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.

APPENDIX

ROBERT DUDEK,
Chief Appellate Defender

SOUTH CAROLINA COMMISSION
ON INDIGENT DEFENSE
Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEYS FOR RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

HONORABLE JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit
(843) 915-9608

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
ID No. 4806
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR APPELLANT

INDEX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Javon Dion Gibbs, Respondent.

Appellate Case No. 2017-001846

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge.

Unpublished Opinion No. 2020-UP-244
Submitted May 8, 2020 – Filed August 19, 2020

AFFIRMED

Attorney General Alan McCrory Wilson, Senior Assistant Attorney General W. Edgar Salter, III, both of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, all for Appellant.

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Respondent.

PER CURIAM: The State appeals the circuit court's order granting Javon Gibbs's pretrial motion to suppress Gibbs's phone records in his trial for kidnapping and murder. The circuit court found that the issuing magistrate did not have a substantial basis upon which to conclude that probable cause existed for the warrant to search

Gibbs's phone. The State argues the circuit court erred in its findings because the law at the time the warrant was issued was that historical cell site location information (CSLI) was not protected under the Fourth Amendment.[1] Further, the State argues even if the information was protected, the warrant affidavit in conjunction with the oral testimony from the pretrial hearing constituted sufficient probable cause for the warrant. In the alternative, the State argues that the good faith exception applies. We affirm.

FACTS/PROCEDURAL HISTORY

This is a murder and kidnapping case in which the victim's body has not been recovered. Victim was reported missing on August 27, 2013, and on November 5, 2013, Horry County Police Department (HCPD) detective Jonathan Martin sought a warrant to search Gibbs's phone records. In the warrant's affidavit asserting probable cause, Detective Martin attested to the following:

> On 8/27/13[,] the mother of [Victim] 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 11/5/13, [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[self]. It is my belief that searching the records of Javon Gibbs will provide information regarding any contact with [Victim] and his whereabouts during the date and time [Victim] went missing.

---

[1] U.S. Const. amend IV.

The magistrate issued the search warrant. On December 6, 2014, Gibbs was arrested for murder and kidnapping, and subsequently indicted as charged on February 26, 2015. Gibbs filed multiple pretrial motions, including a motion to suppress his phone records. A pretrial hearing was held on August 30, 2017, before the circuit court. Gibbs was represented by counsel at the hearing.

On direct examination, Detective Martin testified that Samantha Hopkins (Victim's girlfriend), Jamal Fleming (Victim's friend), Marcus Smith (Victim's friend), and Shakeem Fore each provided information that Victim had an ongoing issue with Gibbs and Christopher Brown over a drug deal gone awry. Detective Martin stated that Victim, Gibbs, and Brown agreed to either purchase or sell drugs for $1,400. Gibbs and Brown supposedly took Victim's portion of the money ($600) and refused to give the money back.

Additionally, Detective Martin testified that Marcus Smith provided information on an incident involving Victim and Brown approximately a month before Victim went missing and before the aforementioned drug deal. Responding to a call of shots fired in a park, officers made contact with Victim, Brown, and Smith, who were all standing next to Victim's mother's car. With consent of Victim's mother, officers recovered a stolen gun from under the car's driver's side seat. Through interviews with all parties on the scene, Brown was subsequently arrested and charged for the gun. Smith was also arrested for an unrelated outstanding warrant. Because Victim was not arrested, Brown believed that Victim may have informed the police that the gun belonged to Brown. Detective Martin also testified to another incident at a store where Smith got into a fist fight with Brown in defense of Victim regarding the aforementioned drug deal. Detective Martin stated these incidents led to animosity between the groups.

Furthermore, Detective Martin mentioned that Victim and Gibbs communicated via Facebook regarding Brown and the drug deal. During their Facebook conversation, Victim told Gibbs that Gibbs needed to get away from Brown. Detective Martin testified that Gibbs provided a statement to HCPD denying being anywhere near Victim's home the night of the incident. Detective Martin also testified that the search of Gibbs's records was "not just to find out if he was the one with [Victim], but also to clear him [by demonstrating] that had he not been the one with [Victim] or around [Victim]'s residence."

