COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2020-SC-0116-D

COMMONWEALTH OF KENTUCKY **APPELLANT**

ON MOTION FOR DISCRETIONARY REVIEW FROM THE KENTUCKY COURT OF APPEALS CASE NO. 2018-CA-1574-MR

v.

APPEAL FROM WOODFORD CIRCUIT COURT HON. JEREMY M. MATTOX, JUDGE INDICTMENT NO. 17-CR-00034

DOVONTIA MONTAYA REED **APPELLEE**

BRIEF FOR APPELLEE, DOVONTIA MONTAYA REED

Submitted by:

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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to Hon. Jeremy M. Mattox, Circuit Judge, Scott County Justice Center, 119 North Hamilton Street, Georgetown, Kentucky 40324; Hon. Keith Eardley, Assistant Commonwealth's Attorney, 187 South Main Street, Versailles, Kentucky 40383, electronically mailed to the Hon. Sarah Fightmaster, Assistant Public Advocate; and to be served by messenger mail to Hon. S. Chad Meredith, Hon. Jeffrey A. Cross, Hon. Matthew F. Kuhn, Hon. Brett R. Nolan, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on May 17, 2021. The record on appeal has not been checked out from the clerk of this Court for the preparation of this Brief.

ADAM MEYER

INTRODUCTION

This case is about whether the Court of Appeals was correct in deciding that the police are required to seek a warrant for real-time cell phone tracking.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument has already been ordered in this case and is necessary.

STATEMENT CONCERNING CITATION TO THE RECORD

The transcript of record will be cited as "TR" with the page number directly following. The court proceedings will be cited in conformance with CR 98(4)(a).

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Mr. Reed does not accept the Commonwealth's statement of the case. The issue in this case is whether real-time cell-site location information (CSLI) can be obtained without a warrant. The Kentucky Court of Appeals found a warrant is required:

> In *Carpenter*, the United States Supreme Court applied the *Katz* test to determine whether the acquisition of historic CSLI data by police constituted an intrusion upon an individual's legitimate expectation of privacy. The Court described the data-gathering process as follows: "Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI)." *Carpenter*, 138 S. Ct. at 2211. In *Carpenter*, the police sought historic CSLI records to establish that the defendant was near four robbery locations at the time they occurred. The records produced by the wireless carriers consisted of 12,898 historical location points for the defendant covering a period of 127 days. *Id.* at 2212.
>
> In deciding whether a warrant was required to obtain these records, the Supreme Court observed that "requests for cell-site records lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake." *Id.* at 2214-15. These two lines of cases address people's expectation of privacy in their physical location and movements, and in information they have turned over to a third party, *i.e.*, a cell phone carrier.

Under the first line of cases, the United States Supreme Court concluded that police planting a beeper on a car in order to track its movements was not a search because a person traveling in a car in a public thoroughfare had no reasonable expectation of privacy in his movements, and the beeper merely augmented visual surveillance. *See United States v. Knotts*, 460 U.S. 276, 282, 103 S. Ct. 1081, 1085-86, 75 L. Ed. 2d 55 (1983).

Under the second line of cases, the Court held that individuals also have no reasonable expectation of privacy in information they voluntarily turn over to a third party, such as bank records, *see United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976), or telephone numbers they have dialed, *see Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

Carpenter concluded that historic CSLI does not fall neatly into either of these two earlier categories of cases due to the unique character of the modern cell phone, which the Court described as having become almost a feature of human anatomy capable of tracking nearly exactly the movements of its owner and providing a "detailed and comprehensive record of the person's movements." *Carpenter*, 138 S. Ct. at 2217. Unlike following an automobile in a public thoroughfare or accessing third-party business records, "[m]apping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.' " *Id.* (citation omitted). Because of its potential for an unprecedented and unexpected level of intrusion into an individual's personal life, the Court held that a warrant was required to obtain historic CSLI data.

