NO. _____

In the
Supreme Court of the United States

CHRISTIAN VERNON SIMS,
***Petitioner*,**

v.

THE STATE OF TEXAS,
***Respondent*.**

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

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PETITION FOR WRIT OF CERTIORARI

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Dated: April 16, 2019

QUESTION PRESENTED

1. In *Carpenter v. United States*, 138 S.Ct. 2206 (2018), this Court held that a person has a legitimate expectation of privacy in both real-time and historic cell-site location information (CSLI). The third-party doctrine was held inapplicable because CSLI data is not voluntarily turned over to a cellphone service provider. Thus, Carpenter had a legitimate expectation of privacy in at least seven days of historical CSLI data associated with his cellphone and the government violated the Fourth Amendment when it searched his phone without a warrant supported by probable cause. Petitioner Sims's cellphone was tracked for an afternoon for about three hours' worth of real-time CSLI records and without a warrant. And, his phone was pinged about five times to obtain his location-information. But, the TCCA determined that although a 5-4 split on this Court "supported the idea that longer-term surveillance might infringe on a person's legitimate expectation of privacy if the location records reveal the privacies of his life," Petitioner's is not that case because apparently the surveillance, although it certainly occurred, was not pervasive enough.

Question: Under the Fourth Amendment, does a person have a legitimate expectation of privacy in historic or real-time cellphone tracking data (CSLI) regardless of the duration of the tracking (seconds) or frequency of the tracking (number of pings)?

PARTIES TO THE PROCEEDING

Christian Vernon Sims, Petitioner

State of Texas, Respondent.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Christopher Vernon Sims respectfully petitions for a writ of certiorari to review the Opinion and Judgment of the Texas Court of Criminal Appeals ("TCCA"):

OPINIONS BELOW

The Opinion and Judgment of the TCCA from which this petition is filed is *Sims v. State,* No. PD-0941-17 (Tex.Crim.App. Jan. 16, 2019) (designated for publication) and is entitled "Opinion" throughout this petition (App.1-23). This Opinion was the appeal from the Opinion of the Sixth Court of Appeals of Texas in *Sims v. State,* 526 S.W.3d 638 (Tex.App.-Texarkana 2017) (App.24-37).

STATEMENT OF JURISDICTION

On January 16, 2019, the TCCA issued the Opinion in *Sims v. State,* No. PD-0941-17 (Tex.Crim.App. Jan. 16, 2019) (designated for publication) (App.1-23). This Court has jurisdiction under 28 U.S.C. § 1257(A) (2019).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

Introduction

In *Carpenter v. United States*, 138 S.Ct. 2206 (2018), this Court held that a person has a legitimate expectation of privacy in both real-time and historic cell-site location information (CSLI). The third-party doctrine was held inapplicable because CSLI data is not voluntarily turned over to a cellphone service provider. Thus, Carpenter had a legitimate expectation of privacy in at least seven days of historical CSLI data associated with his cellphone and the government violated the Fourth Amendment when it searched his phone without a warrant supported by probable cause.

Petitioner's cellphone was tracked for an afternoon for about three hours' worth of real-time CSLI records and it was done so without a warrant. His phone was pinged about five times to obtain his

location-information. But, the TCCA determined that although a 5-4 split on this Court "supported the idea that longer-term surveillance might infringe on a person's legitimate expectation of privacy if the location records reveal the privacies of his life," Petitioner's is not that case because apparently the surveillance, although it certainly occurred, was not pervasive enough.

Thus, the issue before this Court is whether it matters what the duration of the tracking (in seconds or minutes) is or the frequency of the tracking (number of pings). If the Fourth Amendment is violated by the intrusion, why should it matter how many seconds or number of pings occurs? The Fourth Amendment is violated upon an initial intrusion that is unreasonable. An initial intrusion must generally be based on reasonable suspicion or probable cause and the scope of a search must be strictly tied to and justified by the circumstances which rendered its initiation permissible. *Terry v. Ohio*, 392 U.S. 1, 19 (1968). Here, there was nothing reasonable about intentionally and knowingly violating the warrant requirement.

Thus, the question for this Court is whether under the Fourth Amendment a person has a legitimate expectation of privacy in historic or real-time cellphone tracking data (CSLI) regardless of the duration of the tracking (seconds) or frequency of the tracking (number of pings)?

