STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

Opinion No. 2020-UP-244 (S.C. Ct. App. Filed August 19, 2020)

THE STATE,

PETITIONER,

V.

JAVON DION GIBBS,

RESPONDENT

APPELLATE CASE NO. 2017-001846

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

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PETITIONER'S QUESTIONS PRESENTED

1.

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

2.

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

3.

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

COUNTERSTATEMENT OF ISSUES PRESENTED

1.

The Court of Appeals did not commit error by affirming the trial court's suppression of the CSLI for respondent's cell phone particularly after the Supreme Court's decision in Carpenter v. United States, 138 S.Ct. 2206 (2018) where the state earlier was not relying on binding appellate precedent to justify its extremely deficient, reckless and wanton search warrant affidavit.

2.

The Court of Appeals did not err by finding that Respondent Gibbs had a legitimate expectation of privacy in the state's collection of his CSLI.

3.

The Court of Appeals and the trial court did not commit error in finding that Inv. Martin did not act in good faith reliance on the search warrant that was issued, where there was not probable cause for the issuance of the search warrant, particularly where the vague allegations did not even state what, if any, crime respondent allegedly committed, and it did not assert any belief in the reliability of its sources.

STATEMENT OF FACTS

Procedural history

On August 30, 2017, a pre-trial hearing was held before the Honorable Larry B. Hyman pertaining to respondent's motions to suppress "all evidence, substances, tangible items, and/or testimony regarding any and all cell records and/or cell site location information regarding phone number 843-877-1553." R. 101 – 102. Ralph Wilson, Jr., represented respondent. Assistant attorney generals Jason Anders and James Clayton Mitchell represented the state. R. 1. R. 89 – 93.

At the conclusion of the hearing, the judge granted the motion to suppress, ruling, "I find that the information provided for the magistrate and the affidavits are woefully wanting and it was improperly issued and I'll suppress . . ." R. 79, ll. 2-11. A written order granting these suppression motions was filed on September 5, 2017. R. 101 – 102.

The state filed a notice of intent to appeal, and then moved that the Court of Appeals hold the appeal in abeyance pending the United States Supreme Court's decision in Carpenter v. United States, 819 F.3d 880 (6th Cir. 2016) cert. granted, 137 S.Ct. 2211 (2017). The state wrote that "The Supreme Court's decision in Carpenter is highly relevant to this case and will likely play a large and decisive role in the ultimate outcome in the issue on appeal." App. 39. The Court of Appeals denied that motion by an order filed January 8, 2018. App. 45.

Subsequently, in Carpenter v. United States, 138 S.Ct. 2206 (2018), the United States Supreme Court reversed the Sixth Circuit and held that an individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through the cell site location information (CSLI).

Following briefing, the Court of Appeals affirmed the circuit court's suppression of respondent's phone records in State v. Javon Dion Gibbs, 2020-UP-244 (filed August 19, 2020). App. 1-12. The state filed a petition for rehearing with suggestion rehearing En Banc on September 3, 2020. App. 14-34. The Court of Appeals denied the state's petition for rehearing on October 6, 2020. App. 35-36.

The state then filed a petition for writ of certiorari with this Court. This return follows.

Relevant trial facts

At the beginning of the hearing, the state confirmed, "this is a no body case." R. 5, ll. 10-25. The judge observed that he had read the respondent's motion to suppress, and he stated: "I am concerned about the sufficiency of this search warrant." R. 7, ll. 10-17.

Defense counsel Wilson asserted respondent had an expectation of privacy guaranteed by the Fourth Amendment in the cell phone records, and the CSLI. Defense counsel Wilson then read the affidavit to the search warrant for the court:

> MR. WILSON: On 8/27/13, the mother of Zachary Malinowski **reported him missing** from 2918 Highway 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 4:24 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, the victim or his body have not been located. The phone number that he searched belongs to Javon Gibbs, who had 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 late, excuse me, during the date and time the victim went missing**.

R. 8, ll. 6-25 (emphasis added).

The judge observed that respondent's exercise of his constitutional rights to remain silent, and not to submit to a polygraph or give a DNA sample could not be considered as evidence of guilt. R. 9, ll. 14-21.