Although the *Carpenter* Court expressly limited its holding to the acquisition of historic CSLI, Reed urges us to extend its reasoning to encompass the acquisition of real-time CSLI or "pinging." He also relies on opinions of courts in other jurisdictions which have held that a warrant is required to acquire real-time CSLI. *See e.g., Tracey v. State*, 152 So. 3d 504 (Fla. 2014) (pre-*Carpenter* case comparing the acquisition of CSLI to GPS tracking and rejecting a case-by-case approach as unworkable and potentially leading to arbitrary and inequitable enforcement); *State v. Andrews*, 227 Md.App. 350, 134 A.3d 324, 348 (Md. Ct. Spec. App. 2016) (quoting *United States v. Graham*, 796 F.3d 332, 355 (4th Cir. 2015)) (pre-*Carpenter* case rejecting "the proposition that cell phone users volunteer to convey their location information simply by choosing to activate and use their cell phones and to carry the devices on their person"); *State v. Sylvestre*, 254 So. 3d 986, 987 (Fla. Dist. Ct. App. 2018) (applying reasoning of *Carpenter* to real-time CSLI).

We agree that the acquisition of real-time CSLI implicates significant, legitimate privacy concerns. As the Supreme Judicial Court of Massachusetts recently observed, when the police are able to ping a cell phone in order to discover its location, they also acquire the ability to identify the real-time location of its owner, which is "a degree of intrusion that a reasonable person would not anticipate[.]" *Commonwealth v. Almonor*, 482 Mass. 35, 120 N.E.3d 1183, 1195 (2019) (quoting *State v. Earls*, 214 N.J. 564, 70 A.3d 630, 642 (2013)). This distinguishes the situation from one in which the police track an individual in the public thoroughfare or seek access to records held by a third party. "Although our society may have reasonably come to expect that the voluntary use of cell phones -- such as when making a phone call -- discloses cell phones' location information to service providers, and that records of such calls may be maintained, our society would certainly not expect that the

> police could, or would, transform a cell phone into a real-time tracking device without judicial oversight." *Id.* (citations omitted).
>
> Thus, because pinging a cell phone 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, we conclude that a warrant is required to acquire real-time CSLI.

(Slip Op. 5-10); (Appendix 1).

This Court granted discretionary review.

The Warrantless Search.

Mr. Reed called Kirby Caldwell for help because he ran out of gas and had no money. (VR: 2/12/18; 2:42:25). Caldwell agreed to meet Mr. Reed at the Marathon Gas Station on Huntertown Road in Versailles, Kentucky. (*Id.* at 2:43:28, 2:41:48). Caldwell arrived and parked his car next to a dark Nissan Altima. (*Id.* at 2:43:28). Mr. Reed exited the front passenger side of the Altima and entered the front passenger side of Caldwell's car. (*Id.* at 2:43:38).

Mr. Reed pulled out a black handgun and demanded that Caldwell give him $100. (*Id.* at 2:44:22). Mr. Reed stated he knew Caldwell had more money and demanded all of it. (*Id.* at 2:44:40). Caldwell gave Mr. Reed a total of $500. (*Id.*). Mr. Reed forced Caldwell to throw his car keys out the window and over a hillside. (*Id.* at 2:44:56). Mr. Reed exited Caldwell's car, returned to the Altima, and left the parking lot, heading in the direction of Versailles. (*Id.* at 2:45:11).

Caldwell called the police and the police went to the gas station. Caldwell described Mr. Reed as a thin, light-skinned, black male with long dreads and wearing a hoodie. (*Id.* at 2:43:55).

Police obtained a cellphone number from Caldwell which was believed to be Mr. Reed's (*Id.* at 2:45:28). Police also observed the surveillance footage from the gas station. (*Id.* at 3:51:20). Police saw the Altima as described by Caldwell but could not see the driver on the footage. (*Id.* at 2:52:33).