Background Facts

1. December 18, 2014

On December 18, 2014, Annie (Petitioner's grandmother) was found dead by a gunshot to the back of her head. (App.4; RR2.96; RR3.7)[1] Detective Smith of the Lamar County Sheriff's Office responded and identified the deceased. (App.4) Lieutenants Tuttle and Chipman learned that Annie's 2012 Silver Toyota Highlander was missing from the driveway and that Petitioner and his girlfriend Ashley Morrison were possible suspects. (RR2.102, 111; App.4-5). Police searched the property and discovered that in addition to the Highlander and Annie's purse, a Beretta 9mm handgun and a .38 Special revolver were missing. (App.5; RR2.96). When Mike (Annie's husband) arrived home, the police informed him about the missing purse. (App.5).

Mike Sims called Capitol One to report credit cards stolen. (RR2.14, 97-98). A company representative told him that the cards had been used three times, including once at a Wal-Mart in McAlester, Oklahoma (80 miles north of Lamar County, Texas). (App.5). Police contacted the McAlester Police Department and asked them to go to the Wal-Mart to investigate. (App.5). Officers

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[1] Record citations are to the Appendix ("App._") or the record on appeal, which are cited to the Clerk's Record, cited as "CR" and the page number, and the Reporter's Record, cited as "RR" followed by the volume and page or exhibit number ("SX" for State's exhibits or "DX" for Appellant's exhibits). Petitioner will make the record on appeal available to the court upon demand.

discovered that a young man and woman bought items using a credit card stolen from Annie's purse and left in a 2012 Silver Toyota Highlander. (App.5). McAlester police took pictures of the man and woman from security footage and texted them to Texas police. (App.5). Mike Sims identified the people as Petitioner and Morrison. (App.5).

Deputy Springer of the Lamar County Sheriff's Office thought that there was probable cause to believe that Petitioner committed murder, burglary of a habitation, unauthorized use of a motor vehicle, and credit card abuse. (App.5). Springer also believed that Petitioner and Morrison were a danger to the public because they were likely armed. (App.5). Springer returned to the Lamar County Sheriff's Office to obtain a warrant to "ping" Petitioner's and Morrison's cellphones. (App.6). Springer discovered that Sergeant Hill had already begun the process to ping the cellphones. (App.6). Petitioner purchased the phone a year before, he owned it, was always in sole possession of it, always had possession of it, and nobody else ever had custody of or used the phone. (RR2.128-130).

Per Springer, he could have obtained a warrant because it was during business hours and local judges were readily available but he did not because he was told not to do so. (App.6). Hill could have obtained a warrant under Tex. Code Crim. Proc. Art. 18.21 (2016), *Pen Registers and Trap and Trace Devices; Access to Stored Communications; Mobile Tracking Devices* (repealed 2019), which at the time was the statute that allowed for warrant-applications for

cellphone "pings" and the underlying data. (RR2.118-119). But officers never obtained a search or arrest warrant. (RR2.28, 31-37, 64-65). Nor did officers obtain (or attempt to obtain) a warrant for the "pinging" evidence. (RR2.56).

Instead of seeking a warrant, Hill used an exigent-circumstances form ("Emergency Situation Disclosure" form) provided by Verizon, Petitioner's service provider. (App.6; RR2.107, 120-121; RR5.SX-4B). All the form asks is "Does this request potentially involve the danger of death or serious physical injury to a person, necessitating the immediate release of information relating to that emergency?," with "Yes" or "No" checkboxes. (App.6; RR2.125; RR5.SX-4B). Below the title the form states that "Upon receipt of this completed form, Verizon may divulge records or other information to governmental entities in certain emergencies, pursuant to 18 U.S.C. § 2702(b)(8) or § 2702(c)(4) or an equivalent state law." (App.6). Hill checked the box labeled, "Yes." Under "Types of Records Being Requested," Hill checked "Location Information." (App.6-7). Under "Time Frame for Which Information is Requested," Hill wrote "current." (App.7). Hill signed the document on December 18, 2014 and faxed it to Verizon. (App.7).

Per Hill, there was a 20-minute delay from when Petitioner's phone was "pinged" and when the police received real-time location information. (App.7). The real-time cell-site location information ("CSLI") from the first ping showed that the phone was a few miles north of the Wal-Mart where the Capitol One credit card was used, just north of

McAlester. (App.7; RR2.99). Because of this delay, Hill used Google Maps to estimate where Petitioner and Morrison probably were. (App.7). Hill called ahead to Oklahoma police departments to request that they look for Petitioner and Morrison. (App.7). Information from a "ping" indicated that cellphone was at a truck-stop in Sapulpa, Oklahoma, which is about 90 minutes north of McAlester on the Indian Nation Turnpike. (App.7; RR2.21.99.118). Based on this, at 5:53 p.m., a "be on the lookout" was issued for the 2012 Highlander "being driven by two possible murder suspects." (RR2.45-46.49.54-55.59). Police located Petitioner and Morrison at a motel across the street from the truck stop. (App.7; RR2.21-22).

