APPENDIX TABLE OF CONTENTS

OPINION OF THE SECOND CIRCUIT (AUGUST 21, 2018)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

PHILIP ZODHIATES,

Defendant-Appellant.

No. 17-839-cr

Appeal from the United States District Court for the Western District of New York. No. 1:14-cr-00175-2 (RJA), Richard J. Arcara, District Judge.

Before: PARKER, RAGGI, Circuit Judges, and FURMAN, District Judge.*

BARRINGTON D. PARKER, Circuit Judge:

Defendant-Appellant Philip Zodhiates appeals from a judgment of conviction in the United States District Court for the Western District of New York (Arcara, J.). He was convicted of conspiring with and aiding and abetting parent Lisa Miller to remove her seven-year-

* Judge Jesse M. Furman, of the United States District Court for the Southern District of New York, sitting by designation.

old child from the United States to Nicaragua in order to obstruct the lawful exercise of parental rights by Miller's civil union partner, Janet Jenkins, in violation of the International Parental Kidnapping Crime Act ("IPKCA"). *See* 18 U.S.C. §§ 371, 1204, and 2.

Zodhiates contends that the District Court erred in declining to suppress inculpatory location information garnered from his cell phone records. The records should have been suppressed, he argues, because, in violation of the Fourth Amendment, the government had obtained them through a subpoena issued pursuant to the Stored Communications Act ("SCA"), *see id.* § 2703(c)(2), rather than a court-approved warrant. He also contends that portions of the District Court's charge to the jury and statements by the prosecutor in his summation had the effect of denying him a fair trial. We conclude that these contentions are without merit and, accordingly, we affirm the judgment.

BACKGROUND

The facts construed in the light most favorable to the government are as follows. Lisa Miller and Janet Jenkins entered into a civil union in Vermont in 2000. In 2002, Miller gave birth to a daughter, "IMJ." About a year later, Miller and Jenkins separated, and Miller took IMJ to Virginia while Jenkins remained in Vermont. In 2003, Miller petitioned a Vermont family court to dissolve the civil union and the court awarded custody to Miller and visitation rights to Jenkins. After Miller repeatedly refused to respect Jenkins' visitation rights, Jenkins sought to enforce them in Virginia and, ultimately, the Virginia Court of Appeals held that Vermont, not Virginia, had jurisdiction

over the dispute and ordered its courts to "grant full faith and credit to the custody and visitation orders of the Vermont court." *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 637 S.E.2d 330, 332 (Va. Ct. App. 2006).

In 2007, the Vermont court warned Miller that "[c]ontinued interference with the relationship between IMJ and [Jenkins] could lead to a change of circumstances and outweigh the disruption that would occur if a change of custody were ordered." A. 189. Miller refused to comply with the order and, following several contempt citations of Miller, Jenkins returned to court in Vermont. In November 2009, the Vermont family court awarded sole custody of IMJ to Jenkins and visitation rights to Miller.

In September 2009, while the Vermont litigation was pending, Philip Zodhiates, a businessman with strong ties to the Mennonite community, along with Kenneth Miller, a Mennonite pastor living in Virginia, and Timothy Miller, a Mennonite pastor living in Nicaragua, helped Miller to kidnap IMJ and flee to Nicaragua.[1] As confirmed by Zodhiates' cell phone and email records, which were introduced at trial, Zodhiates drove Miller and IMJ from Virginia to Buffalo, and then Miller and IMJ crossed into Ontario. From Ontario, Miller and IMJ traveled to Nicaragua where Miller remains a fugitive and IMJ resides. Email records also show that, following the kidnapping, Zodhiates helped Miller and her daughter settle in Nicaragua. Zodhiates coordinated with others to remove a number of personal items from Miller's Virginia

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[1] Lisa Miller, Timothy Miller, and Kenneth Miller are not related to each other.

apartment, and, in November 2009, Zodhiates arranged for an acquaintance who was traveling to Nicaragua to bring various personal possessions to Miller. At the time of the kidnapping, Virginia law made same-sex marriages entered into outside of Virginia void there in all respects and such marriages could not be used to establish familial or step-parent rights in Virginia. *See* Va. Const. Art. I, § 15-A.[2]

The Government's investigation commenced in 2010 in Vermont, soon after it became apparent that Miller had disappeared. During the course of the investigation, the Government issued subpoenas, which are subjects of this appeal, to nTelos Wireless, a Virginia cell phone company. The subpoenas sought billing records spanning 28 months and other information[3] pertaining to two cell phones that had frequent contact with Kenneth Miller in September 2009. These phones were listed in the customer name "Response Unlimited, Inc.," a direct mail marketing

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[2] This provision was held unconstitutional by *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014).

[3] Specifically:

- "All subscriber information," such as "account number," "subscriber name," and "other identifying information";
- "Means and source of payments";
- "Length of service";
- "Detail records of phone calls made and received (including local and incoming call records if a cellular account) and name of long distance carrier if not [nTelos]";
- "Numeric (non-content) detail records of text messages (including SMS), multimedia messages (including MMS), and other data transmissions made and received (including any IP address assigned for each session or connection)." A. 34.

company owned by Zodhiates. The subpoenas did not request the contents of phone calls or text messages, nor did they specifically request information concerning the locations from which phone calls were made or received.

In response to the subpoenas, nTelos produced billing records that showed detailed call information, including the date and time of phone calls made from various cell phones, together with the "service location" from which each call was made or received. Information presented in the "service location" field showed the general vicinity of the cell phone when the call was made or received, such as a county name, but did not contain details about precisely where in the general area the phone was located. These records, which were later featured prominently at Zodhiates' trial, linked Zodhiates to Miller in Virginia and Buffalo, and established telephone contact among the conspirators.

The matter was subsequently transferred to the Western District of New York, where Zodhiates, Miller, and Timothy Miller were indicted for violating the IPKCA.[4]

Before trial, Zodhiates moved to suppress the cell phone evidence, arguing that because he had a reasonable expectation of privacy in his movements from one place to another, the Government violated the Fourth Amendment when it obtained the billing records with a subpoena instead of a warrant. The District Court, relying on *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L.Ed.2d 71 (1976) and *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577,

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[4] Miller remains a fugitive. Timothy Miller pleaded guilty after being deported from Nicaragua to the United States.

61 L.Ed.2d 220 (1979), denied Zodhiates' motion. The District Court found it "too much" to conclude that a cell phone subscriber operates under the belief that his location is kept secret from telecommunication carriers and other third parties and that because "there is no reasonable expectation of privacy in the cell phone location information at issue in this case" a warrant was not required. A. 52. (internal quotation marks omitted). At trial, the Government introduced evidence including phone records reflecting contact between Zodhiates and Miller in the months before the kidnapping; phone records reflecting contact between Zodhiates and Miller's father; Zodhiates' cell phone bill showing that he traveled from Virginia to Buffalo on the day of the kidnapping; and phone records reflecting contact between the co-conspirators.

Near the end of the trial, the District Court shared with the parties its proposed jury charge—to which no objection was lodged—which read, in part, as follows:

> In this case, the term "parental rights" means Janet Jenkins' right to visit IMJ, as that right was defined by the law and courts of Vermont at the time IMJ was removed from the United States . . . To find that Zodhiates acted with the intent to obstruct the lawful exercise of parental rights, you must find that he acted deliberately with the purpose of interfering with Janet Jenkins' parental rights. You may consider all of the evidence of Zodhiates' other acts in determining whether the government has proven beyond a reasonable doubt that Zodhiates acted with this intent.

United States v. Zodhiates, No. 14-CR-175-RJA, 2016 U.S. Dist. LEXIS 125002, at *9- 10 (Sept. 14, 2016).

Relying on the intended charge, the prosecutor stated in his rebuttal summation that IT doesn't matter what [Zodhiates] understands about Virginia litigation," A. 267, and that the Virginia litigation "should have no bearing on the intent issues," *id.* at 262. That evening, following closing arguments, the defense concluded that this remark by the prosecutor had been improper and requested that the District Court include in its charge a "curative instruction regarding the relevance of Virginia law," reading in part that:

> Parental rights for purposes of this case are defined by reference to the law of the state where the child, [IMJ], lived before leaving the United States. Prior to this case, there were a series of court proceedings in Vermont and Virginia about the parental rights of Lisa Miller and Janet Jenkins. One legal issue in the proceedings was whether Vermont or Virginia law governed the parental rights of Lisa Miller and Janet Jenkins. In its summation, the Government suggested that Virginia law is irrelevant to this case. That is incorrect.
>
> If, as Lisa Miller requested, Virginia had found that Janet Jenkins had no parental rights, it would have been impossible for Lisa Miller to obstruct parental rights for purposes of the international parental kidnapping statute because Janet Jenkins would have had no parental rights that could be obstructed. I will instruct you shortly that as a matter of law, Vermont law was found

> to control. I will also instruct you about what parental rights Janet Jenkins had and when.
>
> By instructing you as to the law, I am not instructing you on what the defendant knew or intended with regard to parental rights. That is a question of fact which you must decide, and which the government must prove beyond a reasonable doubt. In doing so, you may consider evidence about the litigation in both Vermont and Virginia for the purpose of considering whether the prosecution has proven beyond a reasonable doubt that Mr. Zodhiates knew Janet Jenkins had parental rights, understood those rights, and intended to obstruct those rights.

Id. at 74.

The District Court denied the request. It concluded that "[n]othing in the Court's current charge precludes the jury from considering both the Virginia and the Vermont litigation when it decides whether the defendant knew about and intended to obstruct Vermont rights." *Id.* at 289. It also concluded that "the Court's intended charge gives the jury a properly balanced instruction on what evidence it may consider with regard to the issue of intent" and that "[t]he Court also believes that expressly instructing the jury that it may consider a Virginia litigation . . . runs the risk of unnecessarily confusing the jury." *Id.* at 288-89. At the conclusion of the trial, the District Court instructed the jury consistent with the proposed instruction it had shared with the parties earlier. Zodhiates subsequently raised this challenge to the District Court's instruction in a motion under Fed. R. Civ. P. 33 for a new trial, which the Court denied.

The jury found Zodhiates guilty on both counts of the indictment and the District Court sentenced him principally to 36 months of incarceration. This appeal followed. Zodhiates' main contentions are that the District Court erred in refusing to suppress the cell phone records and denying his requested curative charge. We disagree and therefore we affirm.

DISCUSSION

I. FOURTH AMENDMENT CHALLENGE

Zodhiates contends that the government violated the Fourth Amendment when it secured his cell phone records by subpoena under the SCA because it was required to proceed by a warrant supported by probable cause and, consequently, the records were inadmissible. When considering an appeal stemming from a motion to suppress evidence, we review legal conclusions *de novo* and findings of fact for clear error. *United States v. Ganias*, 824 F.3d 199, 208 (2d Cir. 2016) (*en banc*).