Police relayed the cellphone number to dispatch. (*Id.* at 2:45:28). Dispatch tracked the cellphone by contacting the cellphone carrier and "pinging" the phone. (*Id.* at 2:55:59). To successfully "ping," the phone carrier needs only the cellphone number, and for the cellphone to be turned on. (*Id.* at 2:54:28). A warrant to "ping" the cellphone was not sought. (*Id.* at 2:54:44).

Dispatch observed and relayed the cellphone's location to police for an hour and a half. (*Id.* at 2:57:40). Dispatch's "ping" followed Mr. Reed's cellphone traveling away from Versailles on the Bluegrass Parkway then back to Versailles. (*Id.* at 2:45:28). When police learned of Mr. Reed's return, they anticipated where Mr. Reed would take to reenter Woodford County and set up a trap. (*Id.* at 2:46:11). Bluegrass Parkway was empty at the time, so they could easily identify the Altima. (*Id.* at 2:47:02). Police stopped the vehicle observed on the surveillance footage. It matched the description given by Caldwell. (*Id.* at 2:46:11).

Police pulled the car over. Mr. Reed was the passenger. (*Id.* at 2:48:36). He was asked to step out of the car, patted down and then put into custody without incident. (*Id.* at 2:48:50, 2:49:01).

Mr. Reed was subsequently indicted on one count of first degree robbery, one count of possession of a handgun by a convicted felon, and one count of receiving stolen property, firearm. (TR 12-13). Mr. Reed moved to suppress the real-time CLSI search. After a hearing, the motion was denied. (TR 40-53, 54-56, 58-60, 79-87); (Attached as Appendix 2-5). Mr. Reed entered a conditional guilty plea and reserved the right to challenge the denial of his suppression motion. (TR 124-26).

The Court of Appeals reversed and this Court Granted Discretionary Review.

The Court of Appeals should be affirmed.

ARGUMENT

I. A WARRANT IS REQUIRED FOR REAL-TIME CSLI.

Tracking someone's location via smartphone invades a right to privacy that is at the bedrock of both this Country and our Commonwealth. "[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. Amend. IV. Section Ten of the Kentucky Constitution also grants the same protection from unreasonable searches and seizures by government agents. *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006). This protects a personal expectation of privacy. *Katz v. United States*, 389 U.S. 347.

"Since the general civilization of mankind, I believe there are more instances of the abridgement of freedom of the people by gradual and silent encroachments by those in power than by violent and sudden usurpations." *See Klayman v. Obama*, 957 F.Supp.2d 1, 42 & n. 67 (D.D.C.2013) (citing James Madison, Speech in the Virginia Ratifying Convention on Control of the Military (June 16, 1788). We all have our cellphones on us constantly. Government searches of our cellphone location without a warrant are gradual encroachments of our right to privacy in our movements. Chipping away fundamental protections conceived at the founding of our Country and Commonwealth. This is concerning to everyone carrying

a cell phone. The Commonwealth believes this case is decided based on Mr. Reed's location on a road. This narrow argument overlooks the intrusive nature of real-time CSLI. The information emanating from cellphones provides not only a location but also "familial, political, professional, religious, and sexual associations... and hold for many Americans the privacies of life." *Carpenter v. U.S.*, 138 S.Ct. 2206, 2217 (2018); *see also Jones v. United States*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

Cellphones are an integral part of society. The advancement of technology is boundless. Society has been long prepared to have an expectation of privacy recognized in its movements while carrying a cellphone. *See Smith v. Maryland*, 442 U.S. 735, 740 (1979). The intrusion by the Government into that recognized privacy requires a warrant. *Id.* "The Constitution's protection extends only to legitimate expectations of privacy, that is, those situations where the defendant has exhibited an actual (subjective) expectation of privacy, and where the expectation is one that society is prepared to recognize as reasonable." *Easterling v. Commonwealth*, 580 S.W.3d 496, 503 (Ky. 2019) (footnote omitted).