On cross examination, Detective Martin confirmed that the only drug deal Gibbs and Victim were allegedly involved in together was the one incident in which

Victim's $600 had been taken by Brown and Gibbs. Moreover, he stated he had not discussed the reliability of any of the witnesses with the magistrate, nor did he give the magistrate the police report.

The court then questioned Detective Martin. Detective Martin revealed that during the issuance of the warrant, he informed the magistrate that Gibbs and Brown were best friends, they were in communication at the time Victim went missing, and that Brown's phone location was placed at Victim's house around this time.[2] Furthermore, Detective Martin advised that over the course of the investigation from August to November, HCPD obtained twenty-six (26) warrants. The warrants were issued by multiple magistrates, and Detective Martin could not recall whether he spoke to the magistrate with any specificity regarding the Facebook messages.[3]

On September 5, 2017, the circuit court issued an order granting Gibbs's motion to suppress the phone records. The court found that "the [a]ffidavit on its face did not establish probable cause [by] failing to set forth the source and its reliability of the facts alleged and failing to set forth facts as to why the police believed [Gibbs] committed a crime." Additionally the court found that the facts given to the magistrate to supplement the affidavit did not provide a substantial basis upon which to conclude that probable cause existed and that the supplementing testimony at the hearing failed to identify what crime Gibbs was believed to have committed. This appeal from the State follows.

ISSUE ON APPEAL

Did the circuit court err in suppressing the CSLI by finding that the CSLI was protected under the Fourth Amendment, the search warrant affidavit lacked sufficient probable cause, and the good faith exception to the warrant requirement did not apply?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). On appeals from a motion to suppress based on the Fourth Amendment, appellate courts apply a deferential standard of review and will reverse only if there is clear error. *State v. Moore*, 415

---

[2] HCPD conducted a search of Brown's phone records prior to searching Gibbs's phone.

[3] A search warrant for Facebook was issued by a different magistrate.

S.C. 245, 251, 781 S.E.2d 897, 900 (2016). We must affirm if there is any evidence to support the trial court's decision. *State v. Provet*, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013). "The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." *Baccus*, 367 S.C. at 50, 625 S.E.2d at 221.

LAW/ANALYSIS

SUPPRESSION OF CSLI

In its initial brief, the State argues the circuit court (1) erred as a matter of law by finding that Gibbs's cell site location information (CSLI) was protected by the Fourth Amendment and that Gibbs had a reasonable expectation of privacy in his CSLI, (2) abused its discretion in finding the search warrant affidavit lacked sufficient probable cause, and (3) erred in finding the good faith exception did not apply, and therefore, the circuit court erred in suppressing the CSLI. However, while the matter was pending on review, the Supreme Court of the United States made clear that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [historical] CSLI." *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). The Court held that the acquisition of the defendant's CSLI over a seven-day period was a "search within the meaning of the Fourth Amendment." *Id.* at 2220. Therefore, "the Government must generally obtain a warrant supported by probable cause before acquiring such records." *Id.* at 2221.

In its reply brief, the State argues that the Court's ruling in *Carpenter* should not affect the analysis of this case and reiterates that the circuit court erred in suppressing the CSLI. First, the State argues that because *Carpenter* leaves open the question of whether the collection of CSLI for less than seven days is afforded protection under the Fourth Amendment, this court should interpret *Carpenter* to allow law enforcement to conduct a warrantless short-term collection of CSLI—a period of five days in the current matter. Second, the State argues that the officers involved acted in objectively reasonable good faith based on the law at the time of the warrant.

Gibbs argues the circuit court correctly found that he had a legitimate expectation of privacy and that *Carpenter* settled the issue of whether the State's collection of Gibbs's CSLI invoked Fourth Amendment scrutiny. Next, Gibbs argues that "the affidavit and search warrant process []did not provide probable cause for the magistrate to determine there was a fair probability that [Gibbs] committed a

crime based on information given by individuals the government deemed reliable." Because the affidavit did not allege Gibbs committed any crime, Gibbs argues there can be no assertion that the affidavit stated that there was a fair probability that evidence of a crime would be found if the warrant was issued. Lastly, Gibbs argues the "sloppiness" of the State's affidavit, including the failure to attest to the reliability of its "sources" of information, precludes the State from any assertion of a good faith exception pursuant to *Leon*.[4] We hold the circuit court did not err by suppressing the CSLI.