During the pendency of this appeal, the Supreme Court decided *Carpenter v. United States*, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018), in which it held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell service location information]" and, therefore, under the requirements of the Fourth Amendment, enforcement officers must generally obtain a warrant before obtaining such information. *Id.* at 2217. However, Zodhiates is not entitled to have the records suppressed because, under the "good faith" exception, when the Government "act[s] with an objectively reasonable good-faith belief that their conduct

is lawful," the exclusionary rule does not apply. *Davis v. United States*, 564 U.S. 229, 238 (2011) (internal quotation marks omitted). This exception covers searches conducted in objectively reasonable reliance on appellate precedent existing at the time of the search. *See United States v. Aguiar*, 737 F.3d 251, 259 (2d Cir. 2013).

In 2011, appellate precedent—the third party doctrine—permitted the government to obtain the phone bill records by subpoena as opposed to by warrant. Under this doctrine, the Fourth Amendment "does not prohibit the obtaining of information revealed to a third party and conveyed by [the third party] to Government authorities." *Miller*, 425 U.S. at 443. In *Miller*, the Supreme Court held that the government was entitled to obtain a defendant's bank records with a subpoena, rather than a warrant, because the bank records were "business records of the banks" and the defendant had "no legitimate expectation of privacy" in the contents of his checks because those documents "contain[ed] only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Id.* at 440-42 (internal quotation marks omitted). Similarly, in *Smith*, the Supreme Court held that a defendant did not have a reasonable expectation of privacy in the telephone numbers that he dialed because "[t]elephone users . . . typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes." 442 U.S. at 743.

These cases stand for the proposition that, in 2011, prior to *Carpenter*, a warrant was not required for the cell records. We acknowledged as much in *United States v. Ulbricht*, 858 F.3d 71 (2d Cir. 2017), when we considered ourselves bound by the third party doctrine in *Smith* "unless it is overruled by the Supreme Court," *id.* at 97.[5]

To escape this result, Zodhiates directs us to *United States v. Jones*, 565 U.S. 400, 404 (2012), which held that when the government engages in prolonged location tracking, it conducts a search under the Fourth Amendment requiring a warrant. However, *Jones* is of no help to him. It was decided in 2012, after the Government's 2011 subpoena and consequently is not relevant to our good faith analysis. For these reasons, we conclude that the District Court properly denied Zodhiates' motion to suppress the cell location evidence.

II. JURY CHARGE

Next, Zodhiates contends that the District Court erred in failing to instruct the jury, as he requested, that in considering whether he intended to obstruct parental rights under the IPKCA, those rights were

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[5] Further, all five courts of appeal to have considered, before Carpenter, whether the warrant requirement in the Fourth Amendment applied to historical cell site information concluded, in light of *Smith* and *Miller*, that it did not. *United States v. Thompson*, 866 F.3d 1149 (10th Cir. 2017); *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (*en banc*); *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), rev'd, 138 S. Ct. 2206 (2018); *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015) (*en banc*); *In re Application of the United States for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013).

defined by Virginia, rather than Vermont, law, because Virginia was the state where IMJ lived before leaving the United States. The principles applicable to this contention are familiar ones. "A defendant is entitled to have his theory of the case fairly submitted to the jury, as long as it has some foundation in the evidence," *United States v. Vaughn*, 430 F.3d 518, 522 (2d Cir. 2005), but he is not entitled to have the exact language he proposes read to the jury, *see United States v. Dyman*, 739 F.2d 762, 771 (2d Cir, 1984).

We review a district court's rejection of a requested jury charge for abuse of discretion. *See United States v. Hurtedo*, 47 F.3d 577, 585 (2d Cir. 1995). "In order to succeed on his challenges to the jury instructions, appellant has the burden of showing that his requested charge accurately represented the law in every respect and that, viewing as a whole the charge actually given, he was prejudiced." *United States v. Ouimette*, 798 F.2d 47, 49 (2d Cir. 1986). The trial court has substantial discretion to fashion jury instructions, so long as they are fair to both sides. *See United States v. Russo*, 74 F.3d 1383, 1393 (2d Cir. 1996).

Zodhiates' challenge fails because, as the District Court correctly noted, "[i]t is clear in this case that, as a matter of state family law, Vermont family law . . . defined parental rights, regardless of where [the child] resided." A. 291. Moreover, Zodhiates cannot show that he was prejudiced by the instruction ultimately given by the District Court.

The IPKCA defines "parental rights" as "the right to physical custody of the child . . . whether arising by operation of law, court order, or legally binding agreement of the parties." 18 U.S.C. § 1204(b)(2)(B). Here, a Vermont court order afforded Jenkins parental

rights. *See Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 912 A.2d 951, 956 (Vt. 2006). Moreover, at the time IMJ was taken from Virginia, an order from a court of that state had also recognized that the Vermont courts had jurisdiction over the custody dispute and required Virginia courts to give full faith and credit to the Vermont orders. *See Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 637 S.E.2d 330, 337-38 (Va. Ct. App. 2006); *Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 661 S.E.2d 822, 827 (Va. 2008) (recognizing Vermont's jurisdiction in reliance on law-of-the-case doctrine). Because Virginia itself recognized that the Vermont court order was controlling, the District Court was correct when it instructed the jury that Vermont law defined parental rights. We agree with the District Court that to instruct otherwise would have been misleading and confusing.

Zodhiates attempts to sidestep the Vermont order by contending that, contrary to the District Court's conclusion, this Court in *United States v. Amer*, 110 F.3d 873, 878 (2d Cir. 1997), defined parental rights under the IPKCA by reference to Article 3 of the Hague Convention, which specifies "the law of the State in which the child was habitually resident immediately before the removal or retention," Hague Convention on the Civil Aspects of Int'l Child Abduction, art. 3, Oct. 25, 1980, P.I.A.S. No. 11,670. *Amer,* Zodhiates contends, means that only Virginia law defined Jenkins' parental rights.

In *Amer*, the defendant was a citizen of both Egypt and the United States. As Amer's marriage began deteriorating, he brought his three children from New York to Egypt, and he was convicted of violating the IPKCA. *Amer*, 110 F.3d at 876. In that case, in

the absence of a court order or legally binding agreement, we looked to Article 3 of the Hague Convention (and, by extension, to the law of New York as the children's habitual residence prior to removal) to define parental rights. Nothing in *Amer* can reasonably be read to hold that parental rights under the IPKCA are always defined by the state of the child's habitual residence.

In any event, Zodhiates cannot demonstrate prejudice. As the District Court noted, its charge did not prevent the parties from arguing, or the jury from deciding, what impact, if any, the Virginia or Vermont custody litigation may have had on Zodhiates' intent.[6] Indeed, the defense took considerable advantage of this latitude by making repeated references in his arguments to the Virginia litigation and to events in Virginia. *See, e.g.*, A. 123 (Def. Ex. 25, an email sent to Zodhiates about the Virginia litigation); *see also id.* at 221-26 (transcript of defense counsel discussing the Virginia litigation on cross-examination). Accordingly, we see no error.

III. PROSECUTION SUMMATION

Finally, Zodhiates contends that the District Court erred in denying his request for a curative instruction in response to the prosecutor's rebuttal summation. During that summation, the prosecutor told the jury that "[i]t doesn't matter what [Zodhiates] understands about Virginia litigation," *id.* at 267,

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[6] "Nothing in the Court's current charge precludes the jury from considering both the Virginia and Vermont litigation when it decides whether the defendant knew about and intended to obstruct Vermont rights." A. 289.

and that the Virginia litigation "should have no bearing on the intent issues," *id.* at 262. Following closing arguments, Zodhiates objected to the remarks and requested the following curative instruction: "In its summation, the Government suggested that Virginia law is irrelevant to this case. That is incorrect." A. 74.

The District Court correctly denied the request because the prosecutor's statements, in context, were unobjectionable. The District Court recognized them for what they were: factual interpretations of the evidence and not statements of legal principles. As the District Court observed in denying Zodhiates' motion for a new trial: "[T]he AUSA's comment simply told the jury that, in the Government's view, Zodhiates's interpretation of the evidence was wrong—not that Zodhiates's understanding of the Virginia litigation was legally irrelevant." *United States v.* Zodhiates, 235 F. Supp. 3d 439, 457 (W.D.N.Y. 2017). The prosecutor was entitled to present to the jury the Government's interpretation of the evidence. He was entitled to argue that the Virginia litigation deserved no weight in the jury's consideration of Zodhiates' intent, just as the defense was entitled to, and in fact did, argue that it deserved great weight. *See United States v. Salameh*, 152 F.3d 88, 138 (2d Cir. 1998) (*per curiam*) (affording prosecutor "broad latitude" as to reasonable inferences he may argue to jury).

In any event, the District Court adequately addressed Zodhiates' concerns when it instructed the jury to determine "what the defendant knew or intended with regard to" Jenkins' parental rights under Vermont law. Zodhiates, 235 F. Supp. 3d at 457 n.10 (internal quotation marks omitted). As the District Court correctly observed, nothing in the charge or the summa-

tion precluded the jury from considering both the Virginia and Vermont litigation when it decided whether Zodhiates knew about and intended to obstruct Jenkins' rights. For these reasons, we *see* no error in the prosecutor's remarks or in the District Court's response to them.

CONCLUSION

For the foregoing reasons, the judgment of the District Court is AFFIRMED.

AMENDED JUDGMENT IN A CRIMINAL CASE (MARCH 31, 2017)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

PHILIP ZODHIATES,

Case Number: 1:14CR00175-002

USM Number: 18649-084

Before: Richard J. ARCARA,
Senior U.S. District Judge.

Date of Original Judgment: March 22, 2017
(Or Date of Last Amended Judgment)

Reason for Amendment:

- Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

THE DEFENDANT:

- was found guilty on counts 1 and 2 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section: 18 U.S.C. § 371
Nature of Offense: Conspiracy to Obstruct

Parental Rights
Offense Ended 09/22/09
Count 1

Title & Section: 18 U.S.C. § 1204 and § 2
Nature of Offense: International Parental Kidnapping
Offense Ended 09/22/09
Count 2

The defendant is sentenced as provided in pages 2-6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 22, 2017
Date of Imposition of Judgment

/s/ Richard J. Arcara
Signature of Judge

Honorable Richard J. Arcara,
Senior U.S. District Judge
Name and Title of Judge

March 31, 2017
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 36 months on Count 1 and 36 months on Count 2 to be served concurrently to each other

The cost of incarceration fee is waived,

- The court makes the following recommendations to the Bureau of Prisons: –If the sentence is affirmed on appeal, designate to FCI Petersburg, Virginia
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: as notified by the United States Marshal. *The sentence is stayed pending appeal. Designation to FCI Petersburg, VA should be effectuated if the sentence is affirmed on appeal.*

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

One (1) year on Count 1 and one (1) year on Count 2 to be served concurrently to each other

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit to a search of his person, property, vehicle, place of residence or any other property under his control, based upon reasonable suspicion, and permit confiscation of any evidence or contraband discovered.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS

Assessment	$200
Fine	$ 0
Restitution	$ 0

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

B Payment to begin immediately (may be combined with F below); or

F Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay a special assessment of $100 on each count for a total of $200, which shall be due immediately. If incarcerated, payment shall begin under the Bureau of Prisons Inmate Financial Responsibility Program. Payments shall be made to the Clerk, U.S. District Court (WD/NY), 2 Niagara Square, Buffalo, New York 14202.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

DECISION AND ORDER OF THE DISTRICT COURT (JANUARY 20, 2016)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

PHILIP ZODHIATES,

Defendant.