As the Court of Appeals reasoned, Mr. Reed had an expectation of privacy that was violated when, without a warrant, the government tracked his real time location. Whenever government agents conduct a warrantless search of an area, where a person has a reasonable

expectation of privacy, absent the narrowly drawn exceptions to the warrant requirement, such a search is unreasonable. *Id.*, *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (Warrantless searches and seizures are per se unreasonable—subject only to a few specifically established and well delineated exceptions.). Evidence recovered as a result of an unreasonable search or seizure is inadmissible as "fruit of the poisonous tree." *Northrop v. Trippett*, 265 F.3d 372, 377-78 (6th Cir. 2001), *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).

Cellphones function by connecting to a set of radio antennae called cell sites. *Carpenter v. U.S.*, 138 S.Ct. 2206, 2212 (2018). Cellphones generally connect to the closest cell site. *Id.* When a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). *Id.* As such, an "individual continuously reveals his location to his wireless carrier." *Id.* at 2216. "There are 396 million cell phone service accounts in the United States in a Nation of 326 million people." *Id.* at 2211.

In *Carpenter*, the Court dealt with historical CSLI or "the ability to chronicle a person's past movements through the record of his cell phone signals." *Id.* In *Carpenter*, police arrested four men suspected of robbing a series of stores. The government obtained a court order from Carpenter's wireless carriers to disclose CSLI for that period. *Id.* "[A]ltogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day." *Id.*

Carpenter moved to suppress this evidence and the motion was denied. *Id.* At trial, the prosecution used this information to produce maps that confirmed that Carpenter was right where the robberies were at the exact time of the robberies. *Id.* at 2213.

The case eventually made it to the U.S. Supreme Court. In the majority opinion, recognized that "individuals have a reasonable expectation of privacy in the whole of their physical movements." *Id.* at 2217 (citing *Jones v. U.S.*, 565 U.S. 400, 430 (2012) (warrantless placement of a GPS tracking device on a suspect's car violates the Fourth Amendment) (Alito, J., concurring), *Id.*, at 415 (Sotomayor, J, concurring)). However, because people compulsively carry cellphones with them at all times, cellphone records can now provide "an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations... and hold for many Americans the privacies of life." *Carpenter*, 138 S.Ct. at 2217 (internal quotations and citations omitted).

Cellphones are "almost a 'feature of human anatomy.'" *Id.* at 2218 (quoting *Riley v. California*, 573 U.S. 373, 385 (2014) (warrant required to search a person's cellphone because, due to their uses and capacities, they contain the sum of an individual's private life.)). "Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." *Carpenter*, 138 S.Ct. at 2218.

The Court found that "when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements." *Id.* at 2219. As such, the Court held that the government was required to obtain a warrant supported by probable cause before acquiring such records. *Id.* at 2221. *Carpenter* did not express a view on real-time acquisition of CSLI. *Id.* at 2220. However, *Carpenter* should control in this case. Mr. Reed's right to privacy was violated because he had an expectation the government would not track his real-time physical movements.

The Commonwealth theorizes that even though over the past several decades tracking technology has become more and more intrusive to a person's daily life, this case should hinge on *United States v. Knotts*, 460 U.S. 276 (1983), because Mr. Reed happened to be on a road when the cell tracking occurred in this case. In other words, the Commonwealth argues for a rule that would allow the government to obtain a person's real-time CSLI without a warrant and it will pass constitutional muster as long as the search of that real-time location is on a road. This is an unworkable approach because the government can almost never be certain what the real-time location of a person will disclose. *Carpenter* clearly states we have reasonable expectation of privacy in all our physical movements. This court should decline to accept a rule that allows for real-time CSLI searches where the government hopes the person of interest is on a road. The rule adopted

by this Court should be simple. In this case and all cases regarding real-time CSLI – a warrant is required.

Reliance on *Knotts* is antiquated. The technology used to track the defendant in that case was a primitive beeper unlike the personal computers that we all carry in our pockets. Four decades later, the device was a smartphone that is the equivalent to a personal computer in our pockets. Further, a person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S., at 351–352.

