Section 10 of the Kentucky Constitution, which mirrors the Fourth Amendment, "provides no greater protection than does the federal [counterpart]," and so the "United States Supreme Court's construction of the federal provision informs our state right as well." *See Goben v. Commonwealth*, 503 S.W.3d 890, 912 n.19 (Ky. 2016) (quoting *Chavies v. Commonwealth*, 354 S.W.3d 103, 107 (Ky. 2011), *abrogated on other grounds by Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015)).

can "legitimately demand privacy" over information that is as "accessible to the public" as it is to "the police." *See Oliver v. United States*, 466 U.S. 170, 178–79 (1984). Rather, once an individual exposes information to the public, any privacy interest collapses because the government could access the information itself or obtain it from another person who might willingly volunteer it. An officer, for example, investigating a fleeing suspect on a public street is free to ask bystanders which direction the suspect ran—and the suspect cannot legitimately claim a privacy interest in that information.

Katz itself highlighted this point well. In *Katz*, the United States Supreme Court held that law enforcement officials conducted a Fourth Amendment search when they attached a listening device to the outside of a telephone booth. *Katz*, 389 U.S. at 352–53. To reach that conclusion, the Supreme Court started with the principle that the Fourth Amendment does not protect information that individuals "knowingly expose[] to the public." *Id* at 351. Yet even though a telephone booth is publicly *observable*, the Court explained, the conversations happening inside the booth remain private. *Id.* at 351. And so using the listening device amounted to a search because it violated the reasonable expectation that conversations taking place within the phone booth "will not be broadcast to the world." *Id.* at 352.

Since *Katz*, courts have consistently drawn a line between information that individuals expose to the public and information ordinarily kept private. *See, e.g., Air Pollution Variance Bd. of Colo. v. W. Alfalfa Corp.*, 416 U.S. 861, 865 (1974) (finding no Fourth Amendment search when a health inspector observed "what anyone in the

city who was near the plant could see"); *Smith v. Maryland*, 442 U.S. 735, 744 (1979) (finding that the petitioner lacked a reasonable expectation of privacy over the numbers he "exposed" to the telephone company). This Court, for example, recently denied Fourth Amendment protection to a defendant who claimed an expectation of privacy in the information contained on his license plate. *See Traft v. Commonwealth*, 539 S.W.3d 647, 649 (Ky. 2018). "It is well settled," the Court explained, "that what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Id.* (cleaned up) (quoting *Katz*, 389 U.S. at 351); *see also Oliver*, 466 U.S. at 178–79.

2. Applying *Katz*, the United States Supreme Court long ago held that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Knotts*, 460 U.S. at 281. That's because an individual who chooses to travel on "public streets . . . voluntarily convey[s] to anyone who want[s] to look the fact that [he or she] was travelling over particular roads in a particular direction." *Id.* at 281–82. The individual, in other words, "knowingly exposes" information about his location "to the public." *See Katz*, 389 U.S. at 351.

Yet *Knotts* did more than just affirm the common-sense proposition that law enforcement officers do not need a warrant to follow someone along a public road. Instead, it crystallized how courts should apply the *Katz* test to new and evolving technology.

Like the police here, the officers in *Knotts* used electronic signals to monitor a car traveling to an unknown location after they lost visual contact because of the suspect's "evasive maneuvers." *See id.* at 278. The signals came from a beeper the officers placed inside a drum of chloroform that the suspect picked up for transport. *Id.* The beeper intermittently transmitted a signal that the officers tracked to follow the car's location to a remote cabin in rural Wisconsin. *Id.* at 277–78. Once the car arrived, the officers obtained a search warrant for the cabin and uncovered "a fully operable, clandestine drug laboratory." *Id.* at 279.