The state then called Investigator Jonathan Martin as a witness regarding the search warrant. R. 10, l. 9 – 11, l. 10. Martin told the judge he did not have a copy of his investigative report but he asserted that he had numerous statements "from people that Javon Gibbs and Christopher Brown had been involved in a drug transaction" with the missing person [Zach]. R. 11, l. 10 – 12, l. 6. Martin offered that respondent's girlfriend told him that, "Zach had an ongoing issue with Christopher Brown and Javon Gibbs . . . over drug dealing." R. 13, ll. 1-11. Allegedly, the drug deal was for $1400, and "they had taken his half and refused to give it up." R. 13, ll. 12-16.

Martin said that Christopher Brown had been arrested for having a stolen gun and "Zach was being blamed for the arrest and there had been some animosity over that." R. 15, ll. 9-14. Martin talked about another incident involving "Marcus Smith, Chris Brown, and Zach Malinowski at a park, and there was a shotsfired call that the police responded to." R. 16, ll. 1-5. Allegedly, Christopher Brown and Marcus Smith were arrested in this incident. R. 16, ll. 21-23.

Martin also offered that respondent had denied ever being at "Zach's house, you know, pretty much accounting that he wasn't with Zach the night of the incident." R. 17, ll. 6-21.

On the issue of reliability, the following occurred with Jonathan Martin:

> Q: Okay. Well, let me ask you this. In the warrant that you actually wrote to the court, **did you actually tal**k **about the reliability of these particular witnesses** that were saying these things about him?
>
> A: **No, I did not.**

Q: Okay. Did you discuss with the magistrate at all in your conversation with him about the fact that you knew that these people **were reliable**, that y'all had done with business with them before, that they were confidential informants or whatever?

A: None of them were confidential informants; they were all witnesses to the acquaintance of Zach or ---

Q: Well, let me ask you this, did you give the actual Magistrate the actual police report that you had?

A: For right there?

Q: Yes.

A: No.

R. 24, ll. 2-18. (emphasis added).

When asked whether Martin talked about the reliability of the hearsay witnesses, Martin responded, "*I probably did not go through reliability*. **I did nothing to gauge each person's reliability** . . ." R. 30, ll. 8-15. (emphasis added). Martin also said that the search warrant stated that it only hoped respondent could provide information "regarding any contact with the victim and his whereabouts during the date and time that the victim went missing." Martin added, "That's all I can go off of **is my beliefs**." R. 33, ll. 13-23. (emphasis added).

Martin admitted *he did not put in the affidavit that he believed respondent committed a crime.* He also did not even allege respondent did anything illegal or wrong. R. 33, l. 24 – 34, l. 4.

Defense counsel Wilson then noted that there was no assertion as to the reliability of the informants or the hearsay witnesses, nor any statement of why the police believed "a person committed any particular crime." R. 35, l. 16 – 36, l. 24.

The judge observed that "this sworn affidavit didn't even say a crime has been committed." Defense counsel agreed, and he added that the warrant and affidavit were so

deficient in this case that there could not be any assertion that good faith could save them. Counsel Wilson also argued that the affidavit was so irresponsibly put together in this case that an inquiry "into the knowing or reckless falsity of the affidavit" was not out of the realm of a responsible inquiry. R. 37, l. 7 – 38, l. 17. See Franks v. Delaware, 438 U.S. 154 (1978).

As to probable cause, the judge asked, "Probable cause for what?" and defense counsel responded: "Exactly." Counsel said it was apparent that the state was merely going on a fishing expedition in this case, and that there were "a number of different theories out here that they had regarding to what happened to this young kid." R. 38, ll. 2-25. Wilson added, "Some people were saying, look, we saw him here, some people said he was kicked in the head, some people said he was hanged from a tree. They were getting psychics calling in giving them information . . ." R. 38, l. 18 – 39, l. 21. Counsel added:

> And the report is very detailed, but nowhere in the report -- when you look through the first, I think it was 31 pages or 60 pages before he issued the warrant for Javon Gibbs, there was almost no mention of Javon. Now there was a lot of talk about Chris Brown, but there's no mention of Javon Gibbs being this big drug dealer. There weren't incidents. There was one accusation that, you know, Zach said that, again, this man may have taken $600 from him. There was one person that said that. Otherwise, this other stuff was not true. Jamal Fleming never said it, Marcus Smith never said it, no one said this was happening. So, again, the falsity of the affidavit concerns me, but also the fact that that it does not give me conclusions as to what they're looking at this for **other than to say, okay, we're looking at it for his whereabouts. Well, if that's the case then, we don't need to use it against him in a murder trial.**

R. 39, ll. 3-18. (emphasis added).

The judge then stated:

> THE COURT: Let me ask you, counsel, why in the world in a case of this magnitude would you submit an affidavit for a search warrant that does not describe a crime and the only thing it says that the Defendant has been identified by many as being involved with his disappearance, not murder, not kidnapping, disappearance

> based on drug related incidents before his disappearance and not describe it, not put any information as to who the many are, which we've now determined not to be many, maybe one, or put in anything concerning the reliability and the officer says he had no information concerning their reliability, nothing to show any corroboration. **Who in the world goes before a Magistrate with that kind of affidavit in a possible murder case? Please, please, I've only been doing this 40 years.** You know, I'm new to it, I learn every day, but tell me about that.

R. 44, l. 17 – 45, l. 6 (emphasis added).

Defense counsel Wilson repeated that respondent had an expectation of privacy that was a reasonable expectation, and that the state needed a valid search warrant based upon probable cause that respondent had committed a crime, and which alleged the reliability of the hearsay sources. R. 46, l. 8 – 49, l. 2. The state argued that a warrant was not required for "business records" which it, at the time, claimed the CSLI was. R. 49, l. 3 – 50, l. 13. As stated, the judge granted the motion to suppress, and later issued a written order. R. 101 – 102. As further stated, the Court of Appeals affirmed the trial judge's suppression order.

ARGUMENT

1.

The Court of Appeals did not commit error by affirming the trial court's suppression of the CSLI for respondent's cell phone particularly after the Supreme Court's decision in *Carpenter v. United States,* 138 S.Ct. 2206 (2018) where the state earlier was not relying on binding appellate precedent to justify its extremely deficient, reckless and wanton search warrant affidavit.

In Carpenter v. United States, 138 S.Ct. 2206 (2018), the Supreme Court held that an individual maintains a legitimate expectation of privacy in the records of his physical movements as captured through CSLI. In Carpenter, one court order through the Stored Communications Act requested seven days of Carpenter's CSLI from Sprint. This produced two days of records covering the period where Carpenter's phone was "roaming" in northeastern Ohio. The crime involved robbing nine different stores in Ohio and Michigan. Carpenter v. United States, 138 S.Ct. 2206, 2212 (2018). This constituted a search requiring a warrant which requires probable cause. A SCA order, which only required "reasonable grounds" for believing the records were "relevant and material to an ongoing investigation" was a much lesser standard than probable cause. See 18 U.S.C. 2703 (d).

The state in this case has asked this Court to grant certiorari because the government sought five days of CSLI rather than the seven days in Carpenter. That is respectfully a distinction without a meaningful difference here while seeking certiorari from this Court particularly after such a meaningful recent decision of constitutional law by the United States Supreme Court in Carpenter.

In this case, there was no exigency involved, and under Carpenter, there was no exception to the government not needing a search warrant supported by probable cause before it acquired the CSLI and phone records from his wireless carrier.[1]

Following Carpenter, as seen, the state now shifts its ground to argue that "Assuming *arguendo* that a search warrant is required for law enforcement to acquire five days of CSLI from a defendant's phone, the State submits that the Court of Appeals committed clear error by affirming suppression of the (CSLI for Gibbs' cell phone where the search warrant affidavit, as supplemented by the information provided to the magistrate, clearly supports the magistrate's finding of probable cause to issue the warrant." Petition for Writ of Certiorari at 3. Thus, as stated, the state's only remaining minuscule argument is a quibble over the five days in this case versus the seven-day Sprint SCA order rejected in Carpenter. Further, the search warrant affidavit here was horribly defective. No bold statement that the Magistrate's finding of probable cause was supported by the record can change the fact that it was not. The lack of probable cause for the warrant correctly condemned by the circuit court judge and the Court of Appeals is factually based and does not justify certiorari in this case.