14CR-175-A

Before: Hon. Richard J. ARCARA,
United States District Judge.

Philip Zodhiates has been charged in a two-count superseding indictment with (1) conspiring to violate the International Parental Kidnapping Crime Act (IPKCA) and (2) aiding and abetting a violation of the IPKCA. The Government alleges that Zodhiates and his co-defendants removed a child from the United States and that they did so with the intent to obstruct the lawful exercise of the parental rights of one of the child's parents.

The Court referred this case to Magistrate Judge McCarthy for all pre-trial matters. Zodhiates then filed motions to:

(1) suppress location information found in cell phone billing records, which the Government obtained via grand jury subpoena;

(2) suppress evidence acquired by a federal grand jury in the District of Vermont, which investigated a case that relates to this one;

(3) suppress evidence obtained by the Government from a civil lawsuit, brought by a private party, that parallels this one;

(4) dismiss Count II of the superseding indictment and part of Count I of the superseding indictment;

(5) dismiss the superseding indictment based on the Government's alleged cumulative misconduct;

(6) and confirm the scope of "previous court orders."

Magistrate Judge McCarthy filed a report and recommendation that recommended denying motions one, three, four and five. Magistrate Judge McCarthy also recommended denying, without prejudice, Zodhiates' motion to suppress the Vermont grand jury evidence.[1] Finally, Magistrate Judge McCarthy re-

[1] Magistrate Judge McCarthy recommended denying this motion without prejudice because he concluded that that the Second Circuit's decision in *United States v. Miller*, which had not yet been released, might have relevance to the issues raised in Zodhiates' motion. The Second Circuit's decision was issued shortly after Magistrate Judge McCarthy issued his report and recommendation. *See United States v. Miller*, 808 F.3d 607 (2d Cir 2015).

commended denying Zodhiates' last motion without prejudice to renewal before this Court.

For the reasons discussed below, the Court adopts the report and recommendation and denies each of Zodhiates' motions, other than his motion to "confirm the scope of previous court orders." That motion is effectively a request that the Court rule on a jury instruction and, therefore, is premature. Zodhiates may, however, renew the motion closer to trial.

BACKGROUND

This case has its roots in a series of family law disputes in the Vermont and Virginia state courts that resulted in a criminal prosecution in the U.S. District Court for the District of Vermont. Those proceedings form the backdrop of this case. They are also relevant to several of the issues raised in Zodhiates' motions. Accordingly, the Court briefly discusses them below.[2]

After living together in Virginia for several years, Lisa Miller and Janet Jenkins entered into a civil union in Vermont in 2000.[3] *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 912 A.2d 951, 956 (Vt.

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[2] The facts that follow are drawn from the superseding indictment in this case and the various state court orders and decisions underlying the Government's allegations.

[3] Two of the defendants in this case, as well as the defendant in the related criminal action in Vermont, have the surname "Miller." None are related. The Court refers to each by his or her first name to avoid confusion. Likewise, because Lisa Miller and Janet Jenkins shared the same last name during the time of their civil union, the Court refers to each by her first name.

2006). In 2002, Lisa gave birth to a daughter, IMJ,[4] who was conceived via artificial insemination. *Id.* The couple and their daughter lived in Virginia for several more months before moving to Vermont in August 2002. Just over one year later, Lisa and Janet separated, and Lisa returned to Virginia with IMJ.

In November 2003, Lisa petitioned a Vermont family court to dissolve her and Janet's civil union. That court issued a temporary restraining order awarding Lisa temporary legal and physical responsibility for IMJ and assigning Janet the right to visit IMJ and speak with her on a daily basis. *Id.* Shortly thereafter, Lisa began denying Janet the visitation and contact rights ordered by the Vermont family court. Lisa then filed a petition in Virginia state court asking that court to establish IMJ's parentage. *Id.*

The result was "an interstate parental-rights contest," as both Vermont and Virginia state courts asserted jurisdiction to determine parental rights over IMJ. *Id.* at 956-57. Ultimately, the Virginia Court of Appeals held that the state courts of Vermont, and not those of Virginia, had jurisdiction over the matter and ordered Virginia courts to "grant full faith and credit to the custody and visitation orders of the Vermont court." *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 637 S.E. 2d 330, 332 (Va. Ct. App. 2006).

In the meantime, the Vermont family court found Lisa in contempt, found that both Lisa and Janet had parental interests in IMJ, and set the case for a final hearing. *Miller-Jenkins*, 912 A.2d at 957. After a trial,

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[4] The filings in this case refer to Lisa and Janet's daughter as "IMJ," "J1," and by her actual name. For simplicity, the Court refers to her as IMJ.

the Vermont family court, in a decision later affirmed by the Vermont Supreme Court, "ordered sole physical and legal custody of IMJ go to Lisa, subject to Janet's visitation rights." *Miller-Jenkins v. Miller-Jenkins*, 189 Vt. 518, 12 A.3d 768. 772 (Vt. 2010). The Vermont family court also "warned Lisa that continued interference with the relationship between IMJ and Janet could lead to a change in circumstances warranting a modification of custody." *Id.*

Following that order, the Vermont family court found Lisa in contempt seven times for violating parent-child contact orders. *Id.* In January 2009, the Vermont family court "again explicitly warned Lisa that continued failure to comply with court-ordered visits could lead to a transfer of custody to Janet." *Id.*

Janet then filed two motions to transfer custody of IMJ to herself. The first was motion denied. A hearing on the second, which Lisa did not attend, was held in August 2009. *Id.* In November 2009, the Vermont family court "concluded that Lisa's willful interference with Janet's visitation rights amounted to a real, substantial, and unanticipated change in circumstances." *Id.* The court accordingly awarded Janet sole physical and legal custody of IMJ. *Id.*

Those proceedings set the stage for the Government's allegations in this case. The Government alleges that on or about September 21, 2009—after the hearing on Janet's second motion to transfer custody, but before the Vermont family court awarded Janet sole physical and legal custody—Lisa, IMJ, and Zodhiates travelled from Virginia to Buffalo. Docket 41 (Superseding Indictment) at 2. The Government alleges that while he was in Buffalo, Zodhiates spoke by phone with Kenneth Miller, as well as "an individual in

Canada who had agreed to help transport" Lisa into Canada. *Id.*

The next day, the Government alleges, Lisa and IMJ crossed the Rainbow Bridge from Niagara Falls, New York into Canada. That same day, the Government alleges Zodhiates again had telephone contact with both Kenneth and the individual in Canada who had helped Lisa and IMJ cross the border. *Id.*

Slightly more than two years after Lisa left the country with IMJ, Kenneth was indicted in the District of Vermont on a one-count indictment charging him with aiding and abetting Lisa's alleged violation of the International Parental Kidnapping Crime Act (IPKCA). After a jury trial, Kenneth was found guilty of aiding and abetting Lisa's removal of IMJ from the United States. The Second Circuit has since affirmed Kenneth's conviction over his challenge to the Government's decision to lay venue against him in the District of Vermont. *See United States v. Miller*, 808 F.3d 607 (2d Cir. 2015).

This case followed Kenneth's. Zodhiates, Lisa Miller, and Timothy Miller are each charged in a two-count superseding indictment with (1) conspiring to violate the IPKCA, and (2) violating, or aiding and abetting a violation of, the IPKCA.[5] he relevant provision of the IPKCA makes it a crime to "remove[] a child from the United States, or attempt[] to do so, or retain a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights." 18 U.S.C. § 1204(a).

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[5] Lisa Miller and Timothy Miller are both currently fugitives.

DISCUSSION

As noted, Zodhiates has moved to suppress various types of evidence, has moved to dismiss parts of the superseding indictment, and has moved for several other forms of relief. The Court addresses each motion in turn.

1. Motion to Suppress Location Information Obtained By Grand Jury Subpoena

Zodhiates first moves to suppress location information found in the billing records for several cell phones used by Zodhiates and his family.[6] During the Government's investigation of Kenneth Miller in the District of Vermont, two grand jury subpoenas were issued to nTelos Wireless. *See* Docket 18-2. The subpoenas requested a variety of information for two different cell phone numbers over a period of approximately 28 months. *Id.* Specifically, the subpoenas requested, among other things:

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[6] The subscriber for each cell phone is not Zodhiates, but is Response Unlimited, Inc., a company of which Zodhiates is the president and sole shareholder. Docket 36-1 ¶ 2. Nonetheless, the phones "are exclusively used by Mr. Zodhiates, his wife, and one of his sons," and Response Unlimited considers the phones to be "Mr. Zodhiates' personal phones." *Id.* ¶ 5. In its briefing before Magistrate Judge McCarthy, the Government argued that Zodhiates lacks standing under the Fourth Amendment to seek suppression of the cell phone records at issue because Zodhiates does not himself subscribe to the phones. Magistrate Judge McCarthy rejected that challenge, and the Government has not renewed it before this Court. The Court finds no fault with Magistrate Judge McCarthy's conclusion and therefore adopts it.

- "All subscriber information," such as "account number," "subscriber name," and "other identifying information";
- "Means and source of payments";
- "[L]ength of service";
- "Detail records of phone calls made and received (including local and incoming call records if a cellular account) and name of long distance carrier if not [nTelos]";
- "Numeric (non-content) detail records of text messages (including SMS), multimedia (including MMS), and other data transmissions made and received (including any IP address assigned for each session or connection)."

See, e.g., Docket 18-2 at 5. The subpoenas did not request the contents of phone calls or text messages, nor did they specifically request information concerning the locations from which phone calls were made or received.