A. CSLI

Originally, the State asserted that the circuit court was bound by the Fourth Circuit opinion in *United States v. Graham*, which held that individuals do not have a reasonable expectation of privacy in CSLI. 824 F.3d 421, 427 (4th Cir. 2016). Therefore, the State argues, the circuit court erred as a matter of law. We disagree. There is no South Carolina case law adopting *Graham*'s holding that individuals do not have a reasonable expectation of privacy in CSLI. Therefore, *Graham* was not controlling at the time of the hearing, and the circuit court did not err as a matter of law in finding as such. *See Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 282 S.C. 144, 146, 318 S.E.2d 10, 11 (1984) ("[The South Carolina Supreme Court] is not bound by the rulings of the Circuit Court of Appeals . . . ."); *Limehouse v. Hulsey*, 404 S.C. 93, 108–09, 744 S.E.2d 566, 575 (2013) ("Although [the South Carolina Supreme Court] often defers to Fourth Circuit decisions interpreting federal law, . . . it is not obligated to do so . . . ."); *Johnson v. Williams*, 568 U.S. 289, 305 (2013) (stating federal courts of appeals do not bind state supreme courts when they decide federal constitutional questions). Furthermore, "[n]ewly announced rules of constitutional criminal procedure must apply retroactively to all cases, 'pending on direct review or not yet final, with no exception for cases in which a new rule constitutes a "clear break" with the past.'" *Narciso v. State*, 397 S.C. 24, 31, 723 S.E.2d 369, 372 (2012) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). Accordingly, *Carpenter* "applies retroactively to this case, and [Gibbs] may invoke its rule of substantive Fourth Amendment law." *Narciso*, 397 S.C. at 31, 723 S.E.2d at 372.

Next, the State argues *Carpenter* leaves the door open for this court to hold that the State's acquisition of Gibbs's five-day CSLI does not constitute a search. In *Carpenter*, the parties suggested "as an alternative to their primary submissions that the acquisition of CSLI becomes a search only if it extends beyond a limited period." 138 S. Ct. at 2217 n.3. The defendant proposed a 24-hour cutoff, while the

---

[4] *United States v. Leon*, 468 U.S. 897 (1984).

Government suggested a seven-day cutoff. *Id.* The Court declined to decide whether there is a limited period of time for which the Government can obtain CSLI without Fourth Amendment scrutiny. *Id.* ("[W]e need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.").

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.

B. Warrant Sufficiency

The Fourth Amendment of the United States Constitution provides that no warrant shall be issued but upon probable cause, supported by oath or affirmation. U.S. Const. amend. IV. Section 17-13-140 of the South Carolina Code (2014) states that a search warrant may be issued to search for and seize property tending to show that a particular person committed a criminal offense. "[S]earch warrants may be issued 'only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant.'" *State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) (quoting § 17-13-140). "Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause." *State v. Jones*, 342 S.C. 121, 128, 536 S.E.2d 675, 678–79 (2000).

"When reviewing a magistrate's decision to issue a search warrant, [the reviewing court] must consider the totality of the circumstances." *Jones*, 342 S.C. at 126, 536 S.E.2d at 678.

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, *including the "veracity" and "basis of knowledge" of persons supplying hearsay information*, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Bellamy, 336 S.C. at 143, 519 S.E.2d at 348 (emphasis added) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). "The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." *Baccus*, 367 S.C. at 50, 625 S.E.2d at 221. "A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found . . . ." *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014). "[I]n passing upon the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention." *State v. Owen*, 275 S.C. 586, 588, 274 S.E.2d 510, 511 (1981), *abrogated on other grounds by Gates*, 462 U.S. at 238.

Affidavit Sufficiency

The State argues the affidavit underlying the search warrant set forth sufficient information to support a probable cause finding. We disagree.

