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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2017-001846

THE STATE,

Appellant**,**

v.

JAVON D. GIBBS,

Respondent**.**

2020-UP-244

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

On August 19, 2020, this Court filed an unpublished *per curiam* opinion in which it affirmed the trial judge's order granting this murder and kidnapping defendant's motion to suppress the search warrant for his CSLI. *State v. Javon D. Gibbs*, 2020-UP-244 (S.C. Ct.App., Aug. 19, 2020). In doing so, the Court affirmed the trial judge's clearly erroneous finding that that the issuing magistrate did not have a substantial basis upon which to conclude that probable cause existed for the warrant to search the CSLI on Gibbs' phone, and that police did not in good faith reliance on the warrant that was issued. Finally, the Court rejected the State's argument that a search warrant was not required even after the United States Supreme Court's decision in *Carpenter v. United States*, 138 S.Ct. 2206, 2217 n. 3 (2018), where the sharply divided Court

held for the very first time in a 5-4 decision that individuals have a reasonable expectation of privacy in the record of their physical movements captured by cell site location information and that acquisition of more than seven days of historical cell site location information constitutes a "search" under the Fourth Amendment. Appellant (the State) respectfully asks this Court to grant a petition for rehearing pursuant to Rule 221, SCACR, based upon the particular facts or points of law which this Court may have overlooked, misapprehended or misconstrued as set out below. Appellant (the State) also respectfully suggests rehearing en banc pursuant to Rule 219, SCACR, as the resolution in this case is in conflict with other cases decided by this Court. In support of its position, Appellant would respectfully show the Court:

I.

Initially, the State notes that Respondent argued at the hearing on his motion to suppress that "there is a guaranteed expectation of privacy guaranteed by the Fourth Amendment [in] cell phone records." ***R. 7***. He later cited to *United States v. Maynard*, 615 F.3d 544 (D.C.Cir. 2010), *aff'd in part sub nom., United States v. Jones*, 565 U.S. 400 (2012). ***R. 46***. Clearly, this was an erroneous statement of law at the time it was made because no state appellate court had ever ruled to this effect and, as late as 2012, "*no circuit court* [*of appeals*] *had yet held the Fourth Amendment applicable* to CSLI data." *See United States. v. Elmore*, 917 F.3d 1068, 1078 (9th Cir. 2019) (collecting cases) (emphasis added).[1]Judge Hyman, however, accepted this erroneous statement of law in granting the motion to suppress. ***R. 102, ¶ 5***. The State submits that this then-clear legal error infected the remainder of his Order.

[1] *Carpenter* left open whether gathering six days or less of CSLI requires a warrant and, as discussed later, the State's position is that one should not have been required here.

II.

The State submits that this Court may have overlooked that there was probable cause to issue the search warrant for Gibbs' CSLI. The affidavit supporting the search warrant in this case read as follows:

> On 8/27/13 the mother of Zachary Malinowski reported him *missing* from 2918 Hwy 905 in the Conway section of Horry County. Family and friends were interviewed including a close girlfriend and the most recent contact they had with him was 8/25/13 by phone. This is not normal for him and *it is believed something happened to him*. A subsequent search of the victim's phone showed activity up to 0424 where the phone completely shut off in the Aynor area. His vehicle was located several days later completely burned and other property was located on the side of different roadways. As of 1 1/5/13 the victim or his body have not been located. The phone number to be searched belongs to *Javon Gibbs*[,] who has been *identified by many as being involved with his disappearance based on drug related incidents before his disappearance*. The male denied the allegations and identified that he did not want to provide a DNA sample or take a polygraph to exclude him. *It is my belief that searching the records of Javon Gibbs will provide information regarding any contact with the victim and his whereabouts during the date and time the victim went missing.*

R. 97.

The State submits that, in affirming Judge Hyman's ruling, the Court may have overlooked or misapprehended that when this affidavit in support of the warrant is read in conjunction with Inv. Martin's supplementary testimony at the hearing on the motion to suppress, there was sufficient evidence for the magistrate to conclude that probable cause existed for the issuance of a warrant.

In South Carolina, search warrants may be issued "only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140 (2003); *see also State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987). An affidavit supporting a warrant must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of probable cause. *State v.*

Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). In determining whether there is probable cause to issue a warrant, however, the Fourth Amendment permits a magistrate to consider sworn testimony supplementing the affidavit in support of the warrant. *See, e.g., State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975); *State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990); *Frazier v. Roberts*, 441 F.2d 1224, 1226 (8th Cir. 1971); *United States v. Clyburn*, 24 F.3d 613, 617 (4th Cir. 1994).

