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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Opinion No. 2020-UP-244

THE STATE,

Appellant,

v.

JAVON D. GIBBS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing with Suggestion for Rehearing En Banc was made, and finally ruled on by the Court of Appeals on October 6, 2020.

QUESTIONS PRESENTED

I. Assuming that a search warrant is required for law enforcement to acquire five days of historical cell site location information (CSLI) from a defendant's phone after the Supreme Court's decision in *Carpenter v. United States*, did the Court of Appeals commit clear error by affirming suppression of the CSLI for Gibbs' cell phone where the search warrant affidavit, as supplemented by the information provided to the magistrate, clearly supports the magistrate's finding of probable cause to issue the warrant.

II. Did the Court of Appeals clearly err by finding that Gibbs had a legitimate expectation of privacy in the State's collection of only five days of CSLI, such that acquiring his CSLI was a search under *Carpenter* that required a warrant.

III. Did the lower courts commit clear error in finding that Inv. Martin did not act in good faith reliance on the search warrant that was issued, since a search warrant was not required to obtain the CSLI at the time the State obtained this evidence and the magistrate's order satisfied the requirements of the Stored Communications Act?

STATEMENT OF THE CASE

In February of 2014, the Horry County Grand Jury indicted Respondent Javon D. Gibbs (Gibbs) for murder (2015-GS-26-00847) and kidnapping (2015-GS-26-00848). R. 81-84. Gibbs filed a pretrial "Motion to Suppress Phone Records." ***R. 85-88***. On August 30, 2017, the Honorable Larry B. Hyman, Jr., held a hearing on Gibbs's motion at the Horry County Courthouse. ***R. 3-50***. Following the hearing, Judge Hyman orally granted Gibbs's motion and suppressed the cell site location information (CSLI). ***R. 79***. He filed an Order formally granting the motion to suppress on September 5, 2017. ***R. 101-02***.

The State timely served and filed a notice of appeal. On November 17, 2017, the State moved the South Carolina Court of Appeals to hold the appeal in abeyance pending the United

States Supreme Court's decision in *Carpenter v. United States*, 819 F.3d 880 (6th Cir. 2016) *rev'd and remanded*, 138 S.Ct. 2206 (2018) because of the potential impact the Supreme Court's decision could have on the appeal. ***App. 37-41***. Gibbs opposed the State's motion (***App. 42-44***) and the Court of Appeals denied the State's motion on January 9, 2019. ***App. 45***.

An oral argument in the case was originally scheduled for April 15, 2020. ***App. 46-47***. However, on March 31, 2020, the Court of Appeals 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. ***App. 48-49***. The undersigned requested an oral argument via email on April 1, 2020 (***App. 50-51***), but no argument was held.

On August 19, 2020, the Court of Appeals filed an unpublished *per curiam* opinion affirming the suppression of the search warrant for Gibbs' CSLI. *State v. Javon D. Gibbs*, 2020-UP-244 (S.C. Ct.App., Aug. 19, 2020). ***App. 1-13***. The State filed a Petition for Rehearing with Suggestion Rehearing En Banc on September 3, 2020. ***App. 14-34***. The Court of Appeals filed an Order denying the State's Petition on October 6, 2020. ***App. 35-36***.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "In appeals of pretrial rulings, [the appellate court] is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'" *Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) (quoting *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)). A trial judge's ruling on a matter "will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." *State v. Sheldon*, 344 S.C. 340, 342, 543 S.E.2d 585,

585-586 (Ct. App. 2001). An abuse of discretion occurs when the trial judge's conclusions lack evidentiary support or are controlled by an error of law. *State v. Elders*, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ARGUMENTS

I. Assuming *arguendo* that a search warrant is required for law enforcement to acquire five days of historical cell site location information (CSLI) from a defendant's phone after the Supreme Court's decision in *Carpenter v. United States*, the Court of Appeals committed clear error by affirming suppression of the CSLI for Gibbs' cell phone where the search warrant affidavit, as supplemented by the information provided to the magistrate, clearly supports the magistrate's finding of probable cause to issue the warrant.

In *Carpenter v. United States*, 138 S.Ct. 2206, 2217 n. 3 (2018), a sharply divided United States Supreme Court held for the very first time that individuals have a reasonable expectation of privacy in the record of their physical movements captured by historical CSLI and that acquisition of more than seven days of CSLI constitutes a "search" under the Fourth Amendment. Assuming *arguendo* that a search warrant is required for law enforcement to acquire five days of CSLI from a defendant's phone, [1] the State submits that the Court of Appeals committed clear error by affirming suppression of the (CSLI for Gibbs' cell phone where the search warrant affidavit, as supplemented by the information provided to the magistrate, clearly supports the magistrate's finding of probable cause to issue the warrant.