The defendant argued that the government violated his reasonable expectation of privacy by using sense-enhancing technology that allowed for "twenty-four hour surveillance"—including surveillance on private property. *See id.* at 282, 283–84. But the Supreme Court did not bite. The Fourth Amendment question, the Court explained, is not what the government *could* use new technology for. *See id.* at 284–85. Rather, the question is whether an individual has a reasonable expectation of privacy in the information the government *actually obtains* with that new technology. *Id.*

This distinction drove the outcome. The Supreme Court ultimately concluded the government's tracking did not amount to a Fourth Amendment search because the officers made "limited use" of the beeper to "augment[]" their visual surveillance during a single "automotive journey." *Id.* at 282, 284–85. The beeper did not reveal any information "that would not have been visible to the naked eye." *Id.* at 285. In other words, the technology in *Knotts* did not create a search because it simply allowed

the officers to observe what they already could: an individual traveling in a car on a public road during a single journey. *Id.* at 284–85.

The lesson of *Knotts* is twofold. First, there is no doubt after *Knotts* that individuals have no expectation of privacy in their location as they move about public roads—at least during a single "automotive journey" like the one in this case. *Id.* at 284–85. Second, technology that merely "augment[s]" visual surveillance does not transform ordinary surveillance into a Fourth Amendment search. *Id.* at 282, 284–85. So long as law enforcement does not use innovative "scientific devices" to reveal otherwise private information, *id.* at 284, the Fourth Amendment provides no protection, *id.* at 285.

3. After *Knotts*, the Supreme Court has continued to apply the same approach to analyzing technological innovation under the Fourth Amendment. In case after case, the Court has focused its analysis on whether law enforcement uses new technology to obtain information previously thought of as private.

Comparing *Knotts* to a case that came soon after further illustrates this point. Like *Knotts*, law enforcement in *United States v. Karo*, 468 U.S. 705, 707–08 (1984), used a hidden beeper to track a container of drug-manufacturing chemicals (this time, ether). *Id.* But unlike *Knotts*, the officers did not limit their surveillance to monitoring the suspect during a single automotive journey on a public road. Rather, the officers repeatedly used the beeper signal to locate the barrels of ether *after* the suspects had discretely moved them from one private location to another. *Id.* at 708. In other

words, the government did not simply "augment[]" its visual surveillance *while* the suspect was traveling on a public road, *see Knotts*, 460 U.S. at 282—it effectively trespassed inside of private locations to determine where the barrels had been moved when they were "not open to visual surveillance" *Karo*, 468 U.S. at 714. That altered the entire analysis:

> In this case, had a DEA agent thought it useful to enter the . . . residence to verify that the ether was actually in the house and had he done so surreptitiously without a warrant, there is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. For purposes of the Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that *it could not have obtained* by observation from outside the curtilage of the house.

Id. at 715 (emphasis added). Because the government used the beeper to obtain information "that could not have been visually verified," the Court held that it was a search under the Fourth Amendment. *See id.*

The difference in *Knotts* and *Karo* was not the technology—that part was exactly the same. The difference was *how* the government used the technology and *what information* the government obtained. In *Knotts*, there was no Fourth Amendment search because the officers did not acquire any information "that could not have been obtained through visual surveillance." *See Karo*, 468 U.S. at 707. But in *Karo*, the officers *did* acquire information that they could not access in public, and the Supreme Court therefore held that there *was* a Fourth Amendment search. *Id.*

The Supreme Court applied the same rule in *Kyllo v. United States*, 533 U.S. 27 (2001), a case about whether the government conducted a search when it used a thermal-imaging device to detect heat patterns within a residence. *See id.* at 29–30. The Court held that the government violated the defendant's reasonable expectation of privacy because the "sense-enhancing technology" allowed the government to obtain "information regarding the interior of the home that *could not otherwise* have been obtained." *Id.* at 34 (emphasis added). Thus, the question again turned on how the government used the technology (not the technology itself) and what kind of information it acquired.

One more case is useful here. In *Jones v. United States*, 565 U.S 400 (2012), the United States Supreme Court held that the government conducted a search by attaching a GPS device to a car and monitoring it for 28 days. *See id.* at 403–04. The majority opinion grounded its decision on the physical trespass in the case, not on the *Katz* rule (in *Knotts*, like here, there was no physical trespass). But in a concurring opinion, four justices reached the same result because "long-term monitoring of the movements of the vehicle" violated the defendant's reasonable expectation of privacy. *See id.* at 419 (Alito, J., concurring).