First, the affidavit fails to mention what crime or offense police believed Gibbs committed. *See* § 17-13-140 (stating, in part, a search warrant may be issued to search for and seize property "tending to show that a particular person *committed a criminal offense*") (emphasis added). Affidavits that fail to set forth facts as to why police believe a suspect committed a particular offense are defective. *See Baccus*, 367 S.C. at 52, 625 S.E.2d at 222 (finding an affidavit in support of a search warrant defective because the affidavit failed to set forth any facts as to why police believed the defendant committed the charged crime); *State v. Weston*, 329 S.C. 287, 291–92, 494 S.E.2d 801, 803 (1997) (same); *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (same). The affidavits in the aforementioned cases *explicitly* mentioned that a crime took place. *See e.g., Baccus*, 367 S.C. at 51, 625 S.E.2d at 221. Nevertheless, our supreme court held that the affidavits must set forth facts as to *why* police believe the defendant was the individual to commit the charged crime. *See id.*

Here, the affidavit fails to even set forth *the crime* police believed transpired.[5] As such, the affidavit necessarily fails to set forth *why* police believed Gibbs committed any crime. *Baccus*, 367 S.C. at 52, 625 S.E.2d at 222. ("This affidavit fails to set forth any facts as to why police believed [the defendant] committed the crime. . . . Given the totality of the circumstances, we conclude the issuing magistrate did not have a substantial basis to find probable cause for a search of [the defendant]'s residence . . . ."). While the affidavit states vaguely why police believed Gibbs was *involved* with Victim's disappearance, it fails to mention what *crime* Gibbs is believed to have committed. *See id.* Plainly stated, police failed to allege a crime for which probable cause for the warrant was needed. *See* § 17-13-140 (stating, in part, a search warrant may be issued to search for and seize property "tending to show that a particular person committed a criminal offense"). Furthermore, the affidavit merely expressed a belief that Gibbs's phone records would provide information regarding any contact the Victim may have had with Gibbs and Gibbs's whereabouts the night of Victim's disappearance.

Next, the affidavit fails to address "the 'veracity' and 'basis of knowledge' of persons supplying hearsay information." *See Bellamy*, 336 S.C. at 143, 519 S.E.2d at 348 (quoting *Gates*, 462 U.S. at 238). The affidavit fails to identify the "many" individuals who identified Gibbs as being involved in Victim's disappearance, fails to give any details regarding the "drug related incidents," and makes no showing of the reliability of these individuals. *See 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). Looking at the four corners of the affidavit, there is no information from which a court could conclude the witnesses

---

[5] The affidavit reads in relevant part:

> The phone number to be searched belongs to Javon Gibbs[,] *who has been identified by many as being involved with [Victim's] 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 [Victim] and his whereabouts during the date and time [Victim] went missing.*

(emphases added).

were reliable. *See State v. Robinson*, 415 S.C. 600, 605, 785 S.E.2d 355, 357–58 (2016) (finding the contents of a search warrant's affidavit sufficient on its face to provide the court a substantial basis to believe the confidential informant was reliable because the affidavit provided that: (1) the HCPD, (2) had a confidential informant, (3) who bought cocaine, (4) from the subject home, and (5) the informant had made previous purchases from the home).

Having concluded that the search warrant affidavit is facially insufficient to establish probable cause, we will now look to oral testimony. *Jones*, 342 S.C. at 128, 536 S.E.2d at 678–79 ("Oral testimony may also be used in this state to supplement search warrant affidavits [that] are facially insufficient to establish probable cause.").

Oral Testimony

The State argues that the supplementary testimony provided at the pretrial hearing, when combined with the affidavit, constitutes sufficient probable cause for the issuance of the search warrant. We disagree.

The State conceded at the hearing that it was difficult to say exactly what was told to the magistrate. Detective Martin testified that police officials went to many different magistrates to obtain the twenty-six warrants issued during the course of the investigation of Victim's disappearance. Nevertheless, Detective Martin testified definitively that the magistrate knew about: the relationship Victim had with Gibbs and Brown, the botched drug deal and the related confrontations, and the fact that Gibbs communicated via phone with Brown at the time of the Victim's disappearance.