Officers spoke to the motel manager and identified the correct room. (App.7; RR2.23.28). Other than the information they received from dispatch and another law-enforcement agency based on cell-phone pinging before they arrived at the motel, there was no evidence of illegal activity in the room (i.e., nobody was entering or exiting the room, nobody was yelling or screaming in or about the room). (RR2.32-33, 38-39, 55-59).

Petitioner and Morrison were taken into custody without incident. (App.7; RR2.23-26, 59-62; RR3.11). Upon arrest, Petitioner was not "Mirandized." (RR2.89-91). Petitioner told an officer "[Morrison] had nothing to do with it. It was all me." (App.7; RR2.36). Inside the motel room the police found several hundred .22-caliber bullets, six knives, a white towel with a blood stain, a loaded Beretta

9mm with a round chambered, and two boxes of 9mm rounds. (App.7-8; RR2.42, 62, 67).

2. Trial court proceedings

On July 27, 2015, a grand jury indicted Petitioner for Murder, alleging that on or about December 18, 2014, Petitioner "…intentionally and knowingly" caused the death of (Annie) by shooting her with a firearm. (CR.182). As to the Fourth Amendment issues, Petitioner filed a motion to suppress: (1) the warrantless seizure of the location-data evidence ("pinging") of the cellphone; and (2) the warrantless arrest of Petitioner under the Fourth Amendment. (CR.240-245, 362-387).

In September-October 2016, hearings were held on Petitioner's motion to suppress evidence, which was denied by the trial court. (CR.390-391, CR.423-428). In exchange for a 35-year prison sentence, Petitioner changed his plea to "guilty" to Murder. (RR4.17; CR.421-422); *see* Tex. Penal Code § 19.02 (2014).

3. Proceedings in the TCCA and the Opinion

After the court of appeals affirmed Petitioner's conviction, Petitioner filed a petition for discretionary review, asserting two grounds that were granted review (as relevant here): (1) The Court of Appeals erred by ruling that violations of the Federal Stored Communication Act ("SCA") do **not** require suppression of evidence pertaining to the warrantless pinging of a cellphone because it is irrelevant that the SCA does not provide that suppression is available

since they are laws of the United States; and (2) The Court of Appeals erred by holding that Petitioner was not entitled to a reasonable expectation of privacy in the real-time, tracking-data that was illegally seized because under the Fourth Amendment a person has a legitimate expectation of privacy in real-time tracking-data regardless of whether he is in a private or public location.

The Opinion concluded that Petitioner did not have an expectation of privacy in the real-time location information stored in his phone. (App.23). Per the TCCA, in *Carpenter* this Court held that a person has a legitimate expectation of privacy in historical CSLI records. (App.20); *citing Carpenter*, 138 S.Ct. at 2214-2215. The third-party doctrine was inapplicable because historical CSLI information is not voluntarily turned over to a cellphone service provider. Thus, Carpenter had a legitimate expectation of privacy in at least seven days of historical CSLI associated with his cellphone and the government violated the Fourth Amendment when it searched his phone without a warrant supported by probable cause. (App.20); *citing Carpenter*, *id*. at 2221.

The TCCA also observed that this Court's reasoning in *Carpenter* applies to both historical and real-time CSLI. (App.20-21). There is indeed no "bright-line rule" for determining how long police must track a person's cellphone in real time before it violates a person's legitimate expectation of privacy in those records. (App.20-21). Whether a person has a

recognized expectation of privacy in real-time CSLI records must be decided on a case-by-case basis.

The TCCA, however, concluded that Petitioner 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." (App.23). And as the TCCA also observed, a 5-4 split in this Court "supported the idea that longer-term surveillance might infringe on a person's legitimate expectation of privacy if the location records reveal the privacies of his life, but this (Petitioner's) is not that case." (App.23).

STANDARD OF REVIEW

Because this petition involves the interpretation of federal constitutional law and prior holdings of this Court, the standard of review is de novo. *See Salve Regina College v. Russell*, 499 U.S. 225, 231-232 (1991).