Justice Alito's concurrence affirmed the core of *Knotts* by explaining that "relatively short-term monitoring of a person's movements on public streets [with a GPS device] accords with expectations of privacy that our society has recognized as reason-

able." *Id.* at 430 (Alito, J., concurring) (citing *Knotts*, 460 U.S. at 281–82). The problem in *Jones*, Justice Alito explained, was that the officers used the GPS device to monitor the defendant for *four weeks*, rather than a single automotive trip. *Id.* (Alito, J., concurring). "[S]ociety'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." *Id.* (Alito, J., concurring). And that made the Fourth Amendment analysis in *Jones* different from a case like *Knotts* where the officers "might have pursued a suspect for a brief stretch." *See Carpenter*, 138 S. Ct. at 2217 (citing *Jones*, 565 U.S. at 429).

For four decades, the United States Supreme Court has consistently held that individuals like Reed have no reasonable expectation of privacy in their movements along a public road during a "discrete automotive journey." *See Carpenter*, 138 S. Ct. at 2215 (cleaned up). That remains true even when new technology "augment[s]" visual surveillance to make it more "efficien[t]." *See Knotts*, 460 U.S. at 282, 284. Because the police in this case used their access to Reed's cellular location data solely to monitor his movement on a public highway during a single trip—information that could have been available through visual surveillance—no Fourth Amendment search occurred.

B. There is nothing unique about real-time cellular location data that requires departing from *Knotts*.

The Court of Appeals departed from *Knotts* based on its conclusion that individuals have a significant expectation of privacy in their real-time location when that information is broadcast by their cell phone to their cellular carrier. [*See* Slip. Op. at 10]. By focusing on the technology and not the information, the court misapplied *Knotts* and its progeny.

1. The Court of Appeals erred by focusing on the capability of real-time cellular data, [*id.* at 10], rather than the "limited use" the government made of it in this case, *see Carpenter*, 138 S. Ct. at 2215 (quoting *Knotts*, 460 U.S. at 284–85). According to the court, "pinging a cell phone" to obtain real-time location information is a search under the Fourth Amendment because it "enables the police almost instantaneously to track individuals far beyond the public thoroughfare into areas where they would have a reasonable, legitimate expectation of privacy." [Slip. Op. at 10]. That conclusion cannot be sustained.

Recall that in *Knotts* the police used technology that *could* enable "twenty-four hour surveillance" beyond merely following an individual on a public road during a single trip. *See Knotts*, 460 U.S. at 283. The defendant argued that the mere capability of sweeping, "dragnet type law enforcement practices" created a Fourth Amendment problem. *Id.* at 283–84. Yet the Supreme Court rejected that claim. Instead, the Court

focused its analysis on the "limited use" of the technology, *id.*, not what the technology "enables the police" to do, [Slip Op. at 10].

So while the Court of Appeals was correct that pinging a cell phone to obtain real-time location data could allow the police to obtain information far beyond an individual's movements on a public road, it was incorrect to ignore the actual facts of Reed's case. The police pinged Reed's phone after confirming (from Caldwell and the gas station's video surveillance) that Reed left the scene in an automobile only moments ago. And "there is no indication that the [cellular location data] was used in any way to reveal information as to the movement of [the phone] within [private property], or in any way that would not have been visible to the naked eye." *See Knotts*, 460 U.S. at 285. Thus, this case is identical to *Knotts* in almost every material way: the police used technology that *could* be constitutionally problematic in a manner that *wasn't* constitutionally problematic. As a result, "there was [no] 'search' . . . within the contemplation of the Fourth Amendment." *See id.*

This is not to say that accessing cellular location data is never a search under the Fourth Amendment. Just like the outcome in *Knotts* changed in *Karo* even though the technology remained the same, so too would the Fourth Amendment inquiry here. If police ping a cellphone to obtain real-time location data "that could not have been obtained through visual surveillance" because it reveals an individual moving about his or her private property, a search occurs. *See Karo*, 468 U.S. at 707; *see also Kyllo*, 533 U.S. at 34. But the mere capability of technology is not dispositive.