In response to the subpoenas, nTelos produced billing records that show somewhat detailed call information. Specifically, the records show the date and time of phone calls made from or received by the subject cell phones, together with the "Service Location" from which each call was made or received. For example, the "Roam Activity" for one of the cell phones shows that, over a two-day period in September 2009, the cell phone made or received calls while it was located in "Altoona PA," "Pittsburgh PA," "Buffalo—RO NY,"

and "Harrisburg PA."[7] The "Roam Activity" for another of the cell phones similarly shows numerous calls made or received by a phone located, over a three-day period, in "Hagerstown MD," "Altoona PA," "Pittsburgh PA," "Meadville PA," "Cambdg Spg PA," and "Buffalo NY." Docket 18-4 at 29. Further, several entries in the billing records show multiple calls made or received from the same Service Location at different times and on different dates. The entry for each of these calls also shows the number to which the call was made or from which the call was received, the location called, and the duration of the call. *Id.*[8]

At Kenneth Miller's trial in the District of Vermont, the Government used the location, time, and date information from the nTelos billing records to show the movement of one of the cell phones from Virginia, through Maryland and Pennsylvania, and ultimately to Buffalo over the course of several days in September 2009. *See* Docket 18-3 & 18-5.

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[7] The Court presents these example Service Locations exactly as they appear in the exhibit provided to the Court. *See* Docket 18-4 at 16.

[8] In proceedings before Magistrate Judge McCarthy, an nTelos custodian of records submitted an affidavit stating that when nTelos received the subpoenas at issue, it "only provided basic information about the subscriber, including name, address, and type of account" and that it did "not [provide] all information about the account." Docket 35-1 ¶ 2. The custodian further stated that she was "familiar with requests for subscriber information, and [she] always interprets such requests in a similar way." *Id.* According to the custodian, "nTelos would not provide call detail records or cell site records in response to a subpoena request for subscriber information." *Id.*

Zodhiates has moved to suppress this location information because, he argues, he had a "reasonable expectation of privacy in the 'Service Location' data aggregated by the Government." Docket 70 at 11. Put another way, Zodhiates contends that he has a reasonable expectation of privacy in his movements from one place to another over a period of time. From this premise, Zodhiates argues that the Government conducted a Fourth Amendment "search" when it obtained the billing records. And because the Government conducted a "search," Zodhiates argues, it could obtain the location information only with a warrant, and not simply with a grand jury subpoena.

However, before reaching this constitutional issue, the Court first addresses whether, as Zodhiates argues, the Government lacked the statutory authority to use a grand jury subpoena to obtain the nTelos billing records. The Government stated at oral argument that it subpoenaed the nTelos billing records pursuant to 18 U.S.C. § 2703(c)(2), a provision of the Stored Communications Act (SCA) authorizing the Government to obtain, via grand jury subpoena, among other things, a subscriber's name; address; "local and long distance telephone connection records, or records of session times and durations"; and "length of service . . . and types of service utilized." *See* Tr. of Dec. 21, 2015 Oral Argument at 20 (identifying § 2703(c)(2)(C) as the basis for the subpoenas).

Zodhiates argues that the location information included on the nTelos billing records is not among the information § 2703(c)(2) authorizes the Government to obtain by subpoena. Zodhiates claims that the Government may gather location information only by, among other means, obtaining a warrant. *See* 18 U.S.C.

§ 2703(c)(1) (requiring the government to obtain, among other things, a warrant in order to acquire "a record or other information pertaining to a subscriber" that is not listed in § 2703(c)(2)). The Government counters that the location information contained in the billing records is exactly what § 2703(c)(2)(C) authorizes it to obtain by subpoena: "local and long distance telephone connection records."

The Court, however, need not resolve whether the location information contained in the nTelos billing records is information the Government can obtain with just a subpoena. Even if it were (a question on which the Court offers no opinion), the issue is meaningless in this case because "suppression of evidence is not a remedy for alleged violations of the [SCA]." *United States v. Stegemann*, 40 F. Supp. 3d 249, 271 (N.D.N.Y. 2014) (internal quotation marks omitted). The SCA provides that its "remedies and sanctions"—which include administrative discipline and a civil suit against parties other than the United States, but not suppression—"are the only judicial remedies and sanctions for non-constitutional violations" of the SCA. 18 U.S.C. § 2708. *See also* 18 U.S.C. § 2707 (remedies available under the SCA). Zodhiates' SCA arguments are therefore irrelevant to the relief he seeks.

If Zodhiates is to successfully suppress the location information in the nTelos billing records, he must therefore show that the Government obtained the information in violation of the Fourth Amendment. The Fourth Amendment, of course, prohibits "unreasonable searches and seizures." Thus, to make a Fourth Amendment claim, Zodhiates must show that the Government conducted a "search" when it obtained aggregated location information for his cell phones.

"[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). Thus, to claim Fourth Amendment protection, an individual must affirmatively answer "two separate questions": first, that he had "a subjective desire to keep his or her effects private"; and second, that his subjective expectation of privacy is "one that society accepts as reasonable." *United States v. Paulino*, 850 F.2d 93, 97 (2d Cir. 1988). It follows from this test that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967).

Consequently, the Supreme Court has identified what has come to be known as the "third-party doctrine," which provides that the "Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by [the third party] to Government authorities." *United States v. Miller*, 425 U.S. 435, 443 (1976). In other words, revealing certain information to a third party undercuts any expectation of privacy in that information, "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.*

For instance, in *United States v. Miller*, the Supreme Court held that the government was permitted to obtain the defendant's bank records with a subpoena, rather than a warrant, because the records were not the defendant's "private papers." *Id.* at 440. The bank records were instead "business records of the banks . . . pertain[ing] to transactions to which the bank was itself a party." *Id.* at 440-41 (internal quo-

tation marks and citations omitted). Moreover, the defendant had "no legitimate expectation of privacy" in the contents of his checks and deposit slips because those documents "contain[ed] only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Id.* at 442.

Three years after *Miller*, in *Smith v. Maryland*, 442 U.S. 735 (1979), the Court reaffirmed the third-party doctrine in a case that bears a passing factual resemblance to this one. In *Smith*, the Court held that the government did not conduct a Fourth Amendment "search" by using a pen register to record the telephone numbers the defendant dialed. As in *Miller*, the Court concluded that the defendant did not have a "legitimate expectation of privacy" in phone numbers he conveyed to a third party, such as the phone company. According to the Court, "[t]elephone users . . . typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes," such as, the Court noted, compiling billing records. *Id.* at 742-43. As a result, it was "too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret." *Id.* Thus, no Fourth Amendment "search" occurred, even if the defendant otherwise demonstrated his subjective expectation of privacy by dialing phone numbers from his home. *Id.* at 743.

Miller and *Smith* are reasonably interpreted to stand for the proposition that "individuals have no

reasonable expectation of privacy in certain business records owned and maintained by a third-party business." *United States v. Davis*, 785 F.3d 498, 507 (11th Cir. 2015) (*en banc*). That interpretation easily applies to the cell phone location information at issue in this case. Just as the defendant in *Smith* had to transmit a phone number to his phone company in order to place a call, "[cell] [u]sers are aware that cell phones do not work when they are outside the range of the provider company's cell tower network." *Id.* at 511. As a result, a cell phone user cannot reasonably expect that his carrier does not collect and maintain non-content call information such as the location from which he makes or receives a call. Rather, it is "common knowledge that communications companies regularly collect and maintain all types of noncontent information regarding cell-phone communications . . . for cell phones for which they provide service." *In re Application of the U.S.A. for an Order Pursuant to 18 U.S.C. 2703(c) and 2703(d)*, 42 F. Supp. 3d 511, 517 (S.D.N.Y. 2014).[9] The phone simply would not work otherwise. Moreover, attributing this "common knowledge" to cell phone users is even more reasonable

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[9] Several of the cases cited in this section of the Court's opinion involve the government obtaining historical cell-site location information (CSLI) without a warrant. "Historical CSLI identifies cell sites . . . to and from which a cell phone has sent or received radio signals, and the particular points in time at which these transmissions occurred, over a given timeframe." *United States v. Graham*, 796 F.3d 332, 343 (4th Cir. 2015). That data can then "be used to interpolate the path the cell phone, and the person carrying the phone, travelled during a given time period." *Id.* Historical CSLI data is not what is at issue in this case, but as both parties acknowledge, the legal issues are generally the same. The Court, however, expresses no opinion on the constitutionality of warrantless CSLI collection.

where, as in this case, the location information was not collected solely for the purpose of routing calls, but also to determine whether the cell phone was "roaming."[10] A cell phone user cannot reasonably expect that his carrier will charge him for making and receiving calls while roaming if the carrier has no way of determining the location from which the subscriber is making or receiving calls.

In short, it is "too much," *Smith*, 442 U.S. at 743, to conclude that Zodhiates, or any cell phone subscriber,

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[10] Before Magistrate Judge McCarthy, a Response Unlimited employee submitted an affidavit stating, in effect, that no one at Response Unlimited would have seen this location information. *See* Docket 36-1 ¶ 6 ("Since February 2009, nTelos has not sent [Response Unlimited] any paper bills for the Wireless Service. [Response Unlimited] staff accesses the account and pays the bills on line. Bills are not downloaded, printed, or saved. They are just paid. . . . A sample of the on line nTelos bill [attached to the affidavit]. . . . shows only the telephone number of the particular phone, the charges to that number, and the total due.") An nTelos representative confirmed that Response Unlimited "received monthly statements not monthly detailed bills" and that the former "do not list call detail information." Docket 35-1 ¶ 3. However, the detailed billing records received by the Government "were available for review . . . by Response Unlimited." *Id. See also id.* ("nTelos customers, such as Response Unlimited, also have the ability to review the monthly detailed bill on line.") Regardless of whether all of this is accurate, it is irrelevant to the Court's Fourth Amendment analysis. Even if Zodhiates evidenced a subjective expectation of privacy in his location information by not receiving or viewing location information from nTelos (an assumption open to some question), that is not the end of the analysis. As noted, no reasonable cell phone subscriber could believe that his cell phone carrier does not collect location information. Thus, even if Zodhiates demonstrated a subjective expectation of privacy in his location information, he had no objective expectation of privacy in such information.

"labor[s] under the belief that their location is somehow kept secret from telecommunication carriers and other third parties." *In re Smartphone Geolocation Data Application*, 977 F. Supp. 2d 129, (E.D.N.Y. 2013). It follows, under *Miller* and *Smith*, that there is no reasonable expectation of privacy in the cell phone location information at issue in this case. No Fourth Amendment "search" occurred, and the Government thus did not need to obtain a warrant to gather the location information in the nTelos billing records.

Zodhiates' principle response to this conclusion relies on the Supreme Court's recent decision in *United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945 (2012). In *Jones*, government agents placed a GPS tracking device on the defendant's car and then used the device to track the vehicle's movements for 28 days. *Id.* at 948. All nine Justices agreed that the government's conduct constituted a Fourth Amendment "search," but the Justices reached that conclusion for a number of reasons. Five Justices joined an opinion which concluded that the government committed a trespass—and, thus, conducted a "search"—by "physically occup-[ying] private property for the purpose of obtaining information." *Id.* at 949. That is, simply attaching the device to the defendant's car was itself a "search."