In *United States v. Knotts*, 460 U.S. 276 (1983), the Government hid a beeper in a container of chloroform before it was purchased by one of Knotts' co-conspirators. The government tracked movement of the container both by beeper and visual surveillance from Minneapolis to Knotts's cabin in Wisconsin. *Id.* The Court concluded the "augment[ed]" visual surveillance did not constitute a search because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281, 282. Knotts could not assert a privacy interest in the information obtained. *Id.*, at 281.

In *Knotts*, the Court distinguished the primitive tracking facilitated by the beeper by the "limited use which the government made of the

signals from this particular beeper" during a discrete "automotive journey." *Id.* at 284, 285. The Court reserved the question whether "different constitutional principles may be applicable" if "twenty-four hour surveillance of any citizen of this country [were] possible." *Id.* at 283–284.

The Supreme Court considered surveillance the sort envisioned by *Knotts* in *Jones v. United States*, 565 U.S. 400 (2012). The government attached a GPS tracking device on Jones's vehicle and tracked him for 28 days. The government's physical trespass of the vehicle controlled. 565 U.S., at 404–405. Privacy concerns were at issue for the Concurring opinions, because of the track Jones himself or conducting GPS tracking of his cell phone. *Id.* at 426, 428, (Alito, J., concurring) *Id.*, at 415 (Sotomayor, J., concurring). GPS monitoring tracks "every movement" a person makes in that vehicle, the Justices found "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy"—regardless whether those movements were disclosed to the public at large. *Id.* at 430 (opinion of Alito, J.); *Id.* at 415, 132 S.Ct. 945 (opinion of Sotomayor, J.).

Jones and *Carpenter* made *Knotts* inapplicable to such cases.

If *Knotts* were applied to real-time cell phone location information, it allows the government to track an individual through a cell phone giving real-time location information. Whenever we carry cell phones on our person in public, the government could legally follow their every

move without any check. Giving the permission to track a person and discover every place he or she goes, without probable cause to do so.

Cell phones blur the distinction between public and private places, the GPS in *Knotts* was placed onto the car specifically for the purpose of tracking the defendant, that was done in public. The government in *Knotts*, therefore, could only track the defendant on public roads. Conversely, the government has no way of knowing, before calling the cell carrier to get a real-time location, whether a person's phone in public or private. As *Jones* and *Carpenter* concluded, a person might have a reasonable expectation of privacy in their public movements. Justices Sotomayor and Alito concluded that continuous monitoring of individuals' public movements violates their reasonable expectation of privacy. After the *Jones* decision, the rule expressed in *Knotts* is unworkable. *Id.* at 430 (opinion of Alito, J.); *Id.* at 415, 132 S.Ct. 945 (opinion of Sotomayor, J.).

The Court in *Carpenter* recognized that *Knotts* does not apply to historical CSLI because individuals "compulsively carry cell phones with them all the time" which allows the government to track a cell phone user's location with "near perfect surveillance, as if it ha[d] attached an ankle monitor to the phone's user." *Carpenter*, 138 S.Ct. at 2218. Cell phone technology further separates *Knotts* from real-time cell phone location information. "A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the

contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'" *Katz v. United States*, 389 U.S. 347.

Real-time cell phone location information reveals "a detailed chronicle of a person's physical presence compiled ... every moment" of every day. *Carpenter*, 138 S.Ct. at 2218. *Knotts* not applicable to Mr. Reed's case or any case that involves real-time CSLI. The wait and see if there person of interest is on a road should be rejected by this court. "Allowing government access to cell-site records contravenes [society's] expectation" that law enforcement could not, and would not, "secretly monitor and catalogue every single movement" of an individual." *Jones*, 565 U.S. at 430 (opinion of Alito, J.); *Id.* at 415, (opinion of Sotomayor, J.).

The Court of Appeals correctly found there to be a warrant required in this case. This Court should affirm the Court of Appeals and rule that a warrant is required for real-time CSLI.