However, the State was unable to confirm at the pretrial hearing that the magistrate was advised of the crime police believed Gibbs committed. *See* § 17-13-140 (stating, in part, a search warrant may be issued to search for and seize property "tending to show that a particular person committed a criminal offense"); *Baccus*, 367 S.C. at 52, 625 S.E.2d at 222 (finding an affidavit in support of a search warrant defective because the affidavit failed to set forth any facts as to why police believed the defendant committed the charged crime). When asked by the court what crime the affidavit was offered as probable cause of, the State responded, "all of it's probable cause to [Victim's] disappearance." The State then added: "[Detective Martin]'s looking at it as a kidnapping, possible murder." Further, Detective Martin testified that he was seeking the CSLI "not just to find out if [Gibbs] was the one with [Victim], but also to clear him [by demonstrating] that he

had not been the one with [Victim] or around [Victim]'s residence." Based on the statements provided by Detective Martin, HCPD did not appear to have a strong belief that Gibbs was involved in a crime at the time the warrant was issued. The fact that the State responded that the affidavit was meant to establish probable cause for Victim's "disappearance" provides support for Gibbs's assertion that the State had many theories regarding what happened to Victim and was "fishing" for information.

Furthermore, Detective Martin conceded that he did not go through reliability of the witnesses with the magistrate. Nevertheless, in considering the totality of the circumstances, "[a] deficiency in one of the elements of veracity and reliability may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *State v. Dupree*, 354 S.C. 676, 685, 583 S.E.2d 437, 442 (Ct. App. 2003). The sheer number of witnesses who attested to the botched drug deal, coupled with the Facebook messages, corroborate the drug deal and the drug related incidents. However, these witnesses' beliefs that Gibbs was involved in Victim's disappearance due to the botched drug deal does not bolster the reliability of their tip, and there is no "substantial basis for crediting th[is] hearsay." *United States v. Ventresca*, 380 U.S. 102, 108 (1965) (quoting *Jones v. United States*, 362 U.S. 257, 272 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 85 (1980)). There was no testimony that Gibbs made any threats to harm Victim or that any of the witnesses had actual knowledge that Gibbs was involved in either the murder or kidnapping of Victim.

Accordingly, the oral testimony was not enough to overcome the insufficiency of the warrant affidavit. Therefore, the evidence does not show that the magistrate had a substantial basis upon which to conclude that probable cause existed. *Baccus*, 367 S.C. at 50, 625 S.E.2d at 221 ("The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed."); *Dupree*, 354 S.C. at 684, 583 S.E.2d at 441 ("In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention.").

C. Good Faith

The State argues that the circuit court erred by finding that the good faith exception to the warrant requirement did not apply. We disagree.

Initially, the State argued that "law enforcement acted in objectively good faith reliance upon the order that was issued." In *Leon*, the Supreme Court held that

the Fourth Amendment exclusionary rule does not bar the admission of evidence obtained by officers acting in reasonable reliance on a search warrant that was issued by a detached and neutral magistrate but ultimately found to be invalid. 468 U.S. at 922. However, "[r]eviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'" *State v. Johnson*, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990) (quoting *Leon*, 468 U.S. at 915). "Suppression is appropriate . . . when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Weston*, 329 S.C. at 293, 494 S.E.2d at 804 (1997) (quoting *Leon*, 468 U.S. at 923). "Therefore, the good-faith exception would not apply." *Id.*

As indicated in Section B, neither the affidavit nor oral testimony provided the magistrate with a substantial basis for determining the existence of probable cause because the affidavit did not allege that a crime was committed—nor did it allege that police believed Gibbs committed any crime. *See* § 17-13-140 (stating, in part, a search warrant may be issued to search for and seize property "tending to show that a particular person committed a criminal offense"); *Baccus*, 367 S.C. at 52, 625 S.E.2d at 222 (finding an affidavit in support of a search warrant defective because the affidavit failed to set forth any facts as to why police believed the defendant committed the charged crime). Further, Detective Martin admittedly did not attest to the witnesses' veracity and reliability or the basis of their knowledge. Therefore, the good faith exception would not apply. *Weston*, 329 S.C. at 293, 494 S.E.2d at 804 (finding the good faith exception did not apply in a case in which the warrant affidavit failed to set forth any facts as to why police believed the defendant committed the crime); *Johnson*, 302 S.C. at 248, 395 S.E.2d at 170 ("[R]eviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'" (quoting *Leon*, 468 U.S. at 915)).