Gibbs filed a number of pre-trial motions including his "Motion to Suppress Phone Records, which he filed on August 22, 2017. ***R. 85-88***. The trial judge heard the motions on Wednesday, August 30, 2017. **R. 1-80**. Gibbs argued at the hearing that "there is a guaranteed expectation of privacy guaranteed by the Fourth Amendment [in] cell phone records." ***R. 7***. He

[1] *Carpenter* was a 5-4 decision and each dissenter filed a separate opinion. *Carpenter* left open whether gathering six days or less of CSLI requires a warrant and, as discussed in Argument II, the State submits that one was not required here.

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***. He also argued that the investigator's affidavit supporting the magistrate's probable cause finding was not sufficient. ***R. p. 7-8***.

The assertion of a reasonable expectation of privacy was a clearly erroneous statement of law at that time because no state appellate court had ever ruled to this effect and, as late as mid-2014, "no circuit court of appeals had yet held the Fourth Amendment applicable to CSLI data. *See United States v. Pembrook*, 876 F.3d 812, 823 (6th Cir. 2017) (finding that as of mid-2014, no Supreme Court, Sixth Circuit, or out-of-Circuit precedent extended Fourth Amendment protections against warrantless seizures of CSLI to criminal defendants), *vacated on other grds, Calhoun v. United States*, 139 S. Ct. 137 (2018). *See also Carpenter*, 138 S.Ct. 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. .... 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"). The trial judge, 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, including his finding that there was no probable cause to issue the search warrant for Gibbs' CSLI. ***R. 101-02, ¶¶2-6***.

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.

Contrary to the trial judge's ruling and the Court of Appeals' decision, *Gibbs*, at 7-11, when this affidavit in support of the warrant is read in conjunction with Inv. Jonathan 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 the 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); *United States v. Clyburn*, 24 F.3d 613, 617 (4th Cir. 1994); *Frazier v. Roberts*, 441 F.2d 1224, 1226 (8th Cir. 1971).

"[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). Also, the determination must be made under the totality of the circumstances. *Id.* at 230-31, 233, 238.

The Supreme Court explained in *Gates* that:

> 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.

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. *See also Kaley v. United States*, 571 U.S. 320, 338 (2014) (recognizing probable cause "is not a high bar: It requires only the 'kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act'"') (quoting *Florida v. Harris,* 568 U.S. 237, 244 (2013) (quoting *Gates,* 462 U.S. at 231, 238). The proper inquiry is not whether the reviewing judge believes that there was probable cause to issue the warrant. The proper inquiry is "whether the magistrate had a substantial basis for his conclusion that probable cause existed." *United States v. Williams*, 974 F.2d 480, 481 (4th Cir. 1992).

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. And what he told the magistrate. He testified 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]

[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.***

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

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

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 the Court of Appeals 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. *See Gibbs*, at 8-9, ***R. 101,*** ***¶ 2.*** This was a clearly erroneous legal finding because *Gates* does not require an affidavit to include the specific crime alleged to have been committed. Rather, "'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 235 ("[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,* 393 U.S. at 419). *See also District of Columbia v. Wesby*, 138 S.Ct. 577, 586 (2018). The State submits this standard was met.

Specifically and contrary to the findings of the trial judge and the Court of Appeals, *see Gibbs*, at 10-11, ***R. 101-02, ¶ 3-4***, the information Inv. Martin provided to the magistrate clearly supported probable cause to believe that Gibbs' CSLI would lead to the "probability of criminal conduct," *Gates*, 462 U.S. at 235, even if the precise nature of the criminal conduct was unclear at

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[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.***

that stage of the investigation. He could have been involved in 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, the Court of Appeals deferred to the wrong lower court. Worse, this criticism of the affidavit disregards *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]

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[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(b), SCRE, even where counsel stated "same objection, 403" to identical testimony elicited through different witness).

Moreover, the State filed a November 17, 2017 motion to hold the appeal in abeyance pending the Supreme Court's decision in *Carpenter*. ***App. 37-41***. Apparently perceiving a tactical advantage in doing so, Gibbs opposed the State's motion on December 11, 2017. ***App. 42-44***. On January 9, 2019, the State's motion was denied. ***App. 45***. The Initial Brief of Appellant was subsequently filed before *Carpenter* was decided. 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, 426-27 (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 fully brief the sufficiency of the warrant in its Brief.