REASONS FOR GRANTING THE WRIT

I. Under the Fourth Amendment, a person has a legitimate expectation of privacy in real-time and historic cellphone tracking data regardless of the duration (seconds) or frequency of the tracking (number of pings).

1. *Carpenter* is binding on the TCCA

In *Carpenter v. United States*, 138 S.Ct. 2206 (2018), this Court held that the Government conducts

a search under the Fourth Amendment when it accesses historical cellphone records that provide a comprehensive chronicle of the user's past movements. *Id*. at 2222-2223. And, a person maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI, so the location-information obtained from the wireless carriers is the product of a search subject to scrutiny under the Fourth Amendment. This Court went further and also concluded that historical cell-site records present even greater privacy concerns than the GPS-monitoring of a vehicle considered in *United States v. Jones*, 565 U.S. 400 (2012) or the bugged-container considered in *United States v. Knotts*, 460 U.S. 276 (1983). Unlike *Jones* and *Knotts*, a cellphone [referred to as almost a "feature of human anatomy," *Riley v. California*, 573 U.S. 373, 385 (2014)] tracks nearly exactly the movements of its owner. And while individuals regularly leave their vehicles, "they compulsively carry cellphones with them all the time" and in fact, "a cellphone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." *Carpenter*, *id*. at 2218.

Further, as this Court observed, the "retrospective quality" of the CSLI-data gives police access to a category of information otherwise unknowable. *Id*. at 2218. While in the past attempts to reconstruct a person's movements "were limited by a dearth of records and the frailties of recollection," now with CSLI, the Government can "travel back in time to retrace a person's whereabouts, subject only

to the retention polices of the wireless carriers, which currently maintain records for up to five years." *Id.* And "[C]ritically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone. *Id.* Unlike with the GPS device in *Jones*, police need not even know in advance whether they want to follow a certain individual, or when." *Id.*

This Court's bottom-line conclusion is that the government conducts a search under the Fourth Amendment when it accesses historical cellphone records (CSLI records) that provide a comprehensive chronicle of the user's past movements. *Id.* at 2214. The "records" are the personal location information maintained by a third-party (wireless carrier) revealing the location of a user's cellphone whenever it was used to make or received calls. *Id.* Thus, this Court compared the tracking of a cellphone as the achieving of "near-perfect surveillance, as if it had attached an ankle monitor to the phone's user." *Id.* at 2218.

As this Court explained, each time a cellphone connects to a cell-site, it generates a time-stamped record known as CSLI. *Id.* at 2211. Wireless carriers (like Verizon) collect and store CSLI for business purposes, including finding weak spots in their network and applying "roaming" charges when another carrier routes data through their cell-sites. *Id.* at 2212. Keeping this information is useful for

companies because cellphones generate vast amounts of precise CSLI, *id*. at 2212, which again in turn as this Court again termed is "near-perfect surveillance, as if it had attached an ankle monitor to the phone's user." *Id*. at 2218.

The facts of *Carpenter* mirror Petitioner's in several aspects. In *Carpenter*, officers arrested four men suspected of robbing retail stores. *Id*. at 2212. One of the men confessed that over the previous four months, he and over a dozen others participated in the robbery of nine stores in two states. *Id*. He gave the FBI some of their cellphone numbers, which allowed the FBI then to review call records to identify more numbers. *Id*. Based on this information, the government applied for court orders under the SCA to obtain cellphone records for Carpenter and others. *Id*. Under 18 U.S.C. § 2703(d), the SCA permits the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." *Id*. Thus, two orders directing MetroPCS and Sprint were issued to disclose "cell/site sector [information] for [Carpenter's] telephone[s] at call origination and at call termination for incoming and outgoing calls" during the four-month period when the string of robberies occurred. *Id*. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days, and the second requested seven days of CSLI from Sprint, which produced two days of records from when Carpenter's phone was "roaming" in

northeastern Ohio. *Id*. The Government obtained 12,898 location points cataloging Carpenter's movements, an average of 101 data points per day. *Id*.

After he was indicted, Carpenter filed a motion to suppress the cell-site data provided by the carriers, arguing that the seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. *Id*. at 2212. The District Court denied the motion. With the information obtained from the cell-cite data, Agent Hess produced maps that placed Carpenter's phone near four of the charged-robberies. This is similar to how in Petitioner's case, after there was a 20-minute delay from when Petitioner's phone was "pinged" and when the police received real-time location information (App.7) and the real-time CSLI from the first ping showed that the phone was a few miles north of the Wal-Mart where the Capitol One credit card was used, Hill used Google Maps to estimate where Petitioner and Morrison probably were. (App.7).