2. Nor does *Carpenter* change this. In fact, *Carpenter* reaffirmed the analysis in *Knotts* and based its decision on the same legal principles discussed above.

As here, *Carpenter* arose after law enforcement obtained cellular location data without a warrant. *See* 138 S. Ct. at 2212. But that's where the similarities end. The location data in *Carpenter* was what the Court described as "historical." *See id.* at 2211. Law enforcement officials did not track the defendant's public movements in real time. Instead, they obtained five years of past information that allowed them to create a retroactive "chronicle of [the defendant's] physical presence compiled every day, every moment, over several years." *Id.* at 2220. The result was unlike anything the government could do before. It gave the "police access to a category of information *otherwise unknowable*." *Id.* at 2219 (emphasis added).

The outcome of *Carpenter* turned on this uniquely comprehensive nature of historical location data. *Knotts* and *Karo* anchored the Fourth Amendment question on whether the new technology "reveal[ed] information . . . that would not have been visible to the naked eye." *See Knotts*, 460 U.S. at 285; *Karo*, 468 U.S at 707. Likewise, the Court in *Kyllo* focused on how law enforcement used thermal-imaging technology to "obtain[] . . . information . . . that could not otherwise have been obtained." *Kyllo*, 533 U.S. at 34. And that's exactly the kind information contained within *historical* cellular location data. The information the government obtained in *Carpenter* did not just inform law enforcement about the movement of an individual traveling on a highway—information that anyone could observe with their own eyes. It allowed the

government to "travel back in time" and follow an individual "into private residences, doctor's offices, political headquarters, and other potentially revealing locales." *Carpenter*, 138 S. Ct. at 2218. That kind of information was previously "unknowable," *Carpenter*, 138 S. Ct. at 2219, or beyond what "could [ ] have been obtained through visual surveillance," *Karo*, 468 U.S. at 707.

By grounding *Carpenter* in the reasoning of *Knotts*, the Supreme Court preserved the core holding that individuals have no reasonable expectation of privacy in their movements "during a discrete automotive journey." *See Carpenter*, 138 S. Ct. 2215 (cleaned up) (quoting *Knotts*, 460 U.S. at 284, 285). And that holding applies forcefully here. Like *Knotts*, the police only followed Reed's movements "during a discrete automobile journey." *See id.* at 2215 (cleaned up) (quoting *Knotts*, 460 U.S. at 284, 285). And like *Knotts*, the fact that law enforcement *could* use cellular location data for sweeping and previously unimaginable surveillance does not undermine "the limited use which the government made of [it]." *See id.* (quoting *Knotts*, 460 U.S. at 284, 285). In other words, *Carpenter* preserved (and reaffirmed) the principles that control the outcome here.

4. The Court of Appeals looked to other jurisdictions for guidance when it held that *Carpenter* requires a warrant for all real-time location tracking. [Slip Op. at 9–10]. In those cases, however, the courts largely ignored how *Carpenter* preserved the

narrow holding of *Knotts*—and thus, the courts did not grapple with the kind of limited surveillance that the government might conduct with real-time cellular location data.

In *Commonwealth v. Almonor*, 120 N.E.3d 1183 (Mass. 2019), for example, the Supreme Judicial Court of Massachusetts did not even cite *Knotts* in its opinion. That's not entirely surprising. *Almonor* was not a case about tracking a defendant in real time across a public road, *id.* at 1187, so the court had no reason to consider the implications of *Carpenter's* preservation of the core holding in *Knotts*. *See Carpenter*, 138 S. Ct. at 284–85.[4] Other courts reaching a similar conclusion have failed to engage with the continued viability of *Knotts* for tracking individuals during a "discrete automotive journey." *See, e.g.*, *Commonwealth v. Pacheco*, 227 A.3d 358, 367–68 (Pa. 2020) (summarily citing *Knotts* twice while describing *Carpenter*); *State v. Muhammad*, 451 P.3d 1060, 1072 (Wash. 2019) (never citing *Knotts* in concluding that *Carpenter* extends to all uses of real-time location data).