An oral argument in the case was originally scheduled for April 15, 2020. ***App. 46-47***. Yet, on March 31, 2020, the Court of Appeals 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." ***App. 48-49***. The Court's letter gave the parties 15 days within

The trial judge found 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. ***R. 101,*** ***¶ 2.*** In upholding this finding, the Court of Appeals cited cases where the information was provided by a confidential reliable informant, whose identity is cloaked 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). Yet, this finding is contrary to the Court of Appeals' own published decision in *State v. Driggers*, 322 S.C. 506, 511, 473 S.E.2d 57, 60 (Ct. App. 1996), where the Court stated 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." It is likewise contrary to the overwhelming majority of cases that have considered the issue throughout America. *E.g., 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-

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which to request an oral argument. The undersigned requested an oral argument via email on April 1, 2020 (***App. 50-51***), but the case was decided without argument.

As a result, the Petition for Rehearing was the State's first opportunity to fully argue probable cause. Therefore, as a matter of fundamental fairness, this 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"); *S.C. Dep't of Soc. Services v. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 734 (2002) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner").

face, an officer can judge the credibility of the tipster firsthand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion"); *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); *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. Hutz*, 144 So. 3d 618, 621 (Fla.Dist. Ct.App. 2014); *People v. Williams*, 126 N.Y.S.3d 565 (N.Y.A.D. 2020) ("Inasmuch as the individual who identified defendant as having assaulted the victim and warned that he was armed 'was not a confidential informant but a known member of the community,' defendant's effort to invoke the *Aguilar–Spinelli* test to assess her reliability is misplaced") (citation omitted); *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"); *Wilkerson v. State*, 726 S.W. 542, 545 (Tex. Crim. App. 1996) ("When the affidavit contains information given by a named informant, this Court has held that the affidavit is sufficient if the information given is sufficiently detailed so as to suggest direct knowledge on his or her part"); *State v. Thomas*, 673 N.W.2d 897, 908–09 (Neb. 2004) ("[B]y identifying himself or herself by name, the informant is put in the position to be held accountable for providing a false report, which makes the informant more reliable") (citation omitted); *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).

Based upon the present record, the State submits that the magistrate had a substantial basis for concluding probable cause existed. *See Drayton II*, 415 S.C. at 45, 780 S.E.2d at 903. *See also State v. McKnight*, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987); *State v. King*, 349 S.C. 142, 149, 561 S.E.2d 640, 643 (Ct. App. 2002); *State v. Gore*, 408 S.C. 237, 247–48, 758 S.E.2d 717, 722 (Ct. App. 2014). *Cf. State v. Conner*, 467 P.3d 246, 250 (Ariz. App. 1st Div. 2020) ("Although the State concedes the order was not a search warrant, Conner has not shown how the order was *substantively* different from a search warrant. The order was issued after a judge reviewed the detective's affidavit, which set forth probable cause. The order issued based on a probable cause finding and identified the places and items to be searched and seized")

II. The Court of Appeals clearly erred by finding that Gibbs had a legitimate expectation of privacy in the State's collection of only five days of CSLI, such that acquiring his CSLI was a search under *Carpenter* that required a warrant.

Although *Carpenter* expressly limited its holding to cases where the government seeks to acquire seven days or more of CSLI, the Court of Appeals 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.

The State submits that this was a clearly erroneous legal conclusion. First, this reasoning is not supported by any opinion of any Justice in *Carpenter*, including the majority opinion. 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 2234 (Kennedy, J., dissenting) ("In short, the Court's new and uncharted course will inhibit law enforcement and 'keep defendants and judges guessing for years to come'") (citation omitted). Second, the undersigned has been unable to find *any published or unpublished decision* in the United States that has reached a similar conclusion.

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.* the Court reasoned, "Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*." *Id.* 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 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).[7]

(Footnote added).[8]

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[7] 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.

[8] It should be noted that the late Justice Ginsburg was one of the five Justices in the majority. Thus, it is uncertain that the same result would be reached in the future should it be presented in the appropriate case.

The State respectfully submits that the Court of Appeals erroneously concluded a warrant was required here because – like the two days of information in *Edwards* - the five days of CSLI here is not fraught with the concerns that resulted in the majority decision in *Carpenter*. Consequently, 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").

III. The lower courts committed clear error in finding that Inv. Martin did not act in good faith reliance on the search warrant that was issued because a search warrant was not required to obtain the CSLI at the time the State obtained this evidence and the magistrate's order satisfied the requirements of the Stored Communications Act.