"[P]robable cause is a flexible, common-sense standard." *Texas v. Brown*, 460 U.S. 730, 741 (1983). It is a "'practical, nontechnical conception'" that deals with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,'" *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)). It is "a fluid concept—turning on the *assessment of probabilities* in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules," *id*. at 232 (emphasis added), and the determination must be made under the totality of the circumstances. *Id*. at 230-31, 233, 238.

As the Supreme Court explained in *Gates*:

> As early as *Locke v. United States*, 7 Cranch. 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context, that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation.... It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the *quanta* ... of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. *Brinegar*, *supra*, 338 U.S., at 173, 69 S.Ct., at 1309. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." [*Spinelli v. United States*, 393 U.S. 410, 419, 89 S.Ct. 584, 590 (1969)]. *See* Model Code of Pre-Arraignment

> Procedure § 210.1(7) (Proposed Off. Draft 1972); W. LaFave, *Search and Seizure*, § 3.2(3) (1978).
>
> We also have recognized that affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area." [*United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 745 (1965)]. Likewise, search and arrest warrants long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of "probable cause." *See Shadwick v. City of Tampa*, 407 U.S. 345, 348-350, 92 S.Ct. 2119, 2121–2122, 32 L.Ed.2d 783 (1972). The rigorous inquiry into the *Spinelli* prongs and the complex superstructure of evidentiary and analytical rules that some have seen implicit in our *Spinelli* decision, cannot be reconciled with the fact that many warrants are—quite properly, ibid.—issued on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings. Likewise, given the informal, often hurried context in which it must be applied, the "built-in subtleties," *Stanley v. State*, 19 Md.App. 507, 313 A.2d 847, 860 (Md.App.1974), of the "two-pronged test" are particularly unlikely to assist magistrates in determining probable cause.

Gates, 462 U.S. at 235-36, 103 S.Ct. at 2330-31. *See also United States v. Clenney*, 631 F.3d 658, 665 (4th Cir. 2011). Importantly, the probable cause standard does *not* demand any showing the officer's belief was correct or more likely true than false. *Brown*, 460 U.S. at 742.

Applying this standard to the search warrant for Gibbs' CSLI, there was probable cause for the magistrate to issue the warrant. Inv. Martin had information from multiple witnesses of prior altercations between the victim and the defendant stemming from a drug deal gone bad and from an incident where the defendant was arrested on weapons charges. ***R. 12; 18; 26***. The affidavit explains that the victim had been missing since August 26, 2013, which was two months before the search warrant was sought. ***R. 97***. After he had interviewed friends and family, Inv. Martin concluded that it was not normal for the victim to disappear and be out of touch by cellular phone. ***R. 97***. The victim's phone was searched, which revealed that the phone was completely shut off and all activity stopped at 4:24 a.m. on August 26, 2013. ***R. 97***. The

investigation began to show that foul play was involved in the victim's disappearance. The affidavit explains that the victim's vehicle was located several days completely burned. ***R. 97***. Other property belonging to the victim was located on the side of the road. ***R. 97***. This gave investigators reason to believe that the victim was kidnapped and/or possibly murdered after he could not be located. Finally, the affidavit reveals that Gibbs had been "identified by many as being involved with [the victim's] disappearance based on drug related incidents before his disappearance." ***R. 97***.

Inv. Martin testified at the suppression hearing and was able to supplement the record to explain how the investigation progressed and zeroed in on Gibbs and Christopher Brown. He explained that he received statements from "five different people who were close acquaintances to the victim." This information revealed that the victim was involved in a drug transaction with Gibbs and Brown. Among those coming forward with this information were Jamel Fleming, the last person to see the victim alive, and Marcus Smith, a "close acquaintance" who saw the victim on the Saturday night before his Sunday night disappearance. Fleming was questioned twice and passed a polygraph. ***R. 12-14***. The victim's girlfriend, Samantha, Hopkins said the victim had given them $600.00 and they never gave him the drugs. ***R. 13***.

Smith was interviewed within the first week of the investigation. He confirmed the drug transaction and said that Gibbs and Brown had animosity toward the victim because Brown blamed the victim for his arrest on a stolen gun charge. Brown thought that the victim had "ratted on [him]." ***R. 15-17***. Smith likewise provided information about another drug transaction the victim had with Gibbs and Brown that had "gone bad" in Aynor, South Carolina. Words were "exchanged back and forth," with the victim saying negative things about Brown to Gibbs, such as Gibbs should stay away from Brown, even though Gibbs and Brown were very close friends.