Two courts have wrestled with *Knotts* and its application to real-time location data, but neither provides much support for departing from the rule here. Before *Carpenter*, the Florida Supreme Court distinguished *Knotts* in *Tracey v. State*, 152

[4] As the Court of Appeals noted, *Almonor* relied in part on *State v. Earls*, 70 A.3d 630, 642 (N.J. 2013), a case from New Jersey's highest court published long before *Carpenter*. Unlike Kentucky, however, New Jersey's "Constitution [offers] greater protection to New Jersey residents than the Fourth Amendment." *Id.* at 568.

So.3d 504 (Fla. 2014), when it concluded that officers needed a warrant to obtain real-time cellular data. *Id.* at 525. Yet the *Tracey* Court did not have the benefit of *Carpenter* reaffirming that individuals have no reasonable expectation of privacy in their movements "during a discrete automotive journey." *See* 138 S. Ct. at 2215 (cleaned up) (quoting *Knotts*, 460 U.S. at 284, 285). The Texas Court of Criminal Appeals in *Sims v. State*, 569 S.W.3d 634 (Tex. Crim. App. 2019), meanwhile, did have the benefit of *Carpenter*. It reasoned that *Knotts* does not apply to cellular location data, but nevertheless held that individuals do not have a reasonable expectation of privacy in real-time location tracking so long as the government limits the amount of information obtained. *See id.* at 645–46. Thus, because the officers in *Sims* only pinged the phone several times over the course of three hours, there was no search under the Fourth Amendment. *Id.* at 646. So while the court abandoned *Knotts*, it largely adopted its underlying reasoning that allowed limited, real-time location tracking even when the government uses advanced technology.

C. *Carpenter's* application of the third-party doctrine to historical location data does not apply here.

Reed will likely argue that this Court should apply *Carpenter*'s treatment of the so-called "third-party doctrine" to this case. Doing so would be error.

1. Under the third-party doctrine, individuals have "a reduced expectation of privacy in information knowingly shared with another." *See Carpenter*, 138 S. Ct. at 2219. Before *Carpenter*, courts consistently applied this doctrine to hold that accessing

records or information in the hands of a third party does not amount to a Fourth Amendment search. *See, e.g.*, *Deemer v. Commonwealth*, 920 S.W.2d 48, 50 (Ky. 1996) (holding that a defendant "had no reasonable expectation of privacy as to . . . photographs" delivered to a third party); *Smith*, 442 U.S. at 743–44. Because of this, the government need not obtain a warrant even when the third party's records reveal the personal affairs of a defendant. *See United States v. Miller*, 425 U.S. 435, 442–43 (Ky. 1976).

On its face, the third-party doctrine should have controlled the outcome of *Carpenter* because historical location records are created and held by the cellular carrier, not the cell phone user. But the United States Supreme Court held otherwise. The Court explained that while the third-party doctrine "reduce[s]" an individual's expectation of privacy, it does not eliminate it altogether. *See Carpenter*, 138 S. Ct. at 2219. So in the "rare case" where an individual's expectation of privacy is so compelling, the third-party doctrine might not be enough to "overcome" that interest. *Id.* at 2222.

Carpenter went on to hold that historical location data is the kind of "rare" information in which an individual's privacy expectation is so strong that even the "reduced expectations" brought on by the third-party doctrine is not enough to diminish the expectation. *Id.* at 2219, 2222. Historical data—unlike discrete, real-time data—reveals a "detailed chronicle of a person's physical presence compiled every day,

every moment, over several years." *Id.* at 2220. And that information is obtained retrospectively, allowing the government to indiscriminately "travel back in time" to access "a category of information otherwise unknowable." *Id.* at 2218. So even when the court factors in the diminished expectations caused by the fact that this information is in the hands of a third party, individuals maintain a sufficiently reasonable expectation of privacy in the uniquely comprehensive nature of historical records to trigger the Fourth Amendment.