In this case, the affidavit did not allege respondent committed **any crime**. It only stated that it was the "belief" that searching the records of respondent would "provide information regarding any contact with the victim and his whereabouts during the date and time the victim

[1] The state wrote in its brief in the Court of Appeals, which was written prior to Carpenter, that United States v. Graham, 824 F.3d 421 (4th Cir. 2016) (en banc), holding that individuals do not have a reasonable expectation of privacy in CSLI was persuasive *and controlling*. State's brief at 5. However, the Fourth Circuit in United States vs. Chavez, 894 F.3d 593, 608 (4th Cir. 2018), later recognized that United States v. Graham was abrogated by Carpenter. Regardless, respondent correctly argued in this case that the South Carolina Supreme Court was not bound by the rulings of the Fourth Circuit, and our Court of Appeals held that there was no South Carolina case law adopting Graham's holding "that individuals do not have a reasonable expectation of privacy in CSLI." App. 6.

went missing." R. 8, ll. 6-25. In other words, the police were literally going on a fishing expedition hoping that respondent's cell phone records and CSLI information would "provide information regarding any contact with the missing victim." R. 8, ll. 22-25.

Therefore, there should be no serious assertion that this search warrant affidavit stated there was a fair probability that evidence of a crime would be found in a particular place if the search warrant was issued, since what crime respondent allegedly committed was not even asserted in the affidavit or warrant. Further, there was also nothing set forth in the affidavit about the veracity or reliability of the persons supplying hearsay information. See Illinois v. Gates, 462 U.S. 213 (1983); State v. Johnson, 302 S.C. 243, 247, 395 S.E.2d 167, 169 (1990).

The state's brief in the Court of Appeals at 16-17 claimed there was "ample information to support the probable cause finding made by the magistrate judge." Again, this is a bold statement correctly found unsupported by the record in the lower courts.

The affidavit itself, as seen above, only stated it was the belief of the affiant that respondent's CSLI records could provide information regarding any contact with the missing alleged victim. This was truly a fishing expedition, and the judge here correctly ruled that the affidavit did not establish probable cause nor set forth any assertion about the reliability of the "sources." The Court of Appeals properly affirmed. Certiorari is not warranted given this record.

2.

The Court of Appeals did not clearly err by finding that Respondent Gibbs had a legitimate expectation of privacy in the state's collection of his CSLI.

The Court of Appeals wrote of the state's five-day versus seven-day present attack:

> 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 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*, 13 8 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.

App. 6-7. (emphasis added).

There respectfully is no sound reason to grant certiorari to review this conclusion of the Court of Appeals. As respondent argued here in the Court of Appeals, and the Supreme Court reiterated in Carpenter: Cell site records hold for many Americans "the privacies of life." Riley v. California, 573 U.S. 373, 403 (2014). That was one major reason the Supreme Court in Carpenter rejected the government's position that CSLI records should be blindly treated under the "third-party doctrine" stemming from the notion that where an individual knowingly shares information with another that he or she has a reduced or forfeited expectation of privacy. See United States v. Miller, 425 U.S. 435 (1976) (financial records held by a bank); Smith v. Maryland, 442 U.S. 734 (1979). The same cannot be said of CSLI records as is said of bank records because that would be tantamount to holding that because an individual has his or her cell phone turned on, they have knowingly shared all of the details of their present and past whereabouts with law enforcement.

The Supreme Court noted in Carpenter that "The [Fourth] Amendment seeks to secure "the privacies of life" against "arbitrary power." Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886). Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." United States v. Di Re, 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948)." Carpenter v. United States, 138 S.Ct. at 2214.

Thus, the issue of a "legitimate expectation of privacy" in respondent's cell phone records and the CSLI documents are now settled in respondent's favor for Fourth Amendment purposes. However, the state here continues to argue that a warrant was not required in this case, and that there was no expectation of privacy in these documents. Petition for Writ of Certiorari at 17.