Ultimately, Smith went in the victim's stead to have a fist fight with the two men and he won. ***R. 17-18; 25-26***.[2]

This was one of twenty-six warrants issued over four months in connection with the investigation. A separate warrant for the victim's Facebook account showed the victim's statements to Gibbs about the drug deal that went bad. This post also demonstrated that there was bad blood between the victim and Gibbs and Brown. There was a lot of interest in this case at the time of the investigation and it is Inv. Martin's practice to discuss what is occurring in a case with a magistrate, and he did this with the magistrate who issued the warrant for Gibbs' CSLI, Judge Butler. So, he provided in Facebook comments to Judge Butler but could not remember the date he had done so. ***R. 25-26; 28-30; 34***.[3]

Brown's phone records, including the CSLI, were obtained first. ***R. 21-22; 30***. Brown was in communication with Gibbs leading up to the time the victim was last seen and when his cell phone was shut off in the early morning hours. Indeed, "Brown's phone was placed right at [the victim's] house at the time … we believe that [the victim] went missing." ***R. 25-27; 30***. In response to the trial judge's queries, Inv. Martin testified that the magistrate knew the following: (1) the nature of Gibbs' and Brown's continuing relationship, (2) the relationship that the victim had with Gibbs and Brown, including that there was "bad blood" between them, (3) the Facebook exchange between the victim and Gibbs, (4) that Brown and Gibbs were having a conversation at the time the victim disappeared, (5) that Brown's cell phone pinged off a tower near the victim's residence at about the time police theorize the victim went missing, and (6) and

[2] This incident was corroborated by the victim's good friend Shakeem Fore. ***R. 18***. Also, the magistrate did not ask for the names of these acquaintances. ***R. 24***.

[3] The Fourth Amendment does not prohibit a warrant from cross referencing other documents. *Groh v. Ramirez*, 540 U.S. 551, 554 (2004).

that Gibbs denied being near the victim's residence or even in Aynor at the time the victim disappeared. ***R. 25-27***.

Inv. Martin interviewed Gibbs at his bonding agent's office.[4] Gibbs gave a statement denying that he was at the victim's residence on the night the victim disappeared and claiming that he had never even been to the victim's residence. ***R. 17***. "The [reason for obtaining a] search was not just to find out if he was the one with [the victim], but also to clear him that had he not been the one with [the victim] or around [the victim's] residence, you know, that would've also provided the information. So, it was more to confirm where he was based on his statements." ***R. 17***.[5]

Both this Court and the trial judge found that there was no probable cause for the warrant in large part because the affidavit fails to specify the precise crime which police theorize that Gibbs had committed, the State submits that this may have overlooked that it is unnecessary under *Gates* for an affidavit to include the specific crime alleged to have been committed and that "'only a *probability* of criminal conduct need be shown.'" *United States v. Koonce*, 485 F.2d 374, 380 (8th Cir. 1973) (quoting *McCreary v. Sigler*, 406 F.2d 1264, 1268 (8th Cir.1969)); *Gates*, 462 U.S. at ("[I]t is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause'") (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)). *See also United States v. Summage*, 481 F.3d 1075, 1078 (8th Cir. 2007); *Coggin v. State*, 156 S.W.3d 712, 71 (Ark. 2004). Affidavits of probable cause are tested by

[4] Gibbs was on home detention for another offense. ***R. 17***.

[5] Inv. Martin later explained that this was a missing persons case and that law enforcement was trying to prove that a crime had been committed. ***R. 34***.

much less rigorous standards than those governing the admissibility of evidence at trial. *McCray v. Illinois*, 386 U.S. 300, 311 (1967).