2. That conclusion does little to help Reed here. If the third-party doctrine under *Carpenter* "reduce[s]" an individual's pre-existing expectation of privacy, the question the Court must first ask is how strong the privacy interest is to begin with. *See id.* at 2219. And in this case, the Supreme Court answered that question in *Knotts* when it held that individuals do not have *any* expectation of privacy as to their location while traveling on a public road. *See Knotts*, 460 U.S. at 284–85. So even if the third-party doctrine, after *Carpenter*, does not eliminate an individual's reasonable expectation of privacy altogether, Reed never had such an expectation to begin with.

Consider the case in this way: *Carpenter* explained that historical location data posed a problem because it sits "at the intersection of two lines of cases" without "fitting neatly under" either. *See Carpenter*, 138 S. Ct. at 2214–15 (cleaned up). The first of those two lines of cases started with *Knotts*, which held that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements" even when the police "augment[ed] visual surveillance" with

sense-enhancing technology. *See id.* at 2215 (quoting *Knotts*, 460 U.S. at 281, 282). Historical data does not fit into the *Knotts* framework because retroactively reconstructing every detail of an individual's movements goes far beyond "augment[ing]" visual surveillance on a public road. But the real-time location information obtained here *does* "fit neatly" into *Knotts* because the officers only tracked Reed's location "during a discrete automotive journey." *Id.* (cleaned up) (quoting *Knotts*, 460 U.S. at 284–85). Thus, there is no need to even weigh how the second line of cases—those dealing with the third-party doctrine—apply.

* * *

Reed left the gas station in a car and drove down the highway after robbing Caldwell. In a long line of cases recently affirmed by *Carpenter*, the United States Supreme Court has consistently held that individuals do not have a reasonable expectation of privacy as they travel on public roads "during a discrete automotive journey." *See Carpenter*, 138 S. Ct. 2215 (cleaned up). This Court need not decide a question broader than the particular facts of this case. Reed was traveling on the highway "during a discrete automotive journey" when the officers pinged his location. Thus, no Fourth Amendment search occurred.

II. The good-faith exception to the exclusionary rule applies.[5]

Not all violations of the Fourth Amendment require suppressing evidence, particularly when doing so means "withholding reliable information from the truth-seeking process." *Illinois v. Krull*, 480 U.S. 340, 347 (1987). Even if the police "searched" Reed's movements by pinging his cell phone in real time, the good-faith exception to the exclusionary rule applies. The Court of Appeals erred in concluding otherwise.

1. The exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *United States v. Leon*, 468 U.S. 897, 906 (1984). The Constitution does not mandate suppression in any strict sense. *See id.* Rather, the courts created the exclusionary rule to deter unlawful police conduct, *see id.*, and to "compel respect for the constitutional guaranty" of the Fourth Amendment, *Davis v. United States*, 564 U.S. 229, 236 (2011). But the exclusionary rule is neither automatic nor absolute. *See id.* at 248. Instead, courts recognize several exceptions when suppressing evidence will not lead to "appreciable deterrence" of unconstitutional conduct. *Id.* at 237.

[5] This issue is preserved for appellate review: *See* Court of Appeals Slip Op. at 10–14.

The good-faith exception is one such carve-out to the rule. It applies when law enforcement officials act on an objectively reasonable, good-faith belief that their conduct is permissible. *See id.* at 238. Applying this rule is straightforward: When the police "conduct a search in objectively reasonable reliance on clearly established precedent from this Court or the United States Supreme Court," the exclusionary rule does not apply *even if* a court finds that the search was unconstitutional. *See Parker v. Commonwealth*, 440 S.W.3d 381, 387 (Ky. 2014).