However, as the Supreme Court observed in Carpenter: "[H]istorical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*.[2] Unlike the bugged container in Knotts[3] or the car in Jones, a cell phone—almost a "feature of human anatomy," Riley, 573 U.S., at ___, 134 S.Ct., at 2484—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. See *id.,* at ____, 134 S.Ct., at 2490 (noting that "nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower"); contrast Cardwell v. Lewis, 417 U.S. 583, 590, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (plurality opinion) ("A car has little capacity for escaping public scrutiny."). Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." Carpenter v. United States, 138 S.Ct at 2218.

Following Carpenter, there is most respectfully no need for this Court to grant certiorari to tinker with clear very recent Supreme Court precedent because the state has "buyer's remorse" that it guessed wrong on how the United States Supreme Court would rule on this issue when it originally petitioned the Court of Appeals to hold this appeal in abeyance until Carpenter was decided. Carpenter has now been decided, and a warrant, supported by probable cause, was required to obtain respondent's cell phone information because respondent had a legitimate expectation of privacy in these records, and the Court of Appeals, as addressed further below, did

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2 United States v. Jones, 565 U.S. 400 (2012).

3 United States v. Knotts, 460 U.S, 276 (1983).

not err in finding a lack of good faith given the extremely sloppy negligent search warrant affidavit the circuit court correctly found horribly wanting in this case.

3.

The Court of Appeals and the trial court did not commit clear error in finding that Investigator Martin did not act in good faith reliance on the search warrant that was issued, where there was not probable cause for the issuance of the search warrant, particularly where the vague allegations did not even state what, if any, crime respondent allegedly committed, and it did not assert any belief in the reliability of its sources.

Defense counsel correctly argued any assertion of a good faith exception pursuant to Leon[4] in this case was specious. As seen, the trial judge correctly observed he did not understand "how in the world" anyone in this case could assert that this affidavit provided probable cause for the issuance of the search warrant. Again, the affidavit did not assert what, if any, crime respondent may have committed, and it made no assertion of the reliability of the "sources" of its information.[5] Counsel correctly noted that the sloppiness of the state's affidavit raised a Franks v. Delaware[6] issue of the deliberate falsehood or reckless disregard for the truth in obtaining the search warrant in this case.

Yet the state argues that, despite the many problems with the search warrant affidavit in this case, "it is clear that the State acted in good faith and suppression was erroneous." Petition for Writ of Certiorari at 24. The state makes a vague assertion that the Court of Appeals' unpublished opinion in this regard was inconsistent with another unpublished *per curium* opinion

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

5 As defense counsel again correctly argued the state's investigation seemed to reveal if there was any probable cause for a warrant it might more accurately have been for Chris Brown or Marcus Smith.

6 Franks v. Delaware, 438 U.S. 154 (1978).

of the Court of Appeals. Petition for writ of certiorari at 24, n. 15. It is unclear that even if that is true how it somehow warrants certiorari in this case.

As the Court of Appeals correctly decided here:

> [N]either 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* § 17-1 3-140 (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), 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)(l)(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.

App. 12-13.

As to the "reliability" of the sources supplying information, the Court of Appeals correctly wrote:

> [T]he 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 were reliable.
>
> 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 by the Court). 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).

App. 9-10.

As to the oral supplementary testimony, the Court of Appeals noted, inter alia, that "the State conceded at the hearing that it was difficult to say exactly what was told to the magistrate . . . When asked by the court what crime the affidavit was offered as probable cause of, the State responded, all of its 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.'" App. 10-11.

The Court of Appeals also pointed out that "Detective Martin conceded that he did not go through reliability of the witnesses with the magistrate." App. 10.

Further, in addition to their being no indicia of reliability to the hearsay:

> "[T]here 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.").

App. 11.

The well-reasoned ruling by the circuit court judge in this case, was subsequently vindicated by the United States Supreme Court's opinion in Carpenter v. United States, as our state Court of Appeals recognized and therefore it properly affirmed the circuit court judge. Certiorari most respectfully is simply not warranted in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

s/ Robert M. Dudek
Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 18th day of December, 2020.