Moreover, it is clear that the information Inv. Martin provided to the magistrate supported probable cause to believe that Gibbs' CSLI would lead to the "probability of criminal conduct." Yet, the precise nature of the criminal conduct was unclear at that stage of the investigation. It could have been kidnapping, *see State v. Owens*, 291 S.C. 116, 352 S.E.2d 474 (1987) (*Owens I*), murder, *see State v. Owens*, 293 S.C. 161, 359 S.E.2d 275 (1987) (*Owens II*), or, potentially as an accessory. Accordingly, this Court may have overlooked that it deferred to the wrong lower court and that this criticism of the affidavit runs afoul of *Gates*' admonition that "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' …. 'A grudging or negative attitude by reviewing courts toward warrants,' … is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant "courts should not invalidate ... warrant[s] by interpreting affidavit [s] in a hypertechnical, rather than a commonsense, manner." *Gates*, 462 U.S. at 236 (citations omitted).[6]

[6] The State did not raise this argument in its Initial Brief of Appellant. However, the State has consistently argued that the affidavit in support of the search warrant, coupled with Inv. Martin's testimony provided probable cause for the magistrate to issue the warrant. This should be enough to preserve the current argument. *Cf. State v. Bell*, 430 S.C. 449, 459 -60 & n. 10, 845 S.E.2d 514, 519-20 & n. 10 (Ct. App. 2020), *reh'g denied* (Aug. 6, 2020) (finding appellant's objection "404-B" sufficiently preserved challenge to hearsay testimony under Rule 404(), SCRE, even where counsel stated "same objection, 403" to identical testimony elicited through different witness).

More importantly, the State filed a November 17, 2017 motion to hold the appeal in abeyance pending the Supreme Court's decision in *Carpenter*. Apparently perceiving a tactical advantage in doing so, Gibbs opposed the State's motion on December 11, 2017. On January 9, 2019, the Court

III.

Further, in upholding the trial judge's finding that "the affidavit fails to address 'the 'veracity' and 'basis of knowledge' of persons supplying hearsay information'" to Inv. Martin, so that the magistrate could evaluate the credibility of the tip firsthand and determine for himself whether the information provided was sufficiently reliable, this Court cited cases where the information was provided by a confidential, reliable informant, whose identity is shrouded in secrecy. *See, e.g., Gibbs* at 9-10 (citing *State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) and *State v. Philpot*, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995) (finding an affidavit insufficient when it failed to attest to a confidential informant's reliability). In doing so, the Court may have overlooked that this finding is contrary to this Court's published decision in *State v. Driggers*, 322 S.C. 506, 511, 473 S.E.2d 57, 60 (Ct. App. 1996), where the Court stated

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denied the State's motion. The Initial Brief of Appellant was subsequently filed before *Carpenter* was decided and because there clearly was no legitimate expectation of privacy in CSLI at the time and a search warrant was not needed to obtain those records, *see, e.g., United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (en banc) (holding the Government did not violate the defendants' Fourth Amendment rights in obtaining historical cell-site location information from their cell phone provider without a warrant because defendants' had no reasonable expectation of privacy in the historical location information, as they voluntarily conveyed such information to the cell phone provider), *overruled*, *Carpenter v. United States*, 138 S.Ct. 2206 (2018), the State had no occasion to brief the sufficiency of the warrant in its Brief. *See also* section IV, *infra*.

On March 31, 2020, the Court notified the parties that: "Although the argument cannot be conducted at this time, a panel of the Court has studied the case and is preparing to decide the matter on the briefs and record." The Court's letter gave the parties 15 days within which to request an oral argument. The undersigned requested an oral argument via email on April 1, 2020, but the case was decided without argument. As a result, this Petition was the State's first opportunity to fully argue probable cause. Therefore, as a matter of fundamental fairness, the Court should not find the State's argument is not properly before it. See, e.g., *State v. Stewart*, 283 S.C. 104, 110, 320 S.E.2d 447, 450 (1984) ("[i]t would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial") *Stein v. New York*, 346 U.S. 156, 197 (1953) ("[t]he people of the State are also entitled to due process of law"); *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true").

that "a non-confidential informant should be given higher level of credibility because he exposes himself to public view and to possible criminal and civil liability should the information he supplied prove to be false."

