



ALAN WILSON
ATTORNEY GENERAL

November 21, 2017

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SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Javon Dion Gibbs*
Appeal from Horry County
Appellate Case No. 2017-001846

Dear Ms. Kitchings:

As per my assistant's telephone call today with Jacqueline of your office, please be advised that I am in receipt of your letter dated November 16, 2017 regarding the above-captioned matter. I am confirming the following:

1. On November 8, 2017, we received the transcript of hearing before the Honorable Larry B. Hyman, Jr. held August 20, 2017;
2. On November 17, 2017 this office sent in for filing a Motion to Hold Appeal in Abeyance Pending Resolution of Issue by the United States Supreme Court, a copy of which is attached hereto.

Please advise if anything further is needed.

Sincerely,

Melody J. Brown,
Senior Assistant Deputy Attorney General

MJB/dmd
Enclosures

cc: Robert Dudek, Esq. (w/copy of encls.)
Clay Mitchell, Assistant Attorney General
Trisha Allen, Victim Advocacy Division

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2017-001846

THE STATE,

Appellant,

vs.

JAVON DION GIBBS,

Respondent.

**MOTION TO HOLD APPEAL
IN ABEYANCE PENDING RESOLUTION OF
ISSUE BY UNITED STATES SUPREME COURT**

The State, through its undersigned counsel, moves for an order to hold this appeal in abeyance pending the United States Supreme Court's issuance of a decision in Carpenter v. United States, 819 F.3d 880 (6th Cir. 2016) cert. granted, 137 S Ct. 2211, 198 L. Ed. 2d 657 (2017) (No. 16-402). The State would respectfully show unto the Court as follows:

I.

On February 26, 2015, Javon Dion Gibbs (Gibbs) was indicted by the Horry County Grand Jury for murder and kidnapping. Gibbs' case was scheduled for trial the week of September 4th, 2017. Gibbs filed a number of pre-trial motions, and the Honorable Larry B. Hyman, Jr. scheduled and heard pre-trial motions on August 30, 2017. Gibbs was represented by Ralph J. Wilson, Jr. The State was represented by Assistant Attorneys General Jason Anders and

J. Clayton Mitchell. Relevant to this action, Gibbs filed a motion captioned “Motion to Suppress Phone Records,” which argued his phone records, including cell site location information should be suppressed. Specifically, he argued the search warrant lacked probable cause and that his Fourth Amendment rights were violated. Gibbs argued the Fourth Amendment applied because he had a reasonable expectation of privacy in his phone records, including the cell site location information. At the conclusion of the hearing and after hearing arguments from both sides, the trial judge ruled that the phone records would be suppressed. He issued a formal written order on September 5, 2017.

II.

On September 5, 2017, the State filed a notice of appeal and accompanying documents with this Court. The State submits that the issue of whether the trial judge erred in suppressing the defendant’s phone records, specifically cell-site location information, will be implicated in the United States Supreme Court’s decision in Carpenter v. United States, 819 F.3d 880 (6th Cir. 2016) cert. granted, 137 S Ct. 2211, 198 L. Ed. 2d 657 (2017) (No. 16-402). The issue as framed by the government is: “Whether the government’s acquisition, pursuant to a court order issued under 18 U.S.C. 2703(d), of historical cell-site records created and maintained by a cell-service provider violates the Fourth Amendment rights of the individual customer to whom the records pertain.” Brief for the United States at (I) Carpenter v. United States, 137 S Ct. 2211 (2017), No. 16-402. In the case before this Court, the trial judge suppressed the cell-site location information and found that the defendant’s Fourth Amendment rights were violated when the telephone company provided law enforcement with Gibbs’ phone records. He also found that the defendant had a reasonable expectation of privacy in those records.

The Supreme Court's decision in Carpenter¹ is highly relevant to this case and will likely play a large and decisive role in the ultimate outcome in the issue on appeal. It is critical and necessary for the final decision in Carpenter to be issued before the State can fully and properly present the issues to this Court. Carpenter is scheduled to be argued on Wednesday, November 29, 2017, so the court's decision will be issued by the end of the current term, no later than June or July 2018. Accordingly, the State requests this Court to hold this appeal and the time for filing the Initial Brief of Respondent and Designation of Matter in abeyance pending the Supreme Court's resolution of Carpenter and to permit the State thirty (30) days to file the Initial Brief of Respondent and Designation of Matter in this case after the Supreme Court issues its final decision. The State also asks this Court to hold the filing deadlines in abeyance pending resolution of this motion. Should this Court grant the State's motion, the State will immediately notify this Court in writing when the Supreme Court issues its final decision in Carpenter. Further, the State also asks that should this Court deny its motion, that the State have thirty (30) days from such order to submit its Initial Brief of Respondent and Designation of Matter in this case.

¹ The issue is further implicated by a Fourth Circuit Court of Appeals case that is still pending certiorari. See United States v. Graham, 824 F. 3d 421 (4th Cir. 2016), petition for cert. filed, __ S. Ct. __ (U.S. Sep. 26, 2016) (No. 16-6308). The Supreme Court's decision in Carpenter will also likely affect the decision in Graham. The issue as presented by the defendant in Graham:

(1) Whether the Fourth Amendment requires law enforcement to obtain a warrant to acquire cell-site location information used to track and reconstruct the location and movements of cell-phone users over extended periods of time; and (2) whether 18 U.S.C. § 2703, which contains both a provision that requires the government to seek a warrant in order to obtain stored location information from cellular-service providers, as well as a provision allowing law enforcement to obtain this data on less than probable cause, supports application of the good-faith exception to law enforcement's acquisition of over seven months of cell-site location information without a warrant.

Brief of Petitioner at i, Graham v. United States, No. 16-6308.

WHEREFORE, the State asks that the Court hold the time for filing the Initial Brief of Respondent and Designation of Matter in abeyance pending a final disposition by the Supreme Court in Carpenter v. United States; extend the deadline for the service and filing of the Initial Brief of Respondent and Designation of Matter in this case for thirty (30) days from the date the Supreme Court issues the final decision in Carpenter v. United States; hold the filing deadlines in abeyance pending resolution of this motion; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

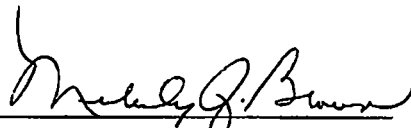
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BY:



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November 17, 2017.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM Horry COUNTY
Court of General Sessions
Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2017-001846

THE STATE,

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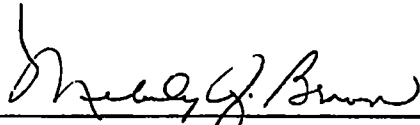
Respondent.

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the within Motion to Hold Appeal in Abeyance Pending Resolution of Issue By the United States Supreme Court by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek
SCCID/Division of Appellate Defense
1330 Lady Street, Suite #401
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served this 17th day of November, 2017.



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ALAN WILSON
ATTORNEY GENERAL

November 17, 2017

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Javon Dion Gibbs
Appellate Case No. 2017-001846

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Motion to Hold Appeal in Abeyance Pending Resolution of Issue by United States Supreme Court, along with roof of service, for filing in the above-referenced appeal.

Thank you for your assistance in this matter.

Sincerely,

Melody J. Brown
Senior Assistant Deputy Attorney General

MJB/dmd
Enclosures

cc: Robert M. Dudek, Esq. (w/two copies of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)