Justice Sotomayor joined the majority's opinion, but she also separately concurred to question 'Whether people reasonably expect that their movements will [through GPS] be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on." *Id.* at 956 (Sotomayor, J., concurring). Even more pertinent to this case, Justice Sotomayor called into question the third-party doctrine,

arguing that it "is ill suited to the digital age." *Id.* at 957. Justice Sotomayor concluded, however, that "[r]esolution of these difficult questions . . . is unnecessary . . . because the Government's physical intrusion on [the defendant's] Jeep supplies a narrower basis for decision." *Id.*

Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, issued a separate concurrence. Justice Alit criticized the Court's trespass approach to the Fourth Amendment issue and argued that the Court should, consistent with *Katz v. United States*, "ask[] whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove." *Id.* at 958 (Alito, J., concurring in the judgment). Justice Alito concluded that "the use of longer term GPS monitoring in investigations of most offenses impinges on privacy" and that "society's expectation has been that law enforcement agents and others would not . . . secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.* at 964.

Zodhiates' argument combines these two concurrences to claim that "five justices agreed that when the Government engages in prolonged location tracking, in conducts a search under the Fourth Amendment." Docket 70 at 8. This argument has some superficial appeal. However, it is ultimately without merit, as Zodhiates cannot reconcile his interpretation of the *Jones* concurrences with the third-party doctrine.

In short, Zodhiates asks for too much on the basis of too little. If the Supreme Court had intended to reach that conclusion, surely five Justices would have said so explicitly. Instead, the far narrower basis for the Court's decision—and the only one expressly

agreed to by five Justices—is Justice Scalia's trespass theory. *Cf. Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks omitted). Justice Scalia's opinion clearly did not address the continuing validity of the third-party doctrine.

Neither did Justice Alito's concurrence, on which Zodhiates bases much of his argument. If Justice Alito's concurrence were to be read to prohibit what the Government did in this case, it would, at the very least, need to be reconciled with the third-party doctrine. But as the Eleventh Circuit observed when rejecting an argument nearly identical to Zodhiates', "[i]t would be a profound change in jurisprudence to say Justice Alito was questioning, much less casting aside, the third-party doctrine without even mentioning the doctrine." *Id.* The result is that the *Jones* concurrences "leave the third-party doctrine untouched and do not help [Zodhiates'] case." *Davis*, 785 F.3d at 514.

Zodhiates' second argument is based on the Second Circuit's recent decisions in *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015) (*Clapper I*) and 804 F.3d 617, 625 (2d Cir. 2015) (*Clapper II*). *Clapper I* concluded that a provision of the USA PATRIOT Act did not authorize the National Security Agency's since-curtailed bulk telephone metadata collection program. 785 F.3d at 821. After reaching this statutory conclusion, the Second Circuit went on to "discuss . . . some of the Fourth Amendment concerns that the [metadata collection] program implicates." *Id.* at 821 n.12. The

court surveyed the case law discussed above and acknowledged that the constitutional questions "present [] potentially vexing issues." *Id.* at 821. However, given its statutory holding, the court declined to address those constitutional issues. *See id.* at 824-25. *See also id.* at 826 ("We reiterate that, just as we do not here address the constitutionality of the program as it currently exists, we do not purport to express any view on the constitutionality of any alternative version of the program.") *Clapper I*'s discussion of the constitutional questions at issue here was thus unquestionably dicta.

Clapper II provides no more guidance than *Clapper I* does. *Clapper II* involved an attempt to enjoin the NSA's metadata collection program prior to the program's termination date, which Congress had implemented in the wake of *Clapper I.* As in *Clapper I*, the Second Circuit acknowledged that the constitutional issues in the case "invoke[d] one of the most difficult issues of modern jurisprudence," and one "on which the Supreme Courts jurisprudence is in some turmoil." *ACLU v. Clapper*, 804 F.3d 617, 625 (2d Cir. 2015) (internal quotation marks omitted). But again, the Second Circuit declined to "decide today the relationship between changing expectations of privacy and third-party providers." *Id.* at n.4.

The *Clapper* cases therefore provide little meaningful guidance (and certainly none that is binding) for this case. The Second Circuit has not otherwise addressed the issue raised by Zodhiates in any detail. The Second Circuit has, however, provided some help. In *United States v. Pascual*, an unpublished decision, the court found no plain error in a district court's decision to admit cell-site records obtained without a warrant. The Second Circuit held that the defend-

ant's argument to the contrary was "(at the very least) in some tension with prevailing case law"—specifically, *Miller* and *Smith*—which established "principles . . . point[ing] the other way." *United States v. Pascual*, 502 Fed. App'x 75, 80 & n.6 (2d Cir. 2012).

Admittedly, *Pascual* says little other than that *Miller* and *Smith* continue to be binding law. But absent Supreme Court intervention or a contrary decision (and not dicta) from the Second Circuit, *Pascual* "reflects the Second Circuit's probable approach" to the issues in this case. *United States v. Cerebella*, 963 F. Supp. 2d 341, 359 (D. Vt. 2013). *See also In re Application of the U.S.A.*, 42 F. Supp. 3d at 517 (observing that "Smith and Miller remain the 'prevailing case law'") (citing *Pascual*, 502 Fed. App'x at 80). Thus, *Miller* and *Smith* preclude any finding that the Government conducted a Fourth Amendment "search" in this case when it obtained cell phone location information.

The Court bases this holding on two other considerations. First, it is consistent with those of several courts of appeals that have addressed similar (if not identical) issues.[11] Second, Zodhiates seeks a

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[11] *See, e.g., United States v. Davis*, 785 F.3d 498, 511 (11th Cir. 2015) (*en banc*) ("[C]ell users must know that they must transmit signals to cell towers within range, that the cell tower functions as the equipment that connects the calls, that users when making or receiving calls are necessarily conveying or exposing to their service provider their general location within that cell tower's range, and that cell phone companies make records of cell-tower usage."); *In re Historical Cell Site Data*, 724 F.3d 600, 613 (5th Cir. 2013) ("Cell phone users, therefore, understand that their service providers record their location information when they use their phones at least to the same extent that the landline users in *Smith* understood that the

ruling that would call into question the constitutionality of common investigative tools that have otherwise been thought to stand on constitutionally firm ground. The Government "routinely issues subpoenas to third parties to produce a wide variety of business records, such as credit card statements, bank statements, hotel bills, purchase orders, and billing invoices"—all documents that "not only show location at the time of purchase, but also reveal intimate details of daily life, such as shopping habits, medical visits, and travel plans." *Davis*, 785 F.3d at 506 & n.9.

Many of these records undoubtedly reveal an individual's location to a degree that is much more precise than the location information in this case. A credit card bill, for instance, might show that an individual made purchases at several stores (and not just, as the billing records here show, in particular cities) over the course of a day. To say the least, it would be consequential to conclude that the Government has conducted a Fourth Amendment "search" when it subpoenas such records.

At bottom, the nTelos billing records are routine business records that reveal nothing protected by the Fourth Amendment. Thus, the Government did not conduct a Fourth Amendment "search" when it obtained the location information in those records. As a result,

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phone company recorded the numbers they dialed."). *But see United States v. Graham*, 796 F.3d 332, 345 (4th Cir. 2015) (holding that "[c]ell phone user have an objectively reasonable expectation of privacy" in "the movements of the cell phone and its user across public and private spaces" obtained by "inspect[ing] a cell phone user's historical [cell site location information] for an extended period of time"). The Fourth Circuit has since agreed to rehear *Graham en banc. See* 2015 WL 6531272 (4th Cir. 2015).

Zodhiates' motion to suppress that information is denied.[12]

2. Motion to Suppress Evidence Obtained By a Federal Grand Jury in the District of Vermont

As discussed above, this case is related to the investigation and prosecution of Kenneth Miller in the District of Vermont. Zodhiates has moved to suppress "evidence gathered by [the] Vermont grand jury" that investigated that case. Docket 70 at 14. According to Zodhiates, the Government "unconstitutionally community forum-shopped by declining to pursue grand jury proceedings in the Western District of Virginia," where, at the time, same-sex marriage was banned by state constitutional amendment, "in favor of the District of Vermont," where same-sex marriage was legal. *Id.*

The crux of Zodhiates' argument is that he "had the right to a grand jury drawn from a vicinage where a crime was committed." Docket 70 at 17. Zodhiates goes on to argue that "[t]he grand jury convened in the District of Vermont exceeded its jurisdiction by investigating alleged crimes outside Vermont." *Id.* Accordingly, Zodhiates argues that to use evidence acquired by the Vermont federal grand jury in this case would violate his Article III right to trial "in the State where the . . . Crimes shall have been committed" (Art. III, § 2, cl. 3), as well as his Sixth Amendment

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[12] Because the Court concludes that no Fourth Amendment "search" occurred in this case, the Court does not reach the good faith exception issue on which Magistrate Judge McCarthy decided Zodhiates' motion.

right to trial "by an impartial jury of the State and district wherein the crime shall have been committed."

Zodhiates' argument is novel and worth some discussion. The grand jury is "an appendage or agency of the court" and may therefore "investigate any crime that is within the jurisdiction of the court." *In re Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir. 1983). But it does not follow that a grand jury's investigative powers are limited to the geographic boundaries of the district court to which it is attached; the grand jury's "duty to inquire cannot be limited to conduct occurring in the district in which it sits." *Id.* This is so for two reasons.

The first takes Zodhiates' argument on its own terms. The question, as Zodhiates has posed it, is whether "the district of Vermont, and therefore the Vermont grand jury, did [or did not] have jurisdiction" to investigate crimes allegedly committed by Zodhiates in the District of Vermont, the Western District of Virginia, the Western District of New York, or elsewhere. Docket 70 at 19. The answer is simple: of course it did.

Congress has invested "[t]he district courts of the United States" with "original jurisdiction . . . of all offenses against the laws of the United States." 18 U.S.C. § 3231 (emphasis added). Section 3231 therefore provided the U.S. District Court for the District of Vermont with subject matter jurisdiction over this case's Vermont companion. "That's the beginning and the end of the jurisdictional inquiry." *United States v. Tony*, 637 F.3d 1153, 1158 (10th Cir. 2011). *See also United States v. Williams*, 341 U.S. 58, 66, 71 S. Ct. 595, 95 L.Ed. 747 (1951). And, as noted above, a federal grand jury has the authority to "investigate any

crime that is within the jurisdiction of the court" to which the grand jury is attached. *Marc Rich & Co., A.G.*, 707 F.2d at 667.

Putting these two principles together, the Vermont federal grand jury had jurisdiction to investigate Zodhiates' alleged commission of a federal crime, regardless of whether the conduct constituting that crime occurred in Virginia, Vermont, New York, or elsewhere. It is simply irrelevant whether, as Zodhiates argues, "the Government has no evidence that [he] committed a crime in Vermont." Docket 70 at 14. Assuming the truth of that statement, a federal grand jury impaneled in Vermont was entitled to acquire evidence simply "because it want[ed] assurance that" the "law [wa]s not . . . violated" in Vermont. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

The second reason for the Court's conclusion is based on a practical analysis of the grand jury's investigative function. "A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) (internal quotation marks omitted). It is a "necessary consequence" of this broad investigative power that the "grand jury paints with a broad brush." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991).