Even should the Court decide that its finding is consistent with *Driggers*, the Court may nevertheless have overlooked that this finding is still inconsistent with the overwhelming majority of cases to consider the issue in the Country. *E.g.*, *United States v. Heard*, 367 F.3d 1275, 1280 (11th Cir. 2004) (holding a tip offered by an informant through a face-to-face encounter may provide a law enforcement officer with reasonable suspicion); *United States v. Perkins*, 363 F.3d 317, 323 (4th Cir. 2004) ("Where the informant is known or where the informant relays information to an officer face-to-face, an officer can judge the credibility of the tipster firsthand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion"); *Milbin v. State*, 792 So. 2d 1272, 1274 (Fla. Dist. Ct.App. 2001) ("A witness who provides information to a police officer through 'face to face' communication is deemed to be sufficiently reliable"); *State v. Fudge*, 42 S.W.3d 226, 232 (Tex.App. 2001) (finding a law enforcement officer possessed sufficient reasonable suspicion to justify an investigatory detention based on the fact he received unsolicited information about criminal activity in a face-to-face manner from an individual who was neither connected to police nor a paid informant, which made the information provided "inherently reliable"); *State v. Hutz*, 144 So. 3d 618, 621 (Fla.Dist. Ct.App. 2014); *Giles v. Commonwealth*, 529 S.E.2d 327, 329-330 (Va. Ct.App. 2000) ("Although Officer Devoti did not obtain the women's names or addresses, their reports were not an anonymous tip. He stood face to face with them and listened to their accounts. He was able to assess their credibility and the reliability of their information"). *Cf. Navarette v. California*, 572 U.S. 393, 400 (2014) (finding an anonymous 911 call reporting

erratic driving was sufficient to establish reasonable suspicion for a stop based, in part, on the fact the call provided "some safeguards against making false reports with immunity" since the caller *potentially* could have been traced and identified under the circumstances).

IV.

It is respectfully submitted that the Court may have likewise overlooked that the good faith exception to the warrant requirement clearly applied to this case. As discussed, the United States Supreme Court decided *Carpenter* while the appeal of this case was pending. *Carpenter* held that a person has a legitimate expectation of privacy in his cell phone records held by a third party, that "accessing seven days of CSLI constitutes a Fourth Amendment search," and that, consequently, a request for seven or more days of CSLI requires the Government to have a warrant to obtain the information. *Carpenter*, 138 S.Ct. at 2217 & n. 3. Assuming without conceding that obtaining five days of CSLI requires a warrant under *Carpenter*, see section V, *infra*, the finding that the State could not have acted in good faith must still be rejected for a fundamental reason. At the time the State obtained the CSLI and even at the time of the hearing on Gibbs' motion to suppress, a search warrant was not required to obtain these records in this jurisdiction. Until the Supreme Court's landmark decision *Carpenter*, neither this Court nor the United States Supreme Court had ever held that an individual retains a reasonable expectation of privacy over information that he voluntarily provides to a third party.

The reasoning in *Carpenter* was a stark and dramatic break from over fifty years of Fourth Amendment precedent. *See id*. at 2223 (Kennedy, J., dissenting) (referring to the majority's decision as a "stark departure from relevant Fourth Amendment precedents"); *id*. at 2224 (Kennedy, J., dissenting) ("In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded

the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other"); *id*. at 2235-36 (Thomas, J., dissenting) ("The Court concludes that, although the records are not Carpenter's, the Government must get a warrant because Carpenter had a reasonable "expectation of privacy" in the location information that they reveal. Ante, at 2216 - 2217. I agree with Justice KENNEDY, Justice ALITO, Justice GORSUCH, and every Court of Appeals to consider the question that this is not the best reading of our precedents"); id. at 2247 (Alito, J., dissenting) ("Treating an order to produce like an actual search, as today's decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century of Supreme Court precedent"); *id*. at 2261 (Alito, J., dissenting) ("The desire to make a statement about privacy in the digital age does not justify the consequences that today's decision is likely to produce"). In fact, the Court was so sharply divided in this 5-4 decision that each dissenter wrote a separate opinion.[7]

As the four *Carpenter* dissents make abundantly clear, prior to *Carpenter*, the Supreme Court precedent supported the conclusion that an individual did not have any reasonable expectation of privacy in information voluntarily disclosed to a third party, such as CSLI, even if unaware of how the third party would use the information. *See, e.g., United States v. Miller,* 425 U.S. 435, 443 (1976) (noting the Court had "held repeatedly that the Fourth Amendment does

[7] The *Carpenter* majority cautioned that its holding was "narrow," 138 S.Ct. at 2217, and even the majority wrestled with how to apply this "new phenomenon" under the Fourth Amendment, *id.* at 2216 (noting that governmental acquisition of CSLI **"**does not fit neatly under existing precedents" and that cell-site records "implicate the third-party principle" because "the individual continuously reveals his location to his wireless carrier"); *id.* at 2214 ("[t]his sort of digital data—personal location information maintained by a third party—does not fit neatly under existing precedents."). *But see id*. at 2236 (Kennedy, J., dissenting) ("The Court says its decision is a narrow one … But its interpretation of *Miller* and *Smith* will have dramatic consequences for law enforcement, courts, and society as a whole").