In *Carpenter*, the Government's argument was that the CSLI location records "clinched the case," confirming that Carpenter was "right where the…robbery was at the exact time of the robbery." *Carpenter*, *id*. at 2213. And in Petitioner's case, the CSLI location records placed Petitioner nearby where he used the credit card and allowed the police to effect a warrantless search and arrest of Petitioner.

This Court rejected the Sixth Circuit's view that *Carpenter* lacked a reasonable expectation of

privacy in the location information collected by the FBI because he had "shared" that information with his wireless carriers (i.e., cellphone users voluntarily convey cell-site data to their carriers as "a means of establishing communication," so the resulting CSLI records are not entitled to Fourth Amendment protection. *Id.* at 2213, *citing Smith v. Maryland*, 442 U.S. 735, 741 (1979).

This Court compared the tracking of CSLI information to the type of intrusion that occurred in *Kyllo v. United States*, 533 U.S. 27, 34 (2001), where this Court rejected a "mechanical interpretation" of the Fourth Amendment and held that use of a thermal-imager to detect heat radiating from the side of the defendant's home was a search that required a warrant because any other conclusion would leave homeowners "at the mercy of advancing technology." *Id.* at 2214. There is no functional difference to the Fourth Amendment search that occurs when the government tracks a person's CSLI data (described by this Court as "near-perfect surveillance, as if it had attached an ankle monitor to the phone's user," *id.* at 2218, to an intrusion into a person's home using a thermal-imager to determine a person's whereabouts inside her home. Merely because a person leaves his home with his cell phone (which per this Court is functionally attached like an ankle monitor to his person) does not diminish that person's rights under the Fourth Amendment.

2. Today's cellphones are different, and the Opinion ignores this reality

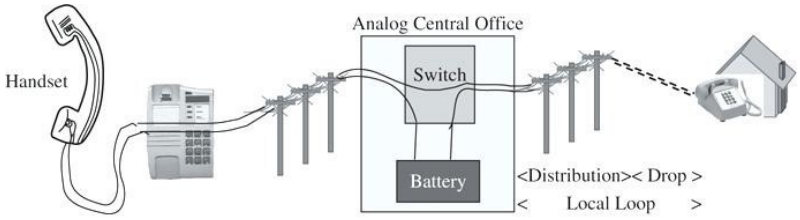
As Justice Roberts explained in *Riley*, today's cellphones are different. They "…differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Riley*, *id.* at 393. The term "cellphone" is "misleading shorthand" since "many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Id*. Further, one of the most notable features of today's cellphones is their "immense storage capacity." Before today's cellphones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. And as a category, today's cellphones "implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id*. at 393. Justice Roberts's description of today's cellphone describes the reality of CSLI data: much like GPS tracking of a vehicle, cellphone location information is detailed, encyclopedic, and effortlessly compiled although the fact that the user continuously reveals his location to the wireless carrier implicates the third-party principle. *Carpenter*, *id*. at 2216.

When a person uses her cellphone in her home, that person has a right to privacy to the contents of the phone and "[a] legitimate expectation of privacy in real-time tracking data in private locations" (such as her home). These principles have been established by *Riley* and by TCCA precedent in *State v. Granville*, 423 S.W.3d 399, 417 (Tex.Crim.App. 2014) (held that

officers cannot activate and search the contents of a cellphone that is stored in a jail property room without a search warrant.). Thus under *Riley* and *Granville*, when the person leaves her home, she does not lose her right of privacy in her cellphone merely because she left her home. Along the same lines, it is not possible for a person to lose "the legitimate expectation of privacy in real-time tracking data" merely because the person leaves her home.

