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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NEVELLE JOSHUA EBERHART,

APPELLANT

APPELLATE CASE NO. 2023-000234

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

1. The mechanical application of the third-party doctrine advanced by Respondent does not protect the reasonable expectation of privacy over a person's movements from a warrantless intrusion by the government.

Respondent argues that there is no constitutional concern, either under the Fourth Amendment or the S.C. Const. art. I, §10, when the government obtains location data of a criminal suspect when such data is maintained by a third party under a private bond agreement because appellant lacked a reasonable expectation of privacy that society is prepared to acknowledge in such data. Resp. Br. p. 12. This mechanical approach to GPS type data is misguided. As location data becomes more and more pervasive, this assertion opens the door to the clear danger foreseen by the United States Supreme Court that we now live in a world in which "[w]hoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment." Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206, 2218 (2018).

In support of the state's position, respondent focuses on the source of the location data, an ankle monitor, rather than the nature of the information itself, the detailed history of appellant's movements, twenty-four hours a day, seven days a week. GPS data, from your phone, your smart watch, your vehicle, and your fitness tracker 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. at ___, 138 S. Ct. at 2217. By simply discounting the nature of the information obtained without a warrant (the location data) and focusing instead on its source

(an ankle monitor supplied by a private bond company), respondent is attempting to carve out an exception to the expectation of privacy recognized in Carpenter.

By contrast, this Court, and the lower court before it, should begin the analysis with the nature of the information to determine whether it is an area deserving of protection under both the Fourth Amendment and S.C. Const. art. I, §10. If the nature of the information is deemed protected (do we as citizens have reasonable expectation of privacy that society recognizes), a warrant would be required before the government may access it absent exigent circumstances (such as ongoing emergency). This approach places the burden of invading the protected area on the state to either obtain a warrant or be prepared to justify the warrantless search and seizure.

In this case, respondent asserts that appellant waived an expectation of privacy due to the nature of the device used to collect the data. Resp. Br. p. 12. The lower court agreed with this argument, specifically finding that "I have not heard anything or did not find that the Defendant has a legitimate expectation of privacy when he *voluntarily* submits to GPS monitoring." R. 43, ll. 11 - 14. One would assume this same argument would apply to all data stored on your behalf by a third-party that you voluntarily agree to use, such as your health information on a fitness tracker. This position was rejected in Carpenter which focused, not on the third-party source of the stored data, but on the nature of the data itself.

> The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today. The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information.

Carpenter, 585 at ___, 138 S. Ct. at 2219.

The logical extension of Carpenter is to focus on the nature of the data (the detailed location data), not its source (an ankle monitor). Here, the data is of the same nature as that addressed in Carpenter. Location data, regardless of its source, is protected by both the Fourth Amendment and S.C. Const. art. I, §10. This does not prohibit government access through proper warrant applications or exigent circumstances, or even waiver of those protections by the citizen through consent in the appropriate settings and with the appropriate showing.

When a warrantless invasion of a protected area occurs, the burden is on the state to demonstrate an appropriate exception. *See* State v. Key, 431 S.C. 336, 348, 848 S.E.2d 315, 320–21 (2020) ("Once a privacy right is held to exist, the court may not sponsor the notion of requiring a defendant to prove that this right—a right she already possesses—exists in any given case."). It was the respondent's burden below to demonstrate a warrant exception applies. That would require the state to have produced some evidence that went to consent or waiver by appellant, rather than the mere existence of the device being connected to a bonding company. Respondent could have attempted to show this through the bond agreement or a court order indicating appellant was aware of the invasion of his legitimate expectation of privacy from government intrusion for investigative purposes unrelated to the reason for the ankle monitor. Such evidence, either in the form of a court order related to appellant's release on bond or the written bond agreement itself, may have demonstrated appellant's expectation in the privacy of his movements from government intrusion was waived.

By way of example, in People v. Henderson, 76 Misc. 3d 1100, 174 N.Y.S.3d 182 (N.Y. Sup. Ct. 2022), a case cited by respondent as authority that petitioner lacked an expectation of privacy, the court was provided evidence of Henderson's agreement with the bond company. The

Henderson court noted that "[c]lause one of the contract states, 'I understand that my location will be monitored by this Device and if necessary and/or required by law, may be shared with other law enforcement agencies.'" Id. at 1105, 174 N.Y.S.3d at 186. The state in Henderson made the effort to provide the court with evidence of the underlying agreement demonstrating Henderson's understanding and consent to release of the GPS data. No such showing or effort was made by the state in the present case.

The state's reliance on People v. Campbell, 425 P.3d 1163 (Colo. App. 2018) is also misplaced. Campbell was decided months before the Supreme Court decided Carpenter. The superficial third-party approach adopted in Campbell was specifically rejected by Carpenter. The Colorado Court of Appeals held that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." Campbell, 425 P.3d at 1169 (citing United States v. Miller, 425 U.S. 435, 443 (1976). While not abandoning the third-party doctrine, the Supreme Court curtailed the automatic waiver concept when it deals with information as pervasive as location data that reveals so much of a person's day to day life to scrutiny.

> The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. Smith and Miller, however, did not rely solely on the act of sharing. They also considered "the nature of the particular documents sought" and limitations on any "legitimate 'expectation of privacy' concerning their contents." Miller, 425 U.S., at 442, 96 S. Ct. 1619. *In mechanically applying the third-party doctrine to this case* the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI.

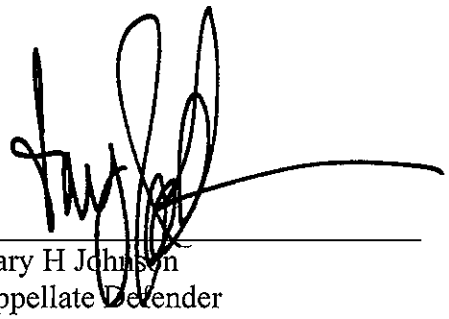
Carpenter, 585 at ___, 138 S. Ct. at 2210 (*emphasis added*).

The lower court, and respondent in its brief to this court, has fallen into the same mechanical approach to the third-party doctrine. Much like the court in Campbell, the

respondent's superficial application of the third-party doctrine fails to appreciate the nature of the invasion of privacy involved – intimate knowledge of the movement of a citizen around the clock. Securing a warrant before obtaining that information, or at least the requirement of producing affirmative evidence of consent or exigent circumstance, is required to comply with the protections of both the Fourth Amendment and S.C. Const. art. I, §10. The lower court committed reversible error in its mechanical application of the law and this court should hold that appellant's location data is protected from a warrantless search by the government and that when such data is obtained without a warrant, the government bears the burden to justify the warrantless search.

CONCLUSION

For the reasons outlined herein and in appellant's Initial Brief, appellant's convictions should be reversed, and the case remanded to the Richland County Court of General Sessions for a new trial.



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This 18th day of December, 2023.

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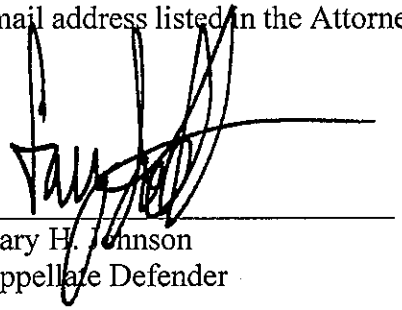
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Final Reply Brief of Appellant in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 18th day of December, 2023.



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