not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed"); *id.* at 442-43 (bank depositor did not have any legitimate expectation of privacy in financial information that he voluntarily conveyed to banks and that was exposed to their employees in the ordinary course of business); *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"); *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (distinguishing the listening device employed in *Katz* and holding that telephone users generally had no subjective expectation of privacy in dialed telephone numbers), *superseded by statute*; *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (applying same principle to confidential statements made in the presence of an informant); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) (principle applied to financial and other records in the hands of third-party businesses); *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion) (applying principle to electronic surveillance of conversations between defendant and informer, by means of radio transmitter concealed on the person of the informant); *Donaldson v. United States*, 400 U.S. 517, 522-23 (1971) (taxpayer was not entitled to intervene in proceeding to enforce summons for his employment records, where "what is sought here by the Internal Revenue Service ... is the production of Acme's records and not the records of the taxpayer"). *Cf. State v. King*, 412 S.C. 403, 419, 772 S.E.2d 189, 197 (Ct.App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), *overruled on other grds, State v. Burdette*, 832 S.E.2d 575 (2019).

Further and as discussed, most American courts did not routinely grant similar protection to data revealing a person's location that was held by a third party, such as CSLI, before the

Carpenter opinion. Indeed, as late as 2012, "*no circuit court had yet held the Fourth Amendment applicable* to CSLI data." *Elmore*, 917 F.3d at 1078 (collecting cases) (emphasis added); *Graham, supra*. *See also* cases cited in Final Brief of Appellant, pp. 9-14. Moreover, neither this Court nor the South Carolina Supreme Court had held that an individual had a reasonable expectation of privacy in CSLI. To the contrary, this Court had issued two unpublished opinions that followed the Fourth Circuit's reasoning in *Graham*. See *State v. Drayton*, 411 S.C. 533, 769 S.E.2d 254 (Ct.App. 2015), *vacated in part, affirmed in result*, 415 S.C. 43, 780 S.E.2d 902 (2015) (*Drayton* II);[8] *State v. Wallace*, 2016–UP–344, 2016 WL 3595792, at *1 (Ct. App., June 29, 2016) (*per curiam*) (unpublished) ("[W]e note that although our supreme court has not directly addressed the issue of whether the warrantless procurement of cell-site location data violates the Fourth Amendment, the federal appellate courts, including a recent en banc decision from the United States Court of Appeals for the Fourth Circuit, have uniformly found such police action does not violate the Fourth Amendment") (citing *Graham* with approval). So, in the pre-*Carpenter* world, reasonable police officers had every reason to believe in the constitutionality of collecting CSLI without a warrant under the SCA. Moreover, *Carpenter* was decided more than four years after the issuance of the magistrate's order in this case and well after Judge Hyman granted the motion to suppress.

Thus, even if the Court rejects the State's position as to the sufficiency of the warrant affidavit when read in conjunction with the other information given to the magistrate, *i.e.*, that there was probable cause, law enforcement clearly went beyond what they were required to do at

[8] The Supreme Court did not expressly disagree with this Court's reasoning but found that it was unnecessary for this Court to address the novel issue because "the affidavits in support of the warrants established probable cause for the search" and because any error in denying the motion to suppress was harmless. *Drayton II*, 415 S.C. at 45, 780 S.E.2d at 903.

the time by seeking and securing a warrant. *Carpenter* prohibits the warrantless seizure of CSLI from the date of the opinion forward, but this case is not about what the State can do post-*Carpenter*. Instead, the question is whether the State acted in good faith considering the status of the law when it seized Gibbs' CSLI and the State submits it did.[9] The Court may have overlooked that the finding that there was no good faith is inconsistent with the result reached by a panel of this Court in *State v. Warner*, 430 S.C. 76, 93-94, 842 S.E.2d 361, 369-70 (2020), where the Court concluded there was good faith reliance on a warrant even though the trial judge found the warrant was void *ab initio* because the magistrate lacked jurisdiction to issue it. The Court's finding is also inconsistent with the *per curiam* decision in *State v. Rhodes*, 2019 WL 5797528, *3 (Ct. App., Nov. 6, 2019) (*per curiam*) (unpublished) (finding good faith where order obtained satisfied SCA).