Other Jurisdictions Require a Warrant.

Other courts have examined this issue and held that a warrant is required to acquire real-time CSLI. For example, in *Tracey v. State*, a pre *Carpenter* case, the Florida Supreme Court held that a warrant is required to acquire real-time CSLI. 152 So.3d 504, 526 (Fl. 2014) (opinion attached in appendix). In so holding, the Court rejected the government's contention that acts of surveillance cellphone tracking may

be lawful in isolation for short periods but otherwise infringe on reasonable expectations of privacy in the aggregate. *Id.* at 520. In holding that a warrant is required to acquire real-time CSLI, the Florida Supreme Court stated that all of the "concerns and conclusions about GPS tracking also apply to tracking and monitoring by the use of real time cell site location information." *Tracey*, 152 So.3d at 519.

One reason the Court in *Tracey* found that even short-term tracking is unconstitutional without a warrant is because it would be unworkable to hold otherwise. *Id.* at 520. Following from U.S. Supreme Court precedent, the Court pointed out that a case-by-case approach regarding the constitutionality of such warrantless tracking requires after-the-fact, ad hoc determinations. *Id.* The U.S. Supreme Court in *Oliver v. United States* has reached such conclusions regarding after-the-fact approaches to constitutional determinations of actions. 466 U.S. 170, 181 (1984) ("This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances."); *Riley v. California*, 573 U.S. 373, 398 (2014) (Allowing warrantless cellphone searches incident to arrest under certain circumstances "contravenes our general preference to provide clear guidance to law enforcement through categorical rules."); *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (In refusing to approve seizures based on less than probable cause, the Court declined to adopt a

multifactor balancing test of reasonable police conduct under the circumstances.). This is also in part because such after-the-fact, case-by-case determinations present the danger of arbitrary and inequitable enforcement. *Tracey*, 152 So.3d at 521.

In a post *Carpenter* case, the Florida Supreme Court reiterated that a warrant was required for real time CSLI tracking and also held that a warrant is required for real time use of cell-site simulators. *State v. Sylvestre*, 254 So.3d 986, 991 (Fl. 2018) (opinion attached in appendix). In doing so, the Court agreed with the logic of *Carpenter* regarding why obtaining historical CSLI data without a warrant is unconstitutional and further stated "[i]f a warrant is required for the government to obtain historical cell-site information voluntarily maintained and in the possession of a third party,... we can discern no reason why a warrant would not be required for the more invasive use of a cell-site simulator." Sylvestre, 254 So.3d at 991 (citing *Carpenter*, 138 S.Ct. at 2221).

In another post *Carpenter* case, the Indiana Supreme Court did not definitively address the issue of warrantless, acquisition of real time CSLI. *Govan v. State*, 116 N.E.3d 1165 (Id. 2019). However, following from *Carpenter*, the Court assumed that Govan had a reasonable expectation of privacy in his real-time cellphone location data. *Id.* at 3. In *Govan*, it had been reported that Govan was holding a woman against her will. *Id.* at 1. Police went to his home and found blood and cords that appeared to have been used to tie someone up. *Id.*

They obtained real time CSLI information from his cellphone provider and located him with that information. *Id.* The defense moved to suppress evidence found on Govan based on obtaining the real time CSLI without a warrant. *Id.* at 2. Again, the Court assumed that Govan had a reasonable expectation of privacy in his real time cellphone location data based on *Carpenter* but found that exigent circumstances existed. *Id.* at 5.

Prior to *Carpenter* and *Govan*, the Court of Special Appeals in Maryland in *State v. Andrews*, 134 A.3d 324, 327 (Md. Spec. App 2016) (opinion attached in appendix) did not just assume, but held that the use of a cell site simulator required a warrant. "[P]eople have a reasonable expectation that their cell phones will not be used as real-time tracking devices by law enforcement." The Court, just as the Court in *Tracey*, stated that it would be impractical to fashion a rule prohibiting a warrantless search only based on retrospective findings. *Id.* at 340.