Parker illustrates the test well. There, the Court considered whether to suppress evidence obtained during a search incident to arrest without probable cause. *See Parker*, 440 S.W.3d at 385–86. When the search occurred, it was arguably lawful under prior precedent from the United States Supreme Court. *Id.* at 385. But later, that precedent changed and not even the government argued that the search would have been lawful under current law. *Id.* This Court adopted the good-faith exception as articulated in *Davis* and declined to suppress the evidence. *Id.* at 387–88. As the Court explained, police officers must "operate in real time without the benefit of judicial hindsight." *Id.* at 387. Thus, the exclusionary rule does not mandate suppression when an officer acts in accordance with the applicable Supreme Court precedent.

The good-faith exception makes sense. Nothing in the Constitution mandates suppressing evidence, and there are "substantial social costs" in doing so. *See Leon*, 468 U.S. at 907. One obvious consequence is that "some guilty defendants may go free." *Id.* And so strictly applying the judicially created exclusionary rule makes little

sense "when law enforcement officers have acted in objective good faith or their transgressions have been minor." *See id.* at 907–08. In those cases, the "appreciable deterrence" against unlawful conduct is low, but the social costs remain high. *See Davis*, 564 U.S. at 237.

2. At the time of the alleged search, it was "clearly established precedent from . . . the United States Supreme Court," *Parker*, 440 S.W.3d at 387, that an individual "travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," *see Knotts*, 460 U.S. at 281. The United States Supreme Court had also made clear (again, at the time of the alleged search) that using sense-enhancing technology to "augment[]" visual surveillance of an individual traveling on a public road did not transform a non-search into a search under the Fourth Amendment. *See id* at 282, 284–85. So when the police obtained location information by asking the cellular carrier to "ping" Reed's phone in April 2017, they did so in "objectively reasonable reliance on binding judicial precedent." *See Davis*, 564 U.S. at 239.

The Court of Appeals reached a different conclusion by applying the good-faith exception too narrowly. Citing dicta from this Court's opinion in *Hedgepath v. Commonwealth*, 441 S.W.3d 119 (Ky. 2014), the panel below held that the good-faith exception did not apply because this Court had not yet addressed the Fourth Amendment implications of real-time, cellular location tracking at the time the officers pinged Reed's phone. [*See* Slip Op. at 13–14 (quoting *Hedgepath*, 441 S.W.3d at 124–

25)]. But the United States Supreme Court *had* addressed the issue of using technological advancement to track individuals traveling along public roads. And the rule in *Knotts*—affirmed by *Carpenter*—is exactly the kind of "binding appellate precedent" that law enforcement is entitled to rely on. *See Davis*, 564 U.S. at 241 ("[W]hen binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities."). So if this Court departs from *Knotts* to adopt a new rule for the facts of this case, that's precisely the kind of change in law that the good-faith exception exists to account for. *See Parker*, 440 S.W.3d at 386–87.

3. Likewise, although the United States Supreme Court had not considered a case involving cell-site location data before *Carpenter*, it *had* addressed whether individuals have a reasonable expectation of privacy in records owned by a third party. *See Smith*, 442 U.S. at 743–44. Before *Carpenter*, both this Court and the United States Supreme Court repeatedly held that individuals have no expectation of privacy in such records. *See id.*; *see also Deemer*, 920 S.W.2d at 50. *Carpenter*—issued fourteen months after the alleged search in this case—altered that analysis for only a unique category of cases. *Compare Carpenter*, 138 S. Ct. at 2219 (explaining that individuals have a "*reduced*" expectation of privacy in third-party records (emphasis added)), *with Smith*, 442 U.S. at 743–44 (explaining that individuals have "*no* legitimate expectation of privacy" in third-party records (emphasis added)). And so when the police accessed cellular location data from the cellular carrier to ping Reed's phone, they did so when

"binding appellate precedent," *Davis*, 564 U.S. at 241, clearly established that Reed had "no legitimate expectation of privacy" in those records, *see Smith*, 442 U.S. at 743–44.