Even if the Court finds its decision is reconcilable with these two decisions, the Court may have overlooked that the United States Supreme Court has observed that the exclusionary rule is to be a "last resort" and not a "first impulse," *Hudson v. Michigan*, 547 U.S. 586, 591 (2006), and that the exclusionary rule's "sole purpose ... is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236-37 (2011) (citing *United States v. Leon*, 468 U.S. 897, 909, 921 n.22 (1984)). Thus "when the police act with an objectively "'reasonable good-faith belief' that their conduct is lawful" ... the 'deterrence rationale loses much of its force,' and exclusion cannot 'pay its way.'" *Id.* at 238 (quoting *Leon*, 468 U.S. at 909). Given the present facts, it is clear that the State acted in good faith and suppression was erroneous. *See, e.g., United States v. Zodhiates*, 901 F.3d 137, 143 (2nd Cir. 2018) (acknowledging

[9] Whether or not there was probable cause, it cannot be seriously contended that the State's showing was sufficient under 18 U.S.C. § 2702(c)(4), a provision of the Stored Communication Act (SCA), which was all that was required at the time the warrant was obtained.

the *Carpenter* decision issued during the pendency of that appeal, but holding that "when the Government "act[s] with an objectively reasonable good-faith belief that their conduct is lawful, the exclusionary rule does not apply"); *United States v. Goldstein*, 914 F.3d 200, 203–07 (3rd Cir. 2019); *United States v. Chavez*, 894 F.3d 593, 608 (4th Cir. 2018); *United States v. Pembrook*, 876 F.3d 812, 823 (6th Cir. 2017), *vacated on other grds*., *Johnson v. United States*, 138 S.Ct. 2676 (2018) (applying the good-faith exception to CSLI obtained under the Stored Communications Act); *United States v. Curtis*, 901 F.3d 846, 847-49 (7th Cir. 2018) (same); *United States v. Davis*, 785 F.3d 498, 511, 518 n.20 (11th Cir. 2015) (same); *United States v. Joyner*, 899 F.3d 1199, 1204-05 (11th Cir. 2018) (same). See also *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987) (confirming that the exclusionary rule generally does not apply to evidence obtained in good-faith reliance on a statute before it was declared unconstitutional); *United States v. Curtis*, 901 F.3d 846, 848 (7th Cir. 2018) (CSLI evidence obtained in good-faith reliance need not be excluded); *United States v. Davis*, 687 F.3d 901, 904-05 (8th Cir. 2014) (holding that police reliance upon then-binding circuit precedent was in good faith, despite an ultimately contrary case pending at the Supreme Court); *United States v. Korte*, 918 F.3d 750, 758 (9th Cir. 2019). *United States v. Parrish*, 942 F.3d 289, 293 (6th Cir. 2019) ("[C]ourts will not exclude evidence from trial that was seized 'by officers reasonably relying on a warrant issued by a detached and neutral magistrate'") (quoting *United States v. Leon*, 468 U.S. at 913); *Reed v. Commonwealth*, 71 Va.App. 164, 834 S.E.2d 505, 510–12 (2019).

V.

Further, this Court found that:

> The CSLI that can be obtained by authorities over a five-day period is of the sort that led the majority in *Carpenter* to conclude that individuals have a legitimate expectation of privacy in the information. The Court reasoned that a person has a

> reasonable expectation of privacy in CSLI because the nature of CSLI is especially revealing. *Carpenter*, 138 S.Ct. at 2219. "[T]ime-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.* at 2217 (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)); *see id.* at 2218 ("A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales."). Allowing CSLI collection for a period of five days does not adequately curtail the Court's privacy concerns so as to render the five-day CSLI collection not a search pursuant to the Fourth Amendment. *See id.* Therefore, we hold that the CSLI collection in this matter constitutes a search.

Gibbs, at 7.

In making this finding, the Court may have overlooked several facts. First, this Court's reasoning is not supported by any opinion of any Justice in *Carpenter*. Indeed, Justice Alito, who concurred in *Jones*, see 565 U.S. at 419 (Alito, J., concurring in judgment), dissented in *Carpenter*. He warned that that "[t]he Court's reasoning fractures two fundamental pillars of Fourth Amendment law, and in doing so, it guarantees a blizzard of litigation while threatening many legitimate and valuable investigative practices upon which law enforcement has rightfully come to rely. 138 S.Ct. at 2247 (Alito, J., dissenting). *See also id*. at 2233 (Kennedy dissenting). Second, the undersigned has been unable to find any published or unpublished decision in the entire Country that has reached a similar conclusion as this Court. Third, the Court in *Carpenter* was faced with a situation where the Government had obtained two warrants under the SCA. The first order sought 152 days of CSLI and "produced records spanning 127 days." The other order sought seven days of CSLI and "produced two days of records." *Carpenter,* 138 S.Ct. at 2212. The majority opinion emphasized that "this case is not about 'using a phone' or a person's movement at a particular time." *Id.* at 2220. "It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years." *Id*. "Such a chronicle," the court

reasoned, "implicates privacy concerns far beyond those considered in *Smith* and *Miller*." *Id*. (citing 442 U.S. at 743 and 425 U.S. at 443). The same concerns are not present when the prosecution only seeks five days of CSLI.