This court should look to these opinions for guidance and affirm the Court of Appeals. This Court should require a warrant when the police want to acquire real-time CSLI.

It is also relevant that the privacy concerns in obtaining CSLI is also reflected in the Stored Communications Act. 18 USC § 2703 reads in pertinent part:

> **(c) Records concerning electronic communication service or remote computing service.-(1)** A governmental entity may require a provider of electronic communication service or

remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

> **(A)** obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President) by a court of competent jurisdiction;
>
> **(B)** obtains a court order for such disclosure under subsection (d) of this section;...

(d) Requirements for court order.--A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

Often when the aforementioned provisions arise in a case, "[u]sing a combination of statutory and Fourth Amendment analysis, the majority of federal courts examining the requirements for the acquisition of real-time cell site location data mandate that the government make a showing of probable cause." *U.S. v. Espudo*, 954 F.Supp 2d 1029, 1035 (S.D. Cal 2013) (citing, *In re App. of U.S. for an Order Authorizing Disclosure of*

Location Information, 849 F.Supp.2d 526, 539–42 (D.Md. 2011) (Fourth Amendment prohibited using electronic means to locate defendant's cell phone, absent an appropriate showing of probable cause); *In re App. of the U.S. for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device*, 396 F.Supp.2d 294 (E.D.N.Y.2005) (government cannot obtain requested information on prospective, real-time basis without showing of at least probable cause); *In re App. For Pen Register and Trap/Trace Device with Cell Site Location Authority*, 396 F.Supp.2d 747 (S.D. Tex) (obtaining real time CSLI is available upon a traditional probable cause showing); see also, *State v. Perry*, 776 S.E.2d 528 (N.C. App. 2015)).

It is undisputed law enforcement obtained real time CSLI from Mr. Reed's cellphone service. According to *Carpenter, Tracey, Sylvestre, Govan, Andrews*, and a majority of federal courts, individuals have a reasonable expectation of privacy in their real time CSLI. Their reasoning is sound. A warrant was required in order for law enforcement officers to access such information. The Court of Appeals was correct in finding a warrant was required. Suppression was required in this case. The Court of Appeals must be affirmed.

II. THE GOOD FAITH EXCEPTION DOES NOT APPLY

The Court of Appeals correctly rejected the application of the good-faith exception to the warrant requirement in this case. There was no case law authorizing the police search of Mr. Reed's real-time CSLI. Generally, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). However, "when binding appellate precedent specifically *authorizes* a particular police practice," suppression is not required. *Davis v. United States*, 564 U.S. 229, 241 (2011) (emphasis in original). There was **no** binding precedent when the search of Mr. Reed real-time location occurred. *Davis* involved a very clear cut, specific rule, not one that could be inferred from other cases via complex legal reasoning. "The *Davis* exception . . . does not reach so far as to excuse mistaken efforts to extend controlling precedents." *United States v. Jenkins*, 850 F.3d 912, 920 (7th Cir. 2017). The Commonwealth would like this court to partake in complex legal reasoning to reach a conclusion there was binding precedent when there clearly was not.

The Court of Appeals correctly found the good faith exception should not apply.

> [T]he Kentucky Supreme Court specifically addressed the constitutional status of real-time CSLI in a case involving a detective who pinged the cell phone of a suspect who was

accused of beating his girlfriend and then disappearing with her children. We set forth in full the Supreme Court's analysis, which does not affirmatively adopt the third-party doctrine and instead emphasizes the unresolved and complex nature of CSLI for Fourth Amendment purposes:

> Whether the location information of a cell phone is entitled to constitutional protection under the Fourth Amendment is an open question, at least to the extent that neither this Court nor the U.S. Supreme Court has decided the question. *See United States v. Caraballo*, 963 F. Supp. 2d 341, 352 (D. Vt. 2013) (describing it as an "open question"); *Cucuta v. New York City*, 13 CIV. 558 AJP [25 F.Supp.3d 400], 2014 WL 1876529 (S.D.N.Y. May 9, 2014) ("[I]t is far from clearly established whether an individual has a legitimate and reasonable expectation of privacy in his real-time location data conveyed by his cell phone, especially where law enforcement affirmatively pings a phone to determine its location.").
>
> While the U.S. Supreme Court has recently held that the warrantless placement of a GPS tracking device on a suspect's car violates the Fourth Amendment, *see United States v. Jones*, [565] U.S. [400], 132 S. Ct. 945, 949, 181 L. Ed. 2d 911 (2012), it did so under a trespass theory, *id.* at 949-52. That is not what happened here. Instead, [the detective] (really, AT & T) analyzed the electronic signals emanating from [the suspect]'s phone to divine its location. As to **"[s]ituations involving merely the transmission of electronic signals without trespass,"** the Supreme Court noted that they **"would *remain* subject to *Katz* analysis."** *Id.* at 953. The *Katz* analysis is the familiar reasonable-expectation-of-privacy test derived from *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).
>
> Whether a cell phone's real-time location information is protected under *Katz* is a difficult question. Some courts, including the Sixth

> Circuit, have held that, at least under some circumstances, there is no reasonable expectation of privacy in the data given off by a cell phone. *E.g., United States v. Skinner*, 690 F.3d 772, 777 (6th Cir. 2012). Other courts have suggested that police intrusion into this data, at least when the phone is not travelling on a public roadway and is in a private residence, is limited to situations constituting an emergency, such as is allowed under 18 U.S.C § 2702. *See, e.g., Caraballo*, 963 F. Supp. 2d at 362-63.
>
> Unfortunately for our purposes, the *Hedgepath* Court did not rule on the matter because it was able to resolve the case on other grounds, but its commentary makes it clear that at the time Reed's cell phone was pinged, there was no clearly established, binding precedent in Kentucky regarding real-time CSLI upon which the police could rely. In the absence of such precedent, the decision to proceed without a warrant and without a showing of exigent circumstances or other exception does not support a finding of good faith. "[*United States v.*] *Davis* [598 F.3d 1259 (11th Cir. 2010)]'s good-faith exception is not a license for law enforcement to forge ahead with new investigative methods in the face of uncertainty as to their constitutionality." *United States v. Sparks*, 711 F.3d 58, 67 (1st Cir. 2013).

(Slip Op. 12-14) (*quoting Hedgepath v. Commonwealth*, 441 S.W.3d 119, 124-25 (Ky. 2014)).

The Commonwealth cites no precedent specifically authorizing the exact action taken by officers. The Court of Appeals highlighted the truly unresolved nature of real-time CSLI at the time of the search in this case. This reasoning and analysis based on *Hedgepath* correctly shows the good faith expectation does not apply.

Although the state of the law was clearly unsettled as to real-time CSLI, the Commonwealth continues its assertion that *Knotts* is "exactly

the kind of 'binding appellate precedent' that law enforcement is entitled to rely on." (Appellant Brief at 26) (quoting *Davis* 564 U.S. at 241). As stated above *Knotts* is distinguishable from this case and should not be applied as a binding precedent to real-time CSLI searches. (*Supra* at 12-16). Just because Mr. Reed happened to be on the road when the search occurred should not change the outcome of this case. Moreover, the specific action taken by police was not authorized at the time and it was prohibited under federal law. The privacy concerns in obtaining CSLI have long been reflected in the Stored Communications Act. 18 USC § 2703. (*Supra* at 19).

The officers in this case were not specifically authorized to take the action taken in this case by a binding court precedent or legislative body. In fact it was prohibited under binding, federal law, and due to *Carpenter*, suppression was required. No exception to the warrant requirement should be applied. The Court of Appeals should be Affirmed.

CONCLUSION

For the reasons stated above, Mr. Reed asks this Court to affirm the Court of Appeals and order that all evidence in this case be suppressed.

Respectfully submitted,

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