Alternatively, the State argues that the good faith exception applies because the law at the time of the collection of the CSLI was that a warrant was not required. The State cites *United States v. Chavez* for its assertion. 894 F.3d 593, 608 (4th Cir. 2018). *Chavez* held that "[w]hile *Carpenter* is obviously controlling going forward, it can have no effect on [the defendant's] case." 894 F.3d at 608. "The exclusionary rule's 'sole purpose . . . is to deter future Fourth Amendment violations." *Id.* (quoting *Davis v. United States*, 564 U.S. 229, 236–37 (2011)). "Thus, when investigators 'act with an objectively "reasonable good-faith belief" that their conduct is lawful,' the exclusionary rule will not apply." *Id.* The *Chavez* court held because

investigators reasonably relied on the law at the time, which allowed them to obtain CSLI via court order instead of a warrant, they acted in good faith. *Id.*

We believe the current matter is easily distinguishable from *Chavez* and similar cases applying the good faith exception to warrantless CSLI acquisitions. In that line of cases, the law enforcement official(s) relied on either voluntary disclosures from the wireless providers or a court order, each pursuant to the Stored Communications Act (SCA),[6] instead of a search warrant. The SCA contains a provision allowing government officials to obtain court orders compelling wireless providers to disclose CSLI and related data. § 2703(c)(1)(B). A court is allowed to issue the order upon a showing of "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are *relevant* and material to an ongoing criminal investigation." § 2703(d) (emphasis added). This is a lesser showing than the probable cause required for a search warrant. *See id.*; *United States v. Sokolow*, 490 U.S. 1, 7 (1989) ("[P]robable cause means 'a fair probability that contraband or evidence of a crime will be found.'" (quoting *Illinois v. Gates*, 462 U.S. at 238)). In *Chavez*, government officials relied on section 2703—and its reduced burden—to procure the defendant's wireless records. 894 F.3d at 608.

Here, there is no question that HCPD relied on a *search warrant* as opposed to voluntary disclosures from a wireless provider—because that provider explicitly denied HCPD's request for voluntary disclosures. Furthermore, HCPD obtained a warrant and not an order pursuant to the SCA. HCPD could not have reasonably relied on a law or procedure that it did not use. *See Chavez* 894 F.3d at 608 (holding that the good faith exception applied because investigators reasonably relied on a provision of the Stored Communications Act for its warrantless search). Accordingly, the court did not err by finding that the good faith exception did not apply in this matter.

CONCLUSION

Based on the foregoing, the circuit court's order is

AFFIRMED.[7]

LOCKEMY, C.J., and GEATHERS and HEWITT, JJ., concur.

---

[6] 18 U.S.C.A. §§ 2701–13 (2015 & Supp. 2020).

[7] We decide this case without oral argument pursuant to Rule 215, SCACR.

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 an banc 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

---

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 do so. 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.

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
S.C. Bar # 4806
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

September 3, 2020.

s/William Edgar Salter, III
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR APPELLANT

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,

vs.

JAVON D. GIBBS,

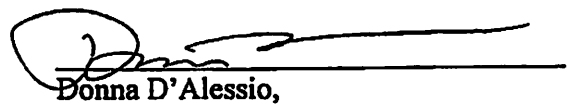
RESPONDENT.

PROOF OF SERVICE

I, Donna D'Alessio, am an employee of the Appellant, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Petition for Rehearing and Suggestion For Rehearing En Banc, and Proof of Service has been forwarded to Respondent's counsel, Robert M. Dudek, Esq., via email today, September 3, 2020 to RDudek@sccid.sc.gov, and by depositing one copy of the same in the United States mail, postage prepaid, and addressed to his attorney of record: Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of September, 2020.



Donna D'Alessio,
Legal Assistant to William Edgar Salter, III
Senior Assistant Attorney General

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211

1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 06, 2020

Mr. W. Edgar Salter, III, Esquire
South Carolina Attorney General's Office
PO Box 11549
Columbia SC 29211

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

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V Claire Allen

CLERK

cc: Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Jimmy A. Richardson, II, Esquire
The Honorable Larry B. Hyman, Jr.

The South Carolina Court of Appeals

The State, Appellant,

v.

Javon Dion Gibbs, Respondent.

Appellate Case No. 2017-001846

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

James E. Lockemy C. J.

J.

J.