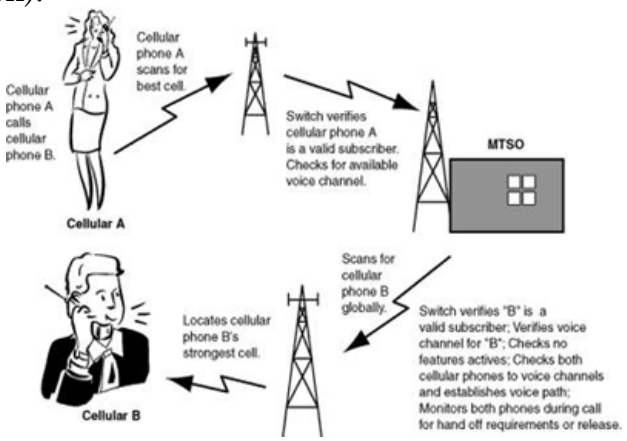
As Petitioner explained in the proceedings below, to understand how today's cellphone technology works and how different it is from other technologies from a Fourth Amendment standpoint, we contrast it to how a landline works. When a person makes a call on a landline, that person "voluntarily conveys" information (phone-number dialed) through the phone company. The landline phone is connected to copper wires that runs through a jack to a box outside, the "entrance bridge." The entrance bridge is in turn connected to cable that runs along the road that either goes to the phone company's switch or a digital concentrator, which is a device that digitizes the person's voice and combines it with other voices that are sent along a coax cable to the phone company's office. There, the line is connected to a line card at a switch, which is the source of the "dial tone" when one picks up a landline. This process is "reversed" back to the destination of the call. There is no "tracking" of where the caller or recipient are because the source-and-destination-points are fixed. And, when a person makes a call on a landline, numbers dialed are turned over to the phone company. *See Smith v. Maryland*, 442 U.S. 735, 742-

743 (1979) (No legitimate expectation of privacy regarding numbers dialed on a landline because these numbers are volunteered to the phone company). Below is a rough schematic of the landline system: a call is made using the handset of an analog phone, which is transmitted to the phone lines outside through the "entrance bridge" (not pictured). The call goes through the phone company's switch or digital concentrator (analog central office) where the line is connected or distributed to a line-card at a switch (inside the analog central office), which is the source of the "dial tone" when one picks up a landline. This process is "reversed" back to the destination of the call.



However, today's cellphone technology works differently. As discussed in *United States v. Forest*, 355 F.3d 942, 951-952 (6th Cir. 2004), unlike dialed phone-numbers, cell-site data is not "voluntarily conveyed" by the user to the phone company but instead is transmitted automatically during the registration process, independent of the cellphone user's input, control, or knowledge. Thus, comparing what a cellphone conveys to a cell-site to "a person travelling in an automobile on public thoroughfares" as held in *Knotts* (1983 case), long before today's cellphones were in use, is an incorrect analysis. *See*

Sims, 526 S.W.3d at 644; citing *United States v. Knotts*, 460 U.S. 276, 281 (1983). Thus, as this basic diagram shows, other than initiating the call, cellphone user A has no control over how the data is transmitted (or where the data is transmitted). Instead, when the caller makes the call, her phone looks for the best cell-tower. The tower's switch verifies that her cellphone has a valid account and is a valid subscriber, checks for an available channel, verifies that the recipient of the call is a valid subscriber, scans globally for the recipient's phone, locates the recipient's phone at the nearest tower, and the calls connect. All the while, both the caller and recipient's phones are transmitting data to the cellphone service-provider without their actual consent (a subscriber gives effective consent when she signs up for the service with any provider, including Verizon).



Other than the actual call made (i.e., you call your spouse and spend 10 minutes discussing dinner plans), the TCCA's opinion supposes that any passive activity (all activity other than the actual call) is not

subject to Fourth Amendment protections. This is incorrect. By concluding that passive activity of a cellphone (for which a subscriber has no control) is not protected, the TCCA ignores the fact that a subscriber who uses a cellphone must subscribe to one of the few providers, all of whom keep real-time, tracking-data pertaining to the location of cellphones. To conclude that a person loses his expectation of privacy in real-time, tracking-data merely because he leaves his house using the rationale of "a person travelling in an automobile on public thoroughfares" (as though the public or police can "see" the invisible waves automatically generated by a cellphone) ignores how today's cellphone technology works.

3. The third-party doctrine does not apply

"Given the unique nature of cellphone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." Carpenter, *id*. at 2218. In fact, the third-party doctrine should not apply at all. Under the third-party doctrine, a person has no legitimate expectation of privacy in information voluntarily turned over to third parties. *Carpenter*, 138 S.Ct. at 2216. This is so 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. The third-party doctrine is a voluntary turnover of information to a third party. That simply did not occur here.

4. A person maintains a legitimate expectation of privacy in the record of his

physical movements as captured through CSLI, and thus has standing to assert such a violation.

