RECEIVED

Nov 16 2026

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT-PETITIONER,

V.

NEVELLE JOSHUA EBERHART,

PETITIONER-RESPONDENT

Opinion No. 6150 (S.C. Ct. App. Filed July 1, 2026)

APPELLATE CASE NO. 2023-000234

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

GARY H JOHNSON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER-RESPONDENT

INDEX

INDEX i

PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI 1

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

ARGUMENT

The Court of Appeals correctly found the State failed to overcome Petitioner-Respondent's reasonable expectation of privacy in the whole of his movements obtained through GPS monitoring by failing to present supporting evidence of waiver or consent in the form of a private bond agreement or court order allowing disclosure to law enforcement for general investigative purposes unrelated to the underlying bond. 4

CONCLUSION 11

PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

A Fourth Amendment search occurs when the government invades an individual's "reasonable expectation of privacy." Eberhart was required to wear an ankle monitor while out on bond. Did the court of appeals err by holding Eberhart was "searched" when police obtained the bondsman's GPS records produced by the ankle monitor?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE

Whether the Court of Appeals correctly found the State failed to overcome Petitioner-Respondent's reasonable expectation of privacy in the whole of his movements obtained through GPS monitoring by failing to present supporting evidence of waiver or consent in the form of a private bond agreement or court order allowing disclosure to law enforcement for general investigative purposes unrelated to the underlying bond?

STATEMENT OF THE CASE

Respondent-Petitioner accurately provides the statement of the case.

STANDARD OF REVIEW

"Each party has the burden to prove separate things during the motion to suppress. The state bears the burden to demonstrate that it was entitled to conduct the search or seizure under an exception to the Fourth Amendment's warrant requirement." State v. Robinson, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014). "[T]he criminal defendant retains the burden to establish that he is asserting his own Fourth Amendment rights, rather than vicariously asserting the rights of others; therefore, the defendant bears the burden to demonstrate that he had an actual and reasonable expectation of privacy in the place illegally searched." Id. "A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable." State v. Brown, 423 S.C. 519, 526, 815 S.E.2d 761, 765 (2018) (*quoting* State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004)). 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. We must therefore part company with the *Mitchell* Court, as we will not impose upon a defendant the burden of establishing the absence of exigent circumstances. We have consistently held the prosecution has the sole burden of proving the existence of an exception to the warrant requirement.

State v. Key, 431 S.C. 336, 348, 848 S.E.2d 315, 320–21 (2020) (referencing and declining to follow Mitchell v. Wisconsin, 139 S. Ct. 2525, 2531 (2019)).

ARGUMENT

The Court of Appeals correctly found the State failed to overcome Petitioner-Respondent's reasonable expectation of privacy in the whole of his movements obtained through GPS monitoring by failing to present supporting evidence of waiver or consent in the form of a private bond agreement or court order allowing disclosure to law enforcement for general investigative purposes unrelated to the underlying bond.

The State misapprehends the limited impact and reach of the Court of Appeals holding. In essence, the Court of Appeals held that Petitioner-Respondent met his initial burden in establishing a reasonable expectation of privacy in the GPS monitoring data of the whole of his movements maintained by a third-party bonding company under both the Fourth Amendment and S.C. Const. art. 1, § 10 under the rationale of Carpenter v. United States, 585 U.S. 296 (2018) and our State's heightened protections for individual privacy.

> We find Eberhart had a subjective expectation in the privacy of his GPS data. He argues he was on bond for an unrelated charge, the GPS monitor was supplied by a private bond company for purposes of ensuring he appeared for that charge, there is no evidence in the record that the monitor was required as a condition of bond by a court, and the State failed to present any evidence that he was informed the government could have access to the data for investigatory purposes unrelated to his bond.

State v. Eberhart, 448 S.C. 331, 342, 934 S.E.2d 185, 190 (Ct. App. 2026), reh'g denied (Aug. 24, 2026).

The Court of Appeals correctly ruled that GPS data, be it from cell phone location data or other sources, invades a person's expectation of privacy. Such "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.'" Carpenter, 585 U.S. at 311. While the source of that data matters, a person on pre-trial release on bond does not waive the protection of his location data for all purposes at all times. Guidance here can be found in other settings, such as those who are monitored as a condition of probation or parole.

Courts have long recognized the lowered constitutional protections of citizens subject to conditions of probationary releases.

> Probation is considered 'an act of grace' given to a person who is still serving the sentence of the court, and 'the revocation of this privilege of probation is more in the nature of an extension of the original proceedings.' In addition, section 24-21-410 of the South Carolina Code (Supp. 2017) provides . . . [before] a defendant may be placed on probation, he must agree in writing to be subject to a search or seizure, without a search warrant, based on reasonable suspicions, of the defendant's person.

State v. Ross, 423 S.C. 504, 511, 815 S.E.2d 754, 757 (2018) (internal citations omitted). While the privacy interest of someone on probation is lower, it is not non-existent.

> Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. Those interests warrant a lesser than probable-cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.

United States v. Knights, 534 U.S. 112, 121, (2001) (internal citations omitted). Knights was followed by Samson v. California, 547 U.S. 843, 857 (2006), which held that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Id. at 857. This blanket reduction of any expectation of privacy for those on probation from warrantless invasions of areas of privacy has been rejected under by other states on state constitutional grounds. *See* State v. Short, 851 N.W.2d 474, 506 (Iowa 2014) ("The United States Supreme Court in Griffin, Knights, and Samson has engaged in innovations that significantly reduce the protections of the Warrant Clause of the Fourth Amendment. We decline to join the retreat under the Iowa Constitution. We hold that under article I, section 8, the warrant requirement has full applicability to home searches of both probationers and parolees by law enforcement. As a result, because evidence seized in this case was obtained unlawfully, the

motion to suppress should have been granted."). As South Carolina's Constitution provides even more explicit protection against invasions of privacy than Iowa's Constitution, which mirrors the Fourth Amendment, the reasoning in State v. Short is compelling, but need not be addressed here as Petitioner-Respondent was not subject to probation or parole restrictions. Rather, his rights were restricted solely by the terms of his pre-trial release and did not equate to a general abandonment of his reasonable expectation of privacy protected by Carpenter and S.C. Const. art. 1, § 10. Importantly, S.C. Const. art. 1, § 10 provides even greater protections to South Carolinians than the Fourth Amendment.

South Carolinians are protected "from two distinct actions by the government: first are 'unreasonable searches and seizures[,]' largely mirroring our federal constitution's Fourth Amendment, and second is a protection not found in the United States Constitution, to be secure from 'unreasonable invasions of privacy.'" Planned Parenthood S. Atl. v. State, 438 S.C. 188, 199, 882 S.E.2d 770, 776 (2023). This heightened protection distinguishes the rights afforded South Carolina citizens from the general Fourth Amendment rights enjoyed by all. *Compare* State v. Counts, 413 S.C. 153, 172, 776 S.E.2d 59, 70 (2015) (holding that "law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door."), *with* Kentucky v. King, 563 U.S. 452, 469 (2011) (holding "law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."). The idea that the government would have access to the whole of your movements, from the public streets to your own bedroom, is an invasion of privacy that "shall not be violated" absent a warrant based upon probable cause. S.C. Const. art. I, §10.

Since Petitioner-Respondent met the initial burden regarding an expectation of privacy, the Court of Appeals found the State failed to establish an exception, such as consent or waiver, as was its burden. "We also note that our analysis in this case would be different if this case concerned court-ordered monitoring or if the agreement was included in the record and indicated BadBoyz could or would share information with law enforcement." State v. Eberhart, 448 S.C. 331, 340, 934 S.E.2d 185, 189 (Ct. App. 2026), reh'g denied (Aug. 24, 2026).[1]

The State has attempted to avoid its failings before the trial court since it was unprepared at trial to meet its own burden once Petitioner-Respondent asserted a valid Fourth Amendment claim related to the warrantless access by law enforcement to the whole of his movements. Rather, the State has attempted to *expand the Record after trial and the decision of the Court of Appeals to contest a fact* (that the bond agreement at issue was a private contract between Petitioner-Respondent and his bond company) that the State failed to contest during trial.

In regard to the nature of the underlying agreement requiring Petitioner-Respondent to wear an ankle monitor as a condition of bond was central to the argument at trial. Counsel for Petitioner-Respondent argued that the private agreement with the bond company was not mandated by the court:

> Your Honor, just on cursory review of the *United States v. Jones*, this is a government installing a GPS device on a targeted vehicle. That is certainly a different circumstance than a voluntary agreement entered into with a bonding company. GPS is to ensure his good behavior on bond and to know his location so that they

[1] S.C. Code Ann. § 17-15-37(B)(2) requires a court ordered bond to "allow any law enforcement agency, including the prosecutor's office, to have access to real-time monitoring, if possible, and any reports requested by law enforcement or the prosecution must be provided within twenty-four hours of the request." This Code section was not applicable at the time of the actions here as it was adopted after the bond was issued due to its effective date of December 20, 2023. However, the GPS monitoring requirement is discretionary by the bond court and, even if this Code section had been applicable, the burden would have been on the State to demonstrate the monitoring was mandated by the bond court.

> can bring him to court when he's required to come to court. That's nothing the State put on him.