Whether a person has an expectation of privacy in the amount of historical CSLI records accessed or real-time CSLI records accessed turns on the significance of the invasion of a protected privacy interest. *See id.* at 2217. As the Supreme Court, Bronx County New York, explained in *People v. Edwards*, 63 Misc.3d 827, 831, 97 N.Y.S.3d 418, 421-22 (N.Y. Sup. Ct. 2019):

> The Supreme Court had good reason to expressly exempt *short-term* CSLI data from its *Carpenter* decision. Gathering *long-term* CSLI data is much more clearly an invasion of a cellular telephone holder's legitimate expectation of privacy; it is, in a sense, the modern day electronic equivalent of sending a government spy out to follow the defendant both day and night, wherever he or she goes, in public or in private. *See Carpenter*, 138 S.Ct. at 2218 ("Whoever the suspect turns out to be, he has effectively been tailed every moment of any day for five years and the police may—in the government's view—call upon the results of that surveillance without regard to the Constitution or the Fourth Amendment").
>
> By way of contrast, in this Court's view, *short-term* CSLI data that is carefully targeted to a specific time in order to determine whether defendant was present at the scene of a crime that was committed in a public place is *not* a search, and is therefore not subject to Fourth Amendment warrant requirements.
>
> The difference between long-term and short-term CSLI data is stark: *long-term* data can be likened to filming a person's entire life for weeks, or months, or even years; *short-term* CSLI data is like taking a single snapshot of that person on the street. *See United States v. Jones*, 565 U.S. 400, 418-419, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (Alito, J., concurring) (*short-term* GPS monitoring does not constitute a search, but *long-term* GPS monitoring does); *see also People v. Weaver*, 12 N.Y.3d 433, 882 N.Y.S.2d 357, 909 N.E.2d 1195 (2009) (distinguishing *short-term* visual surveillance of a car from far more intrusive *long-term* GPS monitoring).[10]

[10] In *Edwards*, the People obtained an order for a period of two days of CSLI. The Court found that that "[i]f any case would seem to fall into the category of short-term CSLI data that the Supreme Court expressly carved out from its *Carpenter* decision, this would appear to be that case." *Id*. at 831, 97 N.Y.S.3d at 421.

(Footnote added).

The State respectfully submits that the Court may have overlooked that – like the two days information in *Edwards* - the five days of CSLI at issue here is not fraught with the concerns that resulted in the majority decision in Carpenter and, as a result, a warrant was not required to obtain this information. *Id*. *See also Sims v. State*, 569 S.W.3d 634, 646 (Tex. Crim. App. 2019), *cert. denied*, 139 S.Ct. 2749 (2019) ("Appellant did not have a legitimate expectation of privacy in his physical movements or his location as reflected in the less than three hours of real-time CSLI records accessed by police by pinging his phone less than five times").

CONCLUSION

Based upon the foregoing, Appellant (the State) would ask the Court to grant the Petition for Rehearing, pursuant to Rule 221, SCACR. Further, Appellant respectfully requests the Court rehear the matter en banc to preserve consistency in the Court's decisions.

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September 3, 2020.

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From: Donna D'Alessio
Sent: Thursday, September 3, 2020 5:03 PM
To: 'rdudek@sccid.sc.gov'; Kellner, Haley (hkellner@sccid.sc.gov)
Subject: Gibbs, Javon D. -Appellate Case No. 2017-001848
Attachments: Gibbs, Javon D. Petiion for Rehearing w en banc suggestion.09-03-2020 - FINAL (02371742xD2C78).pdf

Dear Mr. Dudek:

Attached is a scanned copy of the Petition for Rehearing and Suggestion for Rehearing En Banc, and Proof of Service regarding the above matter. A paper copy is being mailed to you this afternoon. The Petition for Rehearing and supporting document are being submitted to the South Carolina Court of Appeals through e-filing, along with a copy of this email.

Hope you are well, and thank you.

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