Thus, in light of the "awesome power of the government to use the inquisitional function of the grand jury," *United States v. Davis*, 702 F.2d 418, 421 (2d Cir. 1983), it is unsurprising that Zodhiates cites no authority that supports limiting a grand jury's investigative powers to a district court's territorial bounds. Little would be left of the federal grand jury's inves-

tigative powers if the rule were otherwise. "[T]he nature of the crime and the identity of the accused are decisions made by the grand jury at the conclusion of its inquiry, not at the beginning." *Id.* at 422. Given this reality, as well as the fact that many federal crimes are federal crimes *because* they involve multiple jurisdictions, Zodhiates' proposed rule makes no practical sense and would lead to absurd results. To take one of many examples, surely a grand jury impaneled in the Southern District of New York could, as part of its investigation of potential criminal conduct in that district, investigate conduct that took place across the river in the District of New Jersey. Zodhiates offers no authority that states, and no reason to think, that that should not be the case. In addition to these practical considerations, Zodhiates' proposed rule would be contrary to the grand jury's historically broad investigative authority. *See Blair v. United States*, 250 U.S. 273, 282 (1919) (noting that the grand jury is a "body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable results of the investigation"). This is presumably why the little case law on this issue points in the other direction.[13]

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[13] *See, e.g., LaRocca v. United States*, 337 F.2d 39, 43 (8th Cir. 1964) ("There is no question that when the grand jury is investigating a possible federal offense within its jurisdiction, it is authorized to receive evidence as to any acts related to the offense even though they occurred outside its jurisdiction."); *In re Grand Jury Proceedings*, 579 F.2d 1135, 1136 (9th Cir. 1978) (summarily concluding that a nearly identical argument "does not have merit" where "[t]here is no substantial evidence that the grand jury is performing other than its prescribed function

The issue underlying Zodhiates' grand jury argument appears to really be one of venue—as the Government notes, "[h]e appears to view jurisdiction and venue as equivalent." Docket 72 at 24. *See also* Docket 70 (Zodhiates' Br.) at 17 ("The Government's forum shopping was unconstitutional because Mr. Zodhiates had the right to a grand jury drawn from a vicinage where a crime was committed.") But Zodhiates cites no authority for the proposition that he has a right to be investigated by a grand jury that has been impaneled in a manner consistent with the federal venue statutes.

Instead, the fairness concerns that Zodhiates raises as the basis for his grand jury argument are addressed by rules governing the venue where the Government chooses to bring its case. As the Second Circuit noted in its decision affirming Kenneth Miller's conviction against a venue challenge, concerns about "trial in an environment alien to the accused" are solved by identifying the proper venue for a case. *United States v. Miller*, 808 F.3d 607 2015 WL 8952660 at *5 (2d Cir. 2015); *see also id.* ("Constitutionally mandating that a trial be held in the state where the wrong was committed . . . worked to alleviate these concerns.") Thus, the refuge Zodhiates seeks in "a friendlier forum" (Zodhiates Br. 17) is guaranteed by venue rules. Zodhiates, however, has not challenged whether venue is proper in this district. His motion to suppress evidence obtained by the Vermont grand jury is therefore denied.

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of investigating possible crimes committed within its jurisdiction").

3. Motion to Suppress Evidence Obtained By, Or Resulting From, Civil Discovery

Zodhiates next moves to suppress evidence obtained by the Government as a result of a civil suit filed by Lisa Miller's former partner, Janet Jenkins. In August 2012, Jenkins filed a complaint in the U.S. District Court for the District of Vermont against, among others, Zodhiates, Lisa Miller, and Kenneth Miller. Jenkins asserts various state law tort claims, federal civil rights claims, and civil claims for violations of the Racketeer Influenced and Corrupt Organizations Act. *See* Docket 59 (Amended Complaint) in 2:12-cv-00184-wks (D. Vt.).

The Government states that it "only very generally followed the course of the civil litigation" in Vermont. Docket 52 at 5. However, the Government acknowledges that Jenkins' counsel in her civil suit provided the Government with discovery materials produced by Zodhiates' business, Response Unlimited. Docket 52 at 6. The Government states that when Response Unlimited requested that Jenkins' counsel agree to a protective order (after it produced the materials to Jenkins), "the prosecutors immediately suspected that there must be documents of value held by Response Unlimited" and "immediately issued a grand jury subpoena to Response Unlimited." *Id.* Jenkins' attorneys have asserted, through their briefing in the Vermont civil case, that "[t]he Government has had absolutely no input on the discovery requests made in th[e] [civil] case, and has not requested any information about the discovery sought. [Jenkins] has been providing unsolicited information to the appropriate law enforcement officials since the time of her daughter's kidnapping and plans to continue to do so until such time as [IMJ] is located

and returned safely home." Docket 52-1 at 4 (emphasis in original).

In support of his motion to suppress the Government's use of these civil discovery materials, Zodhiates relies primarily on a single civil case from the Second Circuit, in which the court stated that "it may be improper for the Government to institute a civil action to generate discovery for a criminal case." *Doctors' Ass'c, Inc. v. Weible*, 92 F.3d 108, 116 (2d Cir. 1996) (internal quotation marks, citations, and brackets omitted). Zodhiates, however, has not pointed to any evidence (nor, for that matter, has he even alleged) that the Government "institute[d]" the civil action that parallels this case. At most, he asks the Court to draw inferences from timing: that because one event (the Government's issuance of a subpoena to Response Unlimited) followed another (Response Unlimited's production of documents to Jenkins) the Government has improperly utilized Jenkins' civil suit as a way to obtain documents and information for this case.

This is simply too much. The Court finds nothing remarkable about the fact that a putative victim of an alleged crime would share evidence related to that crime with the Government. And Zodhiates points to no authority prohibiting such unsolicited disclosure. To the contrary, the Government "may use evidence acquired in a civil action in a subsequent criminal proceeding unless the defendant demonstrates that such use would violate his constitutional rights or depart from the proper administration of criminal justice." *United States v. Teyibo*, 877 F. Supp. 846, 855 (S.D.N.Y. 1995) (concluding that such problematic cases include those in which "the Government pursued a civil action solely to obtain evidence for a criminal

prosecution" or where there are "other special circumstances suggest[ing] that the criminal prosecution is unconstitutional or improper") (emphasis added). Zodhiates has not come close to making this showing. Accordingly, his motion to suppress evidence acquired by the Government in Jenkins' civil lawsuit is denied.

4. Motion to Dismiss Count II and Part of Count I of the Superseding Indictment

Next, Zodhiates moves to dismiss Count II of the indictment, which alleges that:

> On or about September 22, 2009, in the Western District of New York, and elsewhere, the defendants, LISA MILLER, PHILIP ZODHIATES, and TIMOTHY MILLER, with intent to obstruct the lawful exercise of parental rights, did knowingly remove, and aid and abet the removal of, a child, J1, a person known to the Grand Jury, from the United States.

Docket 41 at 3. Zodhiates also moves to dismiss Count I of the indictment, which alleges a conspiracy to violate the IPKCA, "to the extent [Count I] challenges the removal of [Ms. Miller's daughter]." Docket 70 at 21.

Zodhiates' argument is as follows. The IPKCA requires the Government to prove, among other things, that a defendant acted "with intent to obstruct the lawful exercise of parental rights." 18 U.S.C. § 1204(a) But, Zodhiates notes, the IPKCA also provides that "[i]t shall be an affirmative defense" that the defendant "acted within the provisions of a valid court order granting the defendant legal custody or visitation

rights and that order . . . was in effect at the time of the offense." *Id.* § 1204(c)(1).

Zodhiates next observes that the superseding indictment "does not allege that Lisa Miller could not legally remove [her daughter] from the United States." Docket 70 at 21. To the contrary, Zodhiates argues that the Vermont family court did not grant Jenkins' motion transferring custody from Lisa Miller to Jenkins until approximately two months after Miller left the United States with her daughter. *Id.* at 23. Thus, Zodhiates argues that "[b]ecause Lisa Miller was allowed to leave the country with [her daughter]" in September 2009, Zodhiates "would not have violated any law by allegedly assisting with the departure of Ms. Miller." *Id.* at 22. On this basis, Zodhiates moves to dismiss Count II (aiding and abetting a violation of the IPKCA) and Count I (conspiracy to violate the IPKCA), to the extent Count I alleges a conspiracy to commit an illegal "removal."

In effect, Zodhiates' motion previews his defense at trial and asks the Court to make rulings based on that preview. However, "[t]here is no federal criminal procedure mechanism that resembles a motion for summary judgment in the civil context." *United States v. Yakou*, 428 F.3d 241, 246 (D.C. Cir. 2005). Instead, an indictment "can be challenged on the ground" (among others) "that it fails to allege a crime within the terms of the applicable statute." *United States v. Aleynikov*, 676 F.3d 71, 75-76 (2d Cir. 2012). But that is not what Zodhiates' motion seeks. Rather, it raises questions and issues that are procedurally premature.

To begin, an indictment must contain a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P.

7(c)(1). An indictment is therefore "sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). The indictment therefore "need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *Id.*

The superseding indictment in this case satisfies that standard. The relevant provision of the IPKCA makes it a crime to "remove[] a child from the United States, or attempt[] to do so, or retain[] a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights." 18 U.S.C. § 1204(a). Count II charges that, "[o]n or about September 22, 2009, in the Western District of New York, and elsewhere, the defendant[] . . . PHILIP ZODHIATES . . . with intent to obstruct the lawful exercise of parental rights, did knowingly . . . aid and abet the removal of[] a child . . . from the United States." Docket 41 at 3. There can be no question that Count II of the superseding indictment "accurately stat[es] the elements of the offense charged and the approximate time and place of the [crime] that defendants allegedly conspired to commit." *Alfonso*, 143 F.3d at 776. Zodhiates is therefore provided "sufficient detail to allow [him] to prepare a defense and to invoke the protection of the Double Jeopardy Clause." *Id.* For the same reasons, Count I undoubtedly properly alleges a conspiracy to violate the IPKCA.