The most egregious error committed by both the trial judge and the Court of Appeals was their rejection of the State's argument Inv. Martin acted with an objectively reasonable good faith belief his conduct was lawful based on the search warrant that he obtained. *See Gibbs*, at 11-12; ***R. 102***. Assuming without conceding that obtaining five days of CSLI requires a warrant under *Carpenter*, the finding Inv. Martin did not act in good faith is clearly erroneous because 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. Also, the warrant obtained by Inv. Martin was sufficient under the SCA, which only required a showing by the government of "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U.S.C. § 2703(d). This is a standard lower than probable cause. *Carpenter*, 138 S.Ct. at 2221.[9]

[9] As the Court in *United States v. Williams*, No. CR418-147, 2019 WL 1612833, at *10 n. 11 (S.D. Ga. Feb. 27, 2019), report and recommendation adopted, No. CR418-147, 2019 WL 1601375 (S.D.

As discussed, the Supreme Court decided *Carpenter* while the appeal of this case was pending. *Carpenter* found that an individual has a legitimate expectation of privacy in his cell phone records held by a third party. The Court then held that "accessing seven days of CSLI constitutes a Fourth Amendment search," and that 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. *Carpenter* does not address the applicability of the exclusionary rule at all, much less the good faith exception to that rule. Instead, the Court remanded the case. *Id.* at 2222-23. There is a good reason for the Court's silence on the issue.

Until the landmark decision in *Carpenter*, the United States Supreme Court had never held that an individual retains a reasonable expectation of privacy over information that he voluntarily provides to a third party. Rather, the majority's reasoning in *Carpenter* was a stark and dramatic break from over forty 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

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Ga. Apr. 15, 2019), explained, "Until *Carpenter*, it was generally assumed that the statutory requirements of either the Stored Communications Act or Title III governed the acquisition of such information. *See, e.g.*, Wayne R. LaFave, Jerold H. Israel, *et al.*, 2 Crim. Proc. § 4.5 (4th ed. 2018) (explaining the coverage of the Stored Communications Act, Title III, and the Pen Register Statute, respectively)."

information that they reveal. .... 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.[10]

As the four *Carpenter* dissents make crystal clear, United States Supreme Court precedent prior to *Carpenter* 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 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

[10] 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").

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. *See Pembrook*, 876 F.3d at 823 (finding that as of mid-2014, no Supreme Court, Sixth Circuit, or out-of-Circuit precedent extended Fourth Amendment protections against warrantless seizures of CSLI to criminal defendants). *See also Carpenter*, 138 S.Ct. at 2235-36 (Thomas, J., dissenting); *Graham*, 824 F.3d at 426-27; Cases cited in Final Brief of Appellant, pp. 9-14. Likewise, neither this Court nor the Court of Appeals had held that an individual had a reasonable expectation of privacy in CSLI before *Carpenter*. To the contrary, the Court of Appeals

had issued an unpublished opinion that followed the Fourth Circuit's reasoning in *Graham*. *See, e.g.*, *State v. Drayton*, 411 S.C. 533, 769 S.E.2d 254 (Ct.App. 2015) (*Drayton I*), *vacated in part, affirmed in result*, 415 S.C. 43, 780 S.E.2d 902 (2015) (*Drayton* II).[11] 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. Also, *Carpenter* was decided more than four and a half years after the issuance of the magistrate's order in this case and after the State had served its notice of appeal.

The Supreme Court adopted the exclusionary rule as a judicially-created remedy to effectuate the right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment of the United States Constitution. *Weeks v. United States*, 232 U.S. 383, 393-394 (1914); *see also United States v. Calandra*, 414 U.S. 338, 347 (1974) ("The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure'"). Importantly though, adoption of the exclusionary rule did *not* create a personal constitutional right to the exclusion of evidence, and the rule itself was *not* designed to redress the injury caused by an unconstitutional search or seizure. *Davis v. United States*, 564 U.S. 229, 236 (2011); *see also Stone v. Powell*, 428 U.S. 465, 486 (1976) ("[T]he [exclusionary] rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure"). Instead, the exclusionary rule was adopted and solely exists to deter *future* Fourth Amendment violations.

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[11] In *Drayton II*, this Court did not expressly disagree with the Court of Appeals' reasoning but found that it was unnecessary for that 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. In light of Rule 268(d)(2), SCACR, the State has not cited a second unpublished decision employing the same reasoning.

Davis, 564 U.S. at 236-37 (citing *United States v. Leon*, 468 U.S. 897, 909, 921 n.22 (1984)); *see also Elkins v. United States*, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated to prevent, not to repair").