Columbia, South Carolina

FILED
Oct 06 2020

cc:
Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Jimmy A. Richardson, II, Esquire
W. Edgar Salter, III, Esquire
The Honorable Larry B. Hyman, Jr.

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2017-001846

THE STATE,

Appellant,

vs.

JAVON DION GIBBS,

Respondent.

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

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

I.

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

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

II.

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

The Supreme Court's decision in Carpenter[1] is highly relevant to this case and will likely play a large and decisive role in the ultimate outcome in the issue on appeal. It is critical and necessary for the final decision in Carpenter to be issued before the State can fully and properly present the issues to this Court. Carpenter is scheduled to be argued on Wednesday, November 29, 2017, so the court's decision will be issued by the end of the current term, no later than June or July 2018. Accordingly, the State requests this Court to hold this appeal and the time for filing the Initial Brief of Respondent and Designation of Matter in abeyance pending the Supreme Court's resolution of Carpenter and to permit the State thirty (30) days to file the Initial Brief of Respondent and Designation of Matter in this case after the Supreme Court issues its final decision. The State also asks this Court to hold the filing deadlines in abeyance pending resolution of this motion. Should this Court grant the State's motion, the State will immediately notify this Court in writing when the Supreme Court issues its final decision in Carpenter. Further, the State also asks that should this Court deny its motion, that the State have thirty (30) days from such order to submit its Initial Brief of Respondent and Designation of Matter in this case.

---

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

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

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

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

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General
Bar # 5758

MELODY J. BROWN
Senior Assistant Deputy Attorney General
Bar # 14244

J. CLAYTON MITCHELL
Assistant Attorney General
Bar # 101443

BY: _____
MELODY J. BROWN
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

November 17, 2017.

STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2017-001846

THE STATE,

Appellant,

vs.

JAVON DION GIBBS,

Respondent.

PROOF OF SERVICE

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

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

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

MELODY J. BROWN
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

APPELLANT,

V.

JAVON DION GIBBS,

RESPONDENT

APPELLATE CASE NO. 2017-001846

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

Respondent, through his undersigned counsel, opposes the State's motion to hold the State's appeal in abeyance. Undersigned counsel contacted the office of trial counsel, Ralph J. Wilson, Jr., and was informed that respondent Gibbs remains incarcerated in the local detention center. Based on the fact that respondent remains incarcerated, where the State is the appealing party, respondent Gibbs opposes the motion to hold the State's appeal in abeyance.

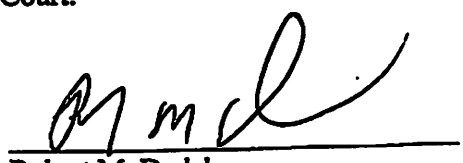
Further, the Sixth Circuit, in Carpenter v. United States, 819 Fd.3d 880 (6th Circuit 2016), held that the government did not conduct a "search" for Fourth

Amendment purposes when it obtained business records from the defendant's wireless carriers for cell phone service, containing cell tower locational data." Assuming this case is close to being on point, while obviously not binding, respondent does not understand how the Supreme Court's potential reversal or modification of that holding would assist the State in its present appeal.

In this case, the Circuit Court ruled that the affidavit "on its face did not establish probable cause, failing to set forth the source in its reliability of the facts alleged and failing to set forth facts as to why the police believed this defendant committed a crime." The Court also wrote "the Court finds the supplementing testimony in the affidavit further failed to identify what, if any, crime was committed by this defendant."

Respectfully, the State's reasons for holding this case in abeyance lack merit.

WHEREFORE, respondent Gibbs opposes the State's motion to hold the State's appeal in abeyance pending resolution of Carpender v. United States, 819 Fd.3d 880 (6th Circuit 2016), in the United States Supreme Court.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

December 11, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

APPELLANT,

V.

JAVON DION GIBBS,

RESPONDENT

APPELLATE CASE NO. 2017-001846

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Return To Motion to Hold Appeal in Abeyance Pending Resolution of Issue by United States Supreme Court in the above referenced case has been served upon Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of December, 2017.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of December, 2017.

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

The South Carolina Court of Appeals

The State, Appellant,

v.

Javon Dion Gibbs, Respondent.

Appellate Case No. 2017-001846

ORDER

The motion to hold this appeal in abeyance is denied. Appellant's initial brief and designation of matter shall be served and filed within thirty days of the date of this order.