A person maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI, so the location information obtained from the wireless carriers was the product of a search. As this Court explained in *Carpenter*, and citing *Katz v. United States*, 389 U.S. 347, 351-352 (1967), a person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id*. at 2213. Society's expectation has been that law enforcement agents and others would not—and indeed could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." Allowing government access to cell-site records without a warrant contravenes that expectation. *Id*. at 2217. Although historical cellphone records that provide a comprehensive chronicle of a person's past movements are generated for commercial purposes, that distinction does not negate the person's anticipation of privacy in his physical location.

Throughout the proceedings below, Petitioner argued that the State's warrantless use of real-time, tracking-data obtained from Verizon, which pertained to the location of his cellphone, was an unreasonable search in violation of the Fourth Amendment *Sims*, 526 S.W.3d at 642-646; U.S. Const. Amend IV. The

conclusion of the court of appeals that "…[w]hile there may be a legitimate expectation of privacy in real-time tracking data in private locations, the same tracking, when following a subject in public places, does not invade legitimate expectations of privacy. Where such surveillance took place on public highways, there was no legitimate expectation of privacy," (App.32); *Sims*, 526 S.W.3d at 644, is incorrect.

What the court of appeals was stating is that once a person leaves a private location, data relating to the location of his cellphone is open-game to warrantless searches. This reasoning cannot be reconciled with a person's right to privacy under the Fourth Amendment.

Under the Fourth Amendment, the basis of assertions of relief is that a person's reasonable expectation of privacy was violated. In other words, a defendant who seeks suppression of evidence obtained in violation of the Fourth Amendment must show that he personally had a reasonable expectation of privacy that the government invaded. *Rakas v. Illinois*, 439 U.S. 128, 139 (1978) (Standing involves two inquiries: first, whether defendant has alleged an "injury in fact"; and second, "whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties."). After all, rights under the Fourth Amendment are personal rights that, like some other constitutional rights, may not be vicariously asserted. *See Alderman v. United States*, 394 U.S. 165, 174 (1969).

In other words, a movant must show that he was a victim of the unlawful search or seizure. The burden is on the defendant to show this, and to carry the burden, the defendant must prove that: (a) by his conduct, he exhibited an actual subjective expectation of privacy (a genuine intention to preserve something as private); and (2) circumstances existed under which society was prepared to recognize his subjective expectation as objectively reasonable.

5. Petitioner did not "abandon" the CSLI data

Merely because the CSLI data left Petitioner's phone (involuntarily) due to the subscriber agreement does not mean that Petitioner somehow "abandoned" the data. "Abandonment" is a wholly voluntary act that usually occurs where a person flees from a location and leaves behind property. *See United States v. Edwards*, 441 F.2d 749, 749-53 (5th Cir. 1971), where it was held that the defendant's right to Fourth Amendment protection came to an end when he abandoned his vehicle to the police on a public highway, with engine running, keys in the ignition, lights on, and fled on foot. *See also United States v. Tate*, 821 F.2d 1328, 1330 (8th Cir. 1987) (A defendant who fled an unlocked vehicle parked on a public road abandoned his expectation of privacy in the vehicle); *People v. Hampton*, 603 P.2d 133, 135 (Colo. 1979) (A defendant who fled from a borrowed car and left keys in the ignition lacked standing to challenge the search); *People v. Washington*, 413 N.E.2d 170, 177 (Ill.App.Ct. 1980) (A defendant has no legitimate interest in a borrowed car from which

he fled and that was unlocked and the ignition key was left in it); *Rodriquez v. State*, 773 S.W.2d 821, 823 (Ark. 1989) (A defendant who after a high-speed chase ending at an air strip exited the vehicle and fled by foot had no reasonable expectation of privacy especially where the defendant left the vehicle running and the door open); *Henderson v. State*, 695 P.2d 879, 882 (Okla.Crim.App. 1985) (A defendant's flight constitutes abandonment of vehicle); *State v. Green*, 605 P.2d 746, 749 (Ore. 1980) (Where two defendants have been pursued from the scene of an apparent burglary and finally leap from their car and flee, they have abandoned any expectation of privacy with respect to the car in the same way that a fleeing robber who drops a bag of loot has abandoned the loot.").