In *Leon*, the Supreme Court rejected the idea the exclusionary rule should be applied to evidence "obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Leon*, 468 U.S. at 900. Instead, the Court adopted a "good faith" exception to the exclusionary rule and cautioned that the exclusion of evidence should only "rarely" occur in cases where officers reasonably relied upon subsequently-invalidated search warrants. *Id.* at 926. The Court explained that suppression of evidence based on a subsequently-invalidated search warrant was *only* appropriate in four limited situations: (1) where the affiant misled the issuing judge by including false or misleading information in the search warrant affidavit; (2) where the issuing judge wholly abandoned his neutral and detached judicial role; (3) where the search warrant affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[;]" and (4) when a search warrant was so facially deficient in some technical respect the officer executing the warrant could not reasonably have presumed it to be valid. *Id.* at 923 (citations omitted).[12]

The Court of Appeals' finding that there was no good faith reliance on the warrant because the warrant lacked probable cause, even considering the supplemental testimony, *see Gibbs*, at 12, is clearly circular reasoning that proves nothing and flagrantly misapplies this controlling United

[12] 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.'" *Davis*, 564 U.S. at 238 (quoting *Leon*, 468 U.S. at 909).

States Supreme Court precedent. See *Leon*, 468 U.S. at 922-23; see also *Messerschmidt v. Millender*, 132 S.Ct. 1235, 1245 (2012) ("Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith'") (quoting *Leon*, 468 U.S. at 922-23). Indeed, the courts below ignored that the United States Supreme Court has admonished that the exclusionary rule is to be a "last resort" and not a "first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).[13]

While *Carpenter* prohibits the warrantless seizure of CSLI from the date of the opinion forward, 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. Even if the Court finds that there was no probable cause to issue the search warrant, law enforcement clearly went beyond what they were required to do at the time by seeking and securing a warrant.[14] The finding that there was no good faith is inconsistent with the result reached by a panel of the Court of Appeals 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

[13] Also, the Court has "repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application," *Pennsylvania Bd. of Probation and Parole v. Scott,* 524 U.S. 357, 364–365, (1998).

[14] Whether or not there was probable cause, it cannot be seriously contended that the State's showing was sufficient under § 2703(d) of SCA, which was all that was required at the time the warrant was obtained. The Court of Appeals rejected this argument because the State attempted to obtain a search warrant. *Gibbs*, at 12-13. Again, the reasoning is circular and ignores *Leon*, as well as the settled law at the time the warrant was obtained.

even though the trial judge found the warrant was void *ab initio* because the magistrate lacked jurisdiction to issue it.[15]

Thus, 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 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. Beverly*, 943 F.3d 225, 234 (5th Cir. 2019) ("We hold that the [*Illinois v. Krull*, 480 U.S. 340, 349-50 (1987)] strand of the good-faith exception properly applies to the [CSLI at issue], since it was obtained pursuant to a pre-*Carpenter* warrantless order authorized by statute"); *United States v. Carpenter*, 926 F.3d 313, 317-18 (6th Cir. 2019) *("Carpenter II")* (on remand from Supreme Court, finding that government agents reasonably relied on the SCA at the time they acquired certain CSLI), *sentence vacated on other grds and case remanded*, 788 Fed.Appx. 364 (6th Cir., Dec. 19, 2019); *Pembrook*, 876 F.3d at 823 (applying the good-faith exception to CSLI obtained under the SCA); *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 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 *Leon*, 468 U.S. at 913); *United States v. Korte*, 918 F.3d 750, 758 (9th Cir. 2019); *State v. Burke*, 2019-Ohio-1951,

[15] The decision here is likewise inconsistent with an unpublished *per curiam* decision of the Court of Appeals that is not cited because of Rule 268(d)(2), SCACR.

¶¶ 31-33, 2019 WL 2172718, *5 (Oh. Ct. App. 2019), *appeal not allowed,* 157 Ohio St.3d 140, 2019-Ohio-3731, ¶¶ 31-33, 6, 131 N.E.3d 75 (2019) (applying good-faith exception to CSLI acquired by grand jury subpoena); *Reed v. Commonwealth*, 71 Va.App. 164, 834 S.E.2d 505, 510–12 (2019). Contrary to the findings of the lower courts, Inv. Martin acted with an objectively "reasonable good faith belief" that his conduct was lawful and suppression of the CSLI was erroneous. *Id.*

CONCLUSION

Based upon the foregoing, Appellant (the State) would ask the Court to grant certiorari, reverse the trial judge's order and judgment, and remand the case for a jury trial.

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