R. 11, l. 22 – 12, l. 5. The State argued below, as opposed to its current argument to this Court, and the lower court found, that Petitioner-Respondent had "consented" to the search or had waived any expectation of privacy as to the data when appellant agreed to the monitor provided by a third-party bonding company as a condition for the posting of his bond on unrelated criminal charges. R. 38, ll. 21-25; 43, l. 24-44, l. 3. The State presented no court order requiring such GPS monitoring and did not contest the private bond agreement assertion by Petitioner-Respondent's counsel. This omission by the State at trial was reflected in the limited holding by the Court of Appeals: Petitioner-Respondent had a reasonable expectation of privacy in the GPS records of the whole of his movements *that may have been waived for disclosure to law enforcement* but the State failed to carry its burden demonstrating such waiver.

Petitioner-Respondent did not assert an absolute expectation of privacy in such records nor did the Court of Appeals find such a right, in direct contrast to the dire predictions asserted by the State that this "decision, if allowed to stand, will seriously undermine the efficacy of pretrial OPS monitoring and set an alarming Fourth Amendment precedent." State's Petition for Certiorari, p. 3. On the contrary, the limited holding by the Court of Appeals that *on this Record* the State failed to establish a viable exception that would allow warrantless access to GPS monitoring data from a private bond company to investigate criminal activity unrelated to the bond itself would have no impact on pretrial monitoring. It is the State, not the Court of Appeals, that relies upon absolutes here.

In the State's view, there are no expectations of privacy for individuals who, by private agreement to secure bond, wear GPS monitoring devices. Since this assertion is an absolute, that data may thus be disclosed without consent to law enforcement and the public at large. Bond

companies would be free to post locations in real time on their website since such would not be an invasion of an expectation of privacy. Both S.C. Const. art. 1, § 10 and Carpenter v. United States, 585 U.S. 296 (2018) reject such an absolute statement when the underlying data encompasses the whole of one's movements like GPS monitoring.

The proper analysis does not stand on absolutes as argued by the State. Rather, the burden here was on the State to overcome the expectation of privacy by demonstrating, for example, *limited consent* to disclosure at the request of law enforcement as our Legislature has recently incorporated into court ordered bond agreements under S.C. Code Ann. § 17-15-37(B)(2). The State's failure to make this proper showing during trial does not require salvage by this Court.

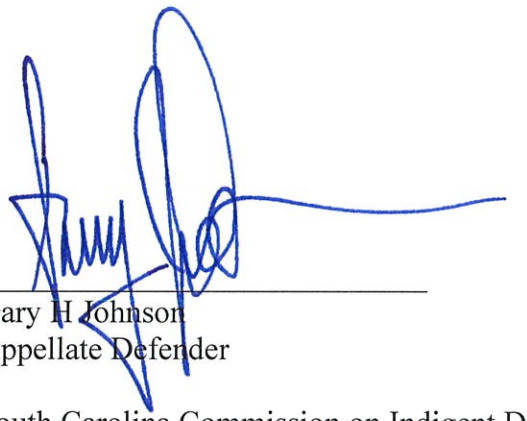
Contrast the present case to the use of GPS in State v. Brown, 424 S.C. 479, 818 S.E.2d 735 (2018), who was being monitored by GPS under terms of probationary release and enjoyed a lower expectation of privacy in such information. This is reinforced by the plain language of S.C. Code Ann. § 24-21-410 (1976 as amended) that specifically mandates a probationer must agree in "writing to be subject to a search or seizure, without a search warrant, based on reasonable suspicion . . ." Since Petitioner-Respondent here was on pre-trial release, his expectation of privacy in his movements, absent a contrary showing by the State of affirmative consent to disclosure of such information through the terms of pre-trial release from a court order or terms of the bond agreement (as S.C. Code Ann. § 24-21-410 dictates for those on probation), was protected by both the Fourth Amendment and S.C. Const. art. I, section 10, from warrantless searches by the State.

The validity of the statutes that overcome the expectation of privacy for those on probation and, as of the effective date, those on pre-trial release are not impacted by the decision

of the Court of Appeals here. Rather, those statutes support the fundamental holding of the Court of Appeals: those on pre-trial bond and probation do have an expectation of privacy such data would show, but that expectation may be waived by either the terms of pre-trial release or as part of the grace of the State under the express terms of probation. In appropriate circumstances, those statutes serve as notice that limited disclosure to law enforcement of such data would be required as a condition to either bond or probation. No such notice was provided to the lower court here, forcing the State to assert an absolute waiver or lack of any expectation of privacy for all those on pre-trial bond. This Court need not adopt such absolute as the Legislature has already created a limited waiver of such expectation that is restricted to law enforcement and related agencies rather than absolute and that falls within the discretion of the judge who may order such monitoring as a condition of pre-trial release.

CONCLUSION

The trial court committed reversible error in not suppressing the GPS data due to the State's failure to provide sufficient ground showing waiver or consent. The Court of Appeals correctly ruled the GPS data was admitted in error. While Petitioner-Respondent has sought Certiorari to review the harmless error analysis of the Court of Appeals, this Court should reject the State's petition asserting error in the underlying holding.



Gary H Johnson
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER-RESPONDENT

This 16th day of November, 2026.