There is no expectation of privacy in abandoned property. When a defendant voluntarily abandons property, he lacks standing to contest the reasonableness of the search of the abandoned property. And when police take possession of property abandoned independent of police misconduct, as was the situation in each of the cases cited in the paragraph above, there is no seizure under the Fourth Amendment. But merely discarding property is not abandonment. Nor is an involuntary transfer of information from one's cellphone to a CSLI considered abandonment. Abandonment is a question of intent to be inferred from words spoken, acts done, and other objective facts and relevant circumstances, as a defendant must: (1) intend to abandon property, and (2) freely decide to abandon the property. If a defendant intended to abandon the property, such

abandonment is not voluntary if it is the product of police misconduct. *See United States v. Colbert*, 474 F.2d 174 (5th Cir. 1973)(en banc) (discussion of how abandonment is a question of intent to be inferred from words spoken, acts done, and other objective facts and relevant circumstances, with the issue not being in the strict property-right sense, but rather whether the accused had voluntarily discarded, left behind, or otherwise relinquished his interest in the property so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.). Petitioner did not intend to "abandon" the CSLI data from his phone.

6. Other state courts of last resort and state statutes require warrants for real-time or historic CSLI data

Other state courts of last resort follow *Carpenter* and require warrants for real-time or historic CSLI data. *See Tracey v. State*, 152 So.3d 504, 526 (Fla. 2014) ("we conclude that a subjective expectation of privacy of location as signaled by one's cellphone—even on public roads—is an expectation of privacy that society is now prepared to recognize as objectively reasonable under the *Katz* "reasonable expectation of privacy" test. Regardless of the defendant's location on public roads, the use of his CSLI emanating from his cellphone in order to track him in real-time was a search under the Fourth Amendment for which probable cause was required. Because probable cause did not support the search in this case, and no warrant based on probable cause authorized the use of the defendant's real-time

CSLI to track him, the evidence obtained as a result of that search was subject to suppression");

State v. Earls, 70 A.3d 630, 644 (N.J. 2013) (in applying New Jersey Const. Art. I, ¶ 7, an individual's privacy interest in the location of his cellphone was protected. A cellphone user is reasonably entitled to expect confidentiality in the ever-increasing level of detail that cellphones can reveal about lives. Because of the nature of the intrusion, and the corresponding, legitimate privacy interest at stake, the Court held that police must obtain a warrant based on a showing of probable cause, or qualify for an exception to the warrant requirement, to obtain tracking information through the use of a cellphone) (note: although the New Jersey Supreme Court believes that its constitution provides greater protection than the Fourth Amendment, there is no functional difference between the Fourth Amendment from New Jersey Const. Art. I, ¶ 7, which provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized);

725 ILL. Comp. Stat. 168/10 (2019) (law enforcement shall not obtain current or future location information pertaining to a person or his effects without first obtaining a court order based on probable cause to believe that the person whose location information is sought has committed, is

committing, or is about to commit a crime or the effect is evidence of a crime…);

Zanders v. State, No. 15S01-1611-CR-571, 2019 Ind. LEXIS 46 (Ind. 2019) (Although *Carpenter* addressed the government's receipt of over 125 days of CSLI, it held that an individual has a reasonable expectation of privacy in seven days or more of CSLI, which provides a comprehensive chronicle of the user's past movements. The 30 days of Zanders's historical CSLI at issue here was therefore a Fourth Amendment search under *Carpenter*;

Ind. Code 35-33-5-12 (2019) (Court order for real time tracking — Exigent circumstances: (a) A law enforcement officer or law enforcement agency may not use a real-time tracking instrument that is capable of obtaining geolocation information concerning a cellular device or a device connected to a cellular network unless: (1) the law enforcement officer or law enforcement agency has obtained an order issued by a court based upon a finding of probable cause to use the tracking instrument; or (2) exigent circumstances exist that necessitate using the tracking instrument without first obtaining a court order); *see also* Md. Code Ann. Crim. Proc. § 1-203.1(b) (2019) and Va. Code § 19.2-70.3(C) (2019);

And see also In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority, 396 F.Supp.2d 747 (S.D.Tex. 2005) (District court ruled that "real-time" location

information may be obtained only under warrant supported by probable cause).

7. The TCCA decided an important federal question in a way that conflicts with relevant decisions of this Court

As explained in this Petition, the TCCA decided an important federal question in a way that conflicts with relevant decisions of this Court in *Carpenter*. Once an intrusion is made in the real-time or historic CSLI data, neither the duration of the intrusion in tracking (seconds) or frequency of the tracking (number of pings) should be relevant. All that is relevant is that the intrusion occurred and it was unreasonable.

CONCLUSION AND PRAYER

For the reasons stated in this petition, the TCCA decided an important federal question in a way that conflicts with relevant decisions of this Court. Petitioner asks this Court to grant certiorari, reverse the Opinion of the TCCA, and grant Petitioner's motion to suppress that he filed in the trial court.

Respectfully submitted,

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