Zodhiates does not appear to contest any of this. Rather, his argument for dismissal is best characterized in one of two ways. First, Zodhiates' argument appears to challenge the sufficiency of the Government's evidence on the element of intent: that he could not have "inten[ded] to obstruct the lawful exercise of parental rights," 18 U.S.C. § 1204(a), because, pursuant to orders of the Vermont family court, Lisa Miller had lawful parental rights at the time she removed her daughter from the United States.[14]

A pretrial motion to dismiss, however, may be granted only if "the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3). That is not the case here. In its briefing, the Government argues that, "[a]t the time Lisa Miller kidnapped IMJ in September 2009, Janet Jenkins had parental rights" (in the form of visitation rights) and that the Government "is confident that it has evidence to prove that Mr. Zodhiates was aware of Ms. Jenkins' visitation rights." Docket 72 at 33. This statement, and the Government's other factual assertions underlying it, is not "what can fairly be described as a full proffer of the evidence [the Government] intends to present at trial," which might permit the Court to consider the sufficiency of the evidence in a pretrial motion to dismiss. *Alfonso*, 143 F.3d at 776-77. Compare with *id.* at 777 (observing that, in another case, "the government had filed an affidavit making a full proffer of the evidence to be presented at trial"). Thus, to the extent Zodhiates' motion to dismiss argues that there is insufficient evidence of his alleged "intent to

[14] This is, of course, Zodhiates' characterization of the relevant evidence and law. The Court expresses no opinion on whether either is correct.

obstruct the lawful exercise of parental rights," 18 U.S.C. § 1204(a), the motion must be denied.

As Magistrate Judge McCarthy observed, Zodhiates' motion to dismiss could also be characterized as one based on the Government's "failure to allege the inapplicability of the affirmative defense provided by § 1204(c)(1) for individuals who act within with the provisions of a valid court order in effect at the time of the offense." Docket 66 at 24. As was true of the first characterization of Zodhiates' motion, this one is also premature. "It has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses." *United States v. Sisson*, 399 U.S. 267, 288 (1970). Rather, "[w]here a defendant asserts an affirmative defense that is not plain from the face of the indictment and that he or she bears the burden of proving, there must usually be a factual determination of the merits of the charged offense, which must be made at trial by the jury in the first instance." *United States v. Hoskins*, 73 F. Supp. 3d 154, 161 (D. Conn. 2014).

For these reasons, Zodhiates' motion to dismiss Count II and part of Count 1 of the superseding indictment is denied.

5. Motion to Dismiss for Cumulative Misconduct

Zodhiates also moves to dismiss the indictment "on the basis of cumulative misconduct by the Government," arguing that "at each stage of its investigation, the Government has violated [his] constitutional rights." Docket 70 at 23. More specifically, Zodhiates repeats his previous grand jury argument, claiming that "[t]he indictment should be dismissed based on the Governments forum shopping in violation of the vicinage

right guaranteed by Article III and the Sixth Amendment." *Id.* This argument for dismissal, however, is predicated on a successful argument that Zodhiates has a right to be investigated by a grand jury drawn from his local community. As discussed above, that argument is without merit.

Zodhiates also argues that "[t]he indictment should . . . be dismissed based on the cumulative investigatory misconduct' described throughout his motion, as well as Zodhiates' allegation that the Government violated Federal Rule of Criminal Procedure 6(e) by "publicly disclosing the grand jury testimony of one of Mr. Zodhiates's daughters." *Id.* Once again, this argument is without merit.

"The concept of fairness embodied in the Fifth Amendment due process guarantee is violated by government action that is fundamentally unfair or shocking to our traditional sense of justice, or conduct that is so outrageous that common notions of fairness and decency would be offended were judicial processes invoked to obtain a conviction against the accused." *United States v. Schmidt*, 105 F.3d 82, 91 (2d Cir. 1997). Although the circumstances surrounding the Governments alleged disclosure of grand jury testimony are unclear, even if true, they certainly do not turn these proceedings into ones that are "fundamentally unfair or shocking to our traditional sense of justice." *Id.*

Moreover, this argument also assumes that the Court finds merit in Zodhiates' other motions. Because the Court does not, Zodhiates' motion for dismissal based on the Government's alleged cumulative misconduct is also denied.

6. Motion to Confirm Scope of Previous Order

Finally, Zodhiates moved before Magistrate Judge McCarthy for "an order confirming," as the court did in Kenneth Miller's case, "that to prove the[] charges [in the superseding indictment], the Government must prove intent to violate lawful parental rights established by court order in place as of September 2009," the date of the alleged criminal conduct in this case. Docket 18 at 13. Magistrate Judge McCarthy denied this motion without prejudice to renewal before this Court. In his objections, Zodhiates "notes for the record that he continues to assert . . . his arguments regarding that issue." Docket 70 at 25.

This motion is effectively a request that the Court rule now on how it will instruct a jury as to 18 U.S.C. § 1204(a)'s intent element. That request is premature. Accordingly, the Court denies Zodhiates' motion without prejudice. Zodhiates may, however, renew his motion closer to trial as part of his proposed jury instructions.

CONCLUSION

For the reasons stated above, each of Zodhiates' pending pre-trial motions, other than his motion for clarification on the element of "intent" in this case, is denied.

SO ORDERED.

/s/ Richard J. Arcara
Hon. Richard J. Arcara
United States District Judge

Dated: January 20, 2016
Buffalo, New York

REPORT AND RECOMMENDATION OF THE DISTRICT COURT OF NEW YORK (SEPTEMBER 15, 2015)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

LISA MILLER, PHILIP ZODHIATES, and TIMOTHY MILLER,

Defendants.

14-CR-00175-RJA-JJM

Before: Jeremiah J. MCCARTHY, United States Magistrate Judge.

This case was referred to me by Hon. Richard J. Arcara for supervision of all pretrial proceedings [2].[1] Before me are the pretrial [19] and supplemental pretrial [51] motions of defendant Philip Zodhiates. Oral argument of Zodhiates' pretrial motions was held on March 25 and July 14, 2015 [34, 59]. Thereafter, the parties made submissions concerning recent case authority [61, 63]. For the following reasons, I recommend that the motions be denied.

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[1] Bracketed references are to the CM/ECF docket entries.

BACKGROUND

Janet Jenkins is the former partner by civil union of defendant Lisa Miller. Zodhiates' Supplemental Memorandum of Law [51-1], p. 3. Lisa Miller, a Virginia resident, was awarded sole custody of their child, subject to the visitation rights of Jenkins, by a Vermont Family Court in June 2007 (*id.*, p. 19). Lisa Miller left the United States with her daughter in September 2009 (*id.*, p. 3).

The two-count Superseding Indictment [41] charges Zodhiates with aiding and abetting Lisa Miller in the removal of the child from the United States with the intent to obstruct the lawful exercise of Jenkins' parental rights, in violation of the International Parental Kidnapping Crime Act ("IPKCA"), 18 U.S.C. §§ 1204 and 2 (*id.*, Count 2). It also alleges that defendants conspired to remove the child from the United States and to retain that child outside of the United States with intent to obstruct the lawful exercise of Jenkins' parental rights, in violation of 18 U.S.C. § 371 (*id.*, Count 1). Zodhiates' alleged overt acts include traveling with Lisa Miller and the child from Virginia to Buffalo, New York, where he then had contact with Kenneth Miller and an individual in Canada who agreed to transport Lisa Miller and the child into that country (*id.*).

Kenneth Miller, a Virginia resident, was arrested on December 5, 2011 in the District of Vermont (*United States v. Miller*, 2012 WL 1435310, *2 (D. Vt. 2012)), and on December 15, 2011, a federal grand jury sitting in Vermont returned a one-count Indictment charging him with violating 18 U.S.C. §§ 1204 and 2. *United States v. Miller*, 2:11 CR 161 (D. Ct. 2012) [16]. He was

tried in that court and convicted in August 2012 (*id.*, [72]). His appeal of that conviction remains pending before the Second Circuit. *United States v. Miller*, No. 13-822 (2d Cir.).

During the investigation into Kenneth Miller, grand jury subpoenas [18-2] were issued in August 2011 from the United States District Court for the District of Vermont to nTelos, a telephone company, for cellular telephone numbers (540) 241-9887 and (540) 649-1999, subscribed to by Response Unlimited, Inc., a company owned by Zodhiates. *See* Zodhiates' Memorandum of Law [18], p. 2. Both grand jury subpoenas sought a variety of information, including "[a]ll subscriber information", "payment history", and "[d]etail records of phone calls made and received" for the period May 1, 2009 to present. [18-2], p. 3, 5 of 5.

In response to the grand jury subpoenas, nTelos produced detailed monthly bills, which identified the dates and times of each call, duration, and the incoming or outgoing telephone numbers dialed [18-4]. Relevant to the current motions, the detailed monthly bills also identified the "Service Location", which appears to be the general vicinity from where the subject telephone received or placed a telephone call (*e.g.*, Augusta County Virginia, Lynchburg, Virginia, Roanoke, Virginia, Pittsburgh, Pennsylvania, Harrisburg, Pennsylvania) (*id.*). While the government states that it "did not subpoena the records with the plan to obtain location information" (government's Response [25], p. 3), it made use of this information at the 2012 trial of Kenneth Miller, during which the government introduced into evidence a map showing the Service Location of calls placed over a three-day period in September 2009, which spanned from Virginia to Buffalo,

New York [18-5]. *See* Zodhiates' Memorandum of Law [18], p. 3.[2]

Zodhiates' initial pretrial motion primarily seeks to suppress the evidence obtained by the nTelos subpoenas. *See* Zodhiates' Memorandum of Law [18], Point I. After oral argument of that motion on March 25, 2015, I twice requested additional briefing from the parties on that issue [31, 35-37, 39, 40]. Thereafter, the Superseding Indictment [41] was filed, which amended the Indictment by expanding the length of the alleged conspiracy charged in Count 1.

At Zodhiates' arraignment on the Superseding Indictment, I set a deadline for "[a]ll supplemental pretrial motions". *See* May 6, 2015 Scheduling Order [46], ¶ 2. While Zodhiates' supplemental pretrial motion [51] addresses recent case authority concerning his previously filed motion to suppress the nTelos records, it also raises new arguments, including seeking suppression of all evidence obtained from Vermont grand jury (Zodhiates' Supplemental Memorandum of Law [51-1], Point I(A)), suppression of discovery obtained by the government in a parallel civil suit commenced by Jenkins (*id.*, Point I(B)), dismissal of Count 2 and that portion of Count 1 arising from the removal of the child (*id.*, Point II(A)), and dismissal of the Superseding Indictment for the government's cumulative misconduct (*id.*, Point II(B)).

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[2] The government also recently resubpoenaed nTelos' records for October through November 2009, which it never previously received [51-2].

ANALYSIS

A. Timeliness of Zodhiates' Supplemental Pretrial Motions

In opposing the newly raised arguments, the government argues that they "could have been raised with regard to the initial indictment and do not appear focused on the new allegations". Government's Response to Supplemental Motions [52], p. 2. Since my Scheduling Order [46] did not specifically limit Zodhiates to filing supplemental motions directed only to the additional allegations of the Superseding Indictment, I do not consider his newly raised arguments to be untimely.