FOR THE COURT

Columbia, South Carolina

FILED
January 8, 2018

cc:
Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
Jason Scott Anders, Esquire
James Clayton Mitchell, III, Esquire
Robert Michael Dudek, Esquire
Melody Jane Brown, Esquire

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1880
FAX: (803) 734-1839
www.sccourts.org

March 03, 2020

Mr. W. Edgar Salter, III, Esquire
South Carolina Attorney General's Office
PO Box 11549
Columbia SC 29211

Mr. Robert Michael Dudek, Esquire
PO Box 11589
Columbia SC 29211

Re: The State v. Javon Dion Gibbs
Lower Court Case No. 2015GS2600847, 2015GS2600848
Appellate Case No. 2017-001846

Dear Counsel:

Please be advised that this appeal will be argued on 04/14/2020 at 11:20 AM in Courtroom 1. The following oral argument times have been allocated:

Appellant: 10 minutes

Respondent: 10 minutes

Appellant in reply: 5 minutes

Acknowledgment received.

Signature: _____ Date: _____

Print Name: _____

Appellant: 10 minutes

Respondent: 10 minutes

Appellant in reply: 5 minutes

Arguments frequently begin before the time set. Please ARRIVE 30 MINUTES prior to your scheduled argument time.

Above is an acknowledgment verifying that you have received notification of the date and time set for argument. Please sign and date, then return the completed acknowledgment to:

V. Claire Allen, Chief Deputy Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Alan McCrory Wilson, Esquire
Jimmy A. Richardson, II, Esquire

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

March 31, 2020

Mr. Robert Michael Dudek, Esquire
PO Box 11589
Columbia SC 29211

Mr. W. Edgar Salter, III
PO Box 11549
Columbia SC 29211

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

Dear Counsel:

This case was originally scheduled to be heard during the April 2020 term. Due to the Supreme Court's order issued March 20, 2020, the oral argument was cancelled. *See RE: Operation of the Appellate Courts During the Coronavirus Emergency* (S.C. Sup. Ct. Order dated March 20, 2020).

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. If you wish the panel to consider delaying the decision until after an oral argument can be conducted, the panel requests that you advise the court within fifteen (15) days. Even so, the case may nevertheless be decided on the briefs given the uncertainty about when arguments can safely resume.

Very truly yours,

CLERK

cc: Alan McCrory Wilson, Esquire

Ed Salter

From: Falin, Lynn <LFalin@sccourts.org>
Sent: Wednesday, April 1, 2020 11:11 AM
To: Ed Salter; rdudek@sccid.sc.gov
Cc: esalter3@bellsouth.net; Alan Wilson; Melody Brown; Angela Bennett; Richardson, Jimmy A.; Kitchings, Jenny; Allen, Claire
Subject: RE: State v. Javon Dion Gibbs Appellate Case No. 2017-001846

Thank you Mr. Salter,

We have noted your request.

Lynn Falin
Court Solutions Manager
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201
803-734-1895

From: Ed Salter [mailto:ESalter@scag.gov]
Sent: Wednesday, April 1, 2020 10:45 AM
To: Falin, Lynn ; rdudek@sccid.sc.gov
Cc: esalter3@bellsouth.net; Alan Wilson ; Melody Brown ; Angela Bennett ; Richardson, Jimmy A.
Subject: RE: State v. Javon Dion Gibbs Appellate Case No. 2017-001846

Dear Ms. Falin:

The State, as Appellant, would respectfully request oral argument of this case when and assuming if that becomes possible.

Sincerely,

Ed Salter.

From: Falin, Lynn <LFalin@sccourts.org>
Sent: Tuesday, March 31, 2020 2:14 PM
To: rdudek@sccid.sc.gov; Ed Salter <ESalter@scag.gov>
Cc: esalter3@bellsouth.net; Alan Wilson <agwilson@scag.gov>; Richardson, Jimmy A. <richj@horrycounty.org>
Subject: State v. Javon Dion Gibbs Appellate Case No. 2017-001846

Good afternoon,

Attached please find correspondence from the Court of Appeals.

Lynn Falin
Imaging Supervisor,
Court Solutions Manager
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201
803-734-1895