To conclude otherwise would allow dicta from this Court to unsettle otherwise settled law. This Court has held that individuals do not have a reasonable expectation of privacy in the contents of photographs handed over to third-party businesses, even when those photographs revealed sensitive information. *See Deemer*, 920 S.W.2d at 50. The Court has applied the same rule to prescription records given to pharmacies, *see Williams v. Commonwealth*, 213 S.W.3d 671, 682–84 (Ky. 2006), and the Court of Appeals has followed suit in a case involving personal information given to internet service providers, *see Hause v. Commonwealth*, 83 S.W.3d 1, 12 (Ky. App. 2001). These cases all involved different kinds of information, but the courts resolved them on the same legal rule. So even though this Court had not yet applied the third-party doctrine to real-time cellular location data, the Court had clearly established how the third-party doctrine applies in general.

Carpenter certainly changed the analysis for applying the third-party doctrine to cellular location data. But suppression is not warranted when there is an intervening change in the law after the search occurs. *See Parker*, 440 S.W.3d at 387–88 ("Law enforcement officers . . . operate in real time without the benefit of judicial hindsight . . . .").

4. In declining to apply the good-faith exception, the Court of Appeals took the narrow view that the doctrine does not apply unless courts have authorized that specific police practice at issue. [Slip Op. at 13]. Adopting such a limited view would hollow out the good-faith exception. The better approach is to focus on the legal rule set by "clearly established precedent" when deciding whether the officers applied that rule to the facts before them.

A recent case from Arizona is illustrative. In *State v. Weakland*, 434 P.3d 578 (Ariz. 2019), the Supreme Court of Arizona considered whether the police conducted an unlawful search and seizure by drawing blood with insufficient consent. *See id.* at 579–80. Like here, the defendant argued that intervening law left no doubt that the officers had violated the Fourth Amendment, and that the state of the law was too "unsettled" for the good-faith exception to apply. *See id.* at 580–81. That's because, the defendant argued, the Supreme Court of Arizona had—in an earlier case—put police on notice that the particular practice might be unconstitutional. *Id.* at 580. Arizona's highest court rejected that argument. In doing so, it held that its prior decision "did not 'unsettle' the law because it *failed to repudiate* . . . existing authorization for" the practice. *Id.* at 582 (emphasis added). "We see no reason," the court explained, "to limit the good-faith exception to police practices that appellate precedent specifically authorizes when the rationale for the exception applies with equal force where binding appellate precedent otherwise supports the practice." *Id.* at 581 (emphasis added).

The panel below focused only on whether this Court had authorized the specific practice of collecting cellular location data in real-time without a warrant, rather than considering whether the Court (or the United States Supreme Court) had issued "binding appellate precedent [that] otherwise supports the practice." *Id.* at 581. That error caused the Court of Appeals to wrongly conclude that the good-faith exception does not apply.

* * *

There is no evidence in this case that Officer Lyons acted in bad faith when he followed the ordinary steps of relaying Reed's phone number to dispatch to ping it in real time. There are no allegations that he acted recklessly or deliberately disregarded the rules governing police investigations. In fact, there is nothing in the record to suggest that the police even made a mistake in this case based on the law as it existed in April 2017. Suppressing the evidence thus "deters no police misconduct" because Officer Lyons could not have known that neither the rule in *Knotts* nor the third-party doctrine would not apply here. *See Valesquez v. Commonwealth*, 362 S.W.3d 346, 350 (Ky. App. 2011). Thus, even if the Court finds that a Fourth Amendment search occurred, it should reverse the Court of Appeals and hold that the good-faith exception to the exclusionary rule applies.

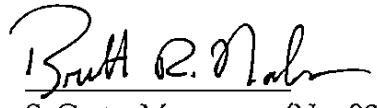
CONCLUSION

The Court of Appeals erred in concluding that the officers conducted a search under the Fourth Amendment when they pinged the location of Reed's cellphone.

This Court should reverse and reinstate the circuit court's judgment below.

Respectfully submitted,

DANIEL CAMERON
Attorney General of Kentucky



S. CHAD MEREDITH (No. 92138)
Solicitor General
JEFFREY A. CROSS (No. 86412)
MATTHEW F. KUHN (No. 94241)
Deputy Solicitors General
BRETT R. NOLAN (No. 95617)
Special Litigation Counsel

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300