B. Motion to Suppress nTelos Records

Zodhiates argues that the government violated the Fourth Amendment by obtaining location information for both telephones without a warrant or court order. Zodhiates' Memorandum of Law [18], pp. 3-12. In response, the government argues: 1) that it was entitled to call detail information with a grand jury subpoena pursuant to the Stored Communications Act ("SCA"), 18 U.S.C. § 2703(c)(2), and that the "Service Location" information supplied, which was not sought in the grand jury subpoenas, was voluntarily produced by nTelos (government's Response [25], pp. 6-7; government's Second supplemental Letter Brief [40], p. 3); 2) that under the third-party doctrine, Zodhiates had no legitimate expectation of privacy in the information produced by nTelos in response to the grand jury subpoenas (government's Response [25], pp. 7-15); 3) that Zodhiates lacks standing to challenge the government's receipt of these records since they were cellular telephones subscribed to by Response Unlim-

ited (*id.*, pp. 15-16); and 4) that the good-faith exception of the exclusionary rule applies (*id.*, pp. 17-20).[3] I will address each of these arguments.

1. Standing

At the outset, "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois*, 439 U.S. 128, 132 n.1 (1978). In support of his standing, Zodhiates relies on the Affidavit of Matthew LaPorta, who states that "[t]he [three] cell phones [subscribed to by Response Unlimited] are exclusively used by Mr. Zodhiates, his wife, and one of his sons, and are regarded by [Response Unlimited] as Mr. Zodhiates' personal phones, though he and his family member do also use the phones for [Response Unlimited] business. The involvement of [Response Unlimited] staff is limited to receiving and paying the bills." [36-1], ¶ 5.

The government argues that since Zodhiates was not the subscriber of the phones, he lacks standing to contest the alleged search. Government's Response [25], p. 16. I disagree. *See United States v. Finley*, 477 F.3d 250, 259 (5th Cir.), *cert. denied*, 549 U.S. 1353 (2007) (defendant had standing to challenge retrieval of records from a cell phone that was a business phone issued by his employer); *United States v. Herron*, 2 F. Supp. 3d 391, 400 (E.D.N.Y. 2014) ("Case law is sparse on the question of whether a defendant who used a phone subscribed to another has standing to move to

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[3] For the first time in its second supplemental letter brief, the government relies upon the inevitable discovery doctrine. [40], p. 5. Therefore, I have not considered this argument.

suppress information gathered from that phone. However, the case may be analogized to situations involving storage lockers, hotel rooms, and mail packages. Such cases clearly establish that '[o]ne need not be the owner of the property for his privacy interest to be one that the Fourth Amendment protects, so long as he has the right to exclude others from dealing with the property'").

The government's reliance on *United States v. Serrano*, 2014 WL 2696569 (S.D.N.Y. 2014), does not compel a different conclusion. There, the defendant was seeking to suppress evidence related to a cell phone subscribed to by his wife, but failed to submit any evidence establishing his privacy interest in the phone. *Id.* at *7.

2. The SCA

The SCA enumerates non-content information that may be sought by a federal grand jury subpoena. *See* 18 U.S.C. §§ 2703(c)(1)(E), (c)(2). That information includes: the subscriber's name, address, "telephone connection records, or records of session times and duration", "the length of service . . . and types of service utilized", "telephone or instrument number or other subscriber number or identity", and the "means and source of payment for such service". 18 U.S.C. §§ 2703 (c)(2)(A)-(F). To obtain disclosure of any other non-content "record or other information pertaining to a subscriber", the government must instead use an appropriate warrant, court order, telemarketing fraud information request, or the customer must provide consent. *See* 18 U.S.C. §§ 2703(c)(1)(A)-(D).

Here, Zodhiates argues that the grand jury subpoenas exceeded the scope of what the government

is permitted to obtain by subpoena pursuant to the SCA by requesting "[a]ll subscriber information, including but not limited to. . . . [d]etail records of phone calls made and received". [18-2] (emphasis added). *See* Zodhiates' Reply Memorandum of Law [26], p. 4. The government responds that the grand jury subpoenas only sought information authorized by 18 U.S.C. § 2703(c)(2), and that nTelos' production of the Service Location information was a voluntary production.

However, I need not resolve these issues, since "suppression is not a remedy for a violation of the [SCA]". *United States v. Guerrero*, 768 F.3d 351, 358 (5th Cir. 2014), *cert. denied*, ___ U.S. ___, 135 S. Ct. 1548 (2015) (concluding that the remedy for obtaining historical cell site location data pursuant to a subpoena in violation of the SCA was not suppression); *United States v. Davis*, 2011 WL 2036463, *2 (D. Or. 2011) ("To the extent that the government's subpoena request may have violated [18 U.S.C. § 2703(c)(2)] by requesting specific information not delineated in the statute, Congress expressly ruled out suppression as a remedy for section 2703(c) violations"); 18 U.S.C. § 2708.

In order for Zodhiates to suppress the Service Location information obtained pursuant to the grand jury subpoenas, he must show that this information was obtained in violation of the Fourth Amendment. *See Guerrero*, 768 F.3d at 358.

3. The Fourth Amendment

"[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). The third-party doctrine recognizes that no reasonable expectation of privacy

exists where an individual "voluntarily turns over [information] to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979). Thus, "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller*, 425 U.S. 435, 443 (1976) (addressing bank records); *Smith*, 442 U.S. at 744 (applying the third-party doctrine to conclude that the defendant had no reasonable expectation of privacy in the numbers he dialed because "[w]hen he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed").

Zodhiates relies heavily upon *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012), *affirming sub nom. United States v. Maynard*, 615 F.3d 544, 555 (D.C. Cir. 2010), to argue that the third-party doctrine no longer applies to the prolonged historical cellular telephone location tracking that occurred here. Zodhiates' Reply [26], p. 8. I disagree. At issue in *Jones* was the discrete question of whether the government's use of a global positioning system ("GPS") tracking device without a valid warrant to track a suspect's vehicle for 28 days violated the Fourth Amendment. The D.C. Circuit held that this constituted a Fourth Amendment search because it violated the defendant's reasonable expectation of privacy. *See Maynard*, 615 F.3d at 555. The decision in *Maynard* turned on

the prolonged nature of surveillance, concluding that it "reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. . . . Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more. . . . A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups-and not just one such fact about a person, but all such facts." *Id.* at 562.

While the Supreme Court in *Jones* affirmed *Maynard*, it did so on different grounds, concluding that the installation of the GPS tracking device on the defendant's vehicle without a warrant constituted a physical trespass on his property. *Jones*, 132 S. Ct. at 949-53. Zodhiates' arguments instead draw upon the concurring opinions in *Jones* by Justices Alito (joined by Justices Ginsberg, Breyer, and Kagan) and Sotomayor, which concluded that the "use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy". *Id.* at 955, 964.[4] Of particular concern to Justice Sotomayor was that "GPS monitoring generates a precise, comprehensive record of a person's public movements that

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[4] The majority opinion in *Jones* noted that this would introduce "yet another novelty into our jurisprudence" as there was "no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated". 132 S. Ct. at 954.

reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.* at 955. She also went a step further, suggesting that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties", explaining that "[t]his approach is ill suited to the digital age". *Id.* at 957.[5]

However, this court remains "bound by precedent, and the actual majority opinion in *Jones* did not address the third-party disclosure doctrine, let alone purport to desert or limit it". *United States v. Wheelock*, 772 F.3d 825, 829 (8th Cir. 2014); *United States v. Gomez*, 575 Fed. Appx. 84, 87 (3d Cir. 2014), *cert. denied*, ___ U.S. ___, 135 S. Ct. 1016 (2015) ("[W]e remain bound by *Smith* until a majority of the Court endorses this view"); *United States v. Davis*, 785 F.3d 498, 514 (11th Cir. 2015), *petition for cert. filed*, No. 15-146 (July 29, 2015) (the concurrences in *Jones* "leave the third-party doctrine untouched. . . . If anything, the concurrences underscore why this Court remains bound by *Smith* and *Miller*").

Although the third-party doctrine was not overruled or limited by *Jones*, some courts both before and after *Jones*, have held that since "cell phone users do not voluntarily convey their [cell site location information] to their service providers. . . . [t]he third-party

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[5] In *Riley v. California*, U.S., 134 S. Ct. 2473 (2014), the Court referred to Justice Sotomayor's concurrence in *Jones* in holding that warrantless searches of cell phones incident to arrest violated the Fourth Amendment, but noted that the cases before it did "not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances". *Id.* at 2490 n. 19.

doctrine of *Miller* and *Smith* is . . . inapplicable". *United States v. Graham*, ___ F.3d ___, 2015 WL 4637931, *14-15 (4th Cir. 2015) (221 days of records); *In re Application of U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records to Government*, 620 F.3d 304, 318 (3d Cir. 2010) ("A cell phone customer has not 'voluntarily' shared his location information with a cellular provider in any meaningful way. . . . [since] it is unlikely that cell phone customers are aware that their cell phone providers collect and store historical location information"). *See also In re U.S. for an Order Authorizing the Release of Historical Cell-Site Information*, 809 F. Supp. 2d 113, 126 (E.D.N.Y. 2011) (113 days of records-relying on *Maynard* to hold "that an exception to the third-party-disclosure doctrine applies . . . because cell-phone users have a reasonable expectation of privacy in cumulative cell-site-location records, despite the fact that those records are collected and stored by a third party");[6] *In re Application for Telephone Information Needed for a Criminal Investigation*, ___ F. Supp. 3d ___, 2015 WL 4594558, *15 (N.D. Cal. 2015) ("the generation of historical CSLI via continually running apps or routine pinging is not a voluntary conveyance by the cell phone user").

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[6] Although the Second Circuit has not directly addressed this issue, it has expressed skepticism at the holding of *In re U.S. for an Order Authorizing the Release of Historical Cell-Site Information. See United States v. Pascual*, 502 Fed. Appx. 75, 80 (2d Cir. 2012) (Summary Order), *cert. denied*, U.S., 134 S. Ct. 231 (2013) (noting that it "is (at the very least) in some tension with prevailing case law" (*citing Miller*, 425 U.S. at 443, and *Smith*, 442 U.S. at 742-44)).

However, other courts have held that the third-party doctrine defeats any expectation of privacy that cell phone users have in their historical cell site information, even where there is a prolonged collection of records, "[b]ecause a cell phone user makes a choice to get a phone, to select a particular service provider, and to make a call, and because he knows that the call conveys cell site information, the provider retains this information, and the provider will turn it over to the police if they have a court order, he voluntarily conveys his cell site data each time he makes a call". *In re United States for Historical Cell Site Data*, 724 F.3d 600, 614 (5th Cir. 2013) (60 days of records); *Davis*, 785 F.3d at 512 n. 12 (addressing 67 days of records "Cell phone users voluntarily convey cell tower location information to telephone companies in the course of making and receiving calls on their cell phones. Just as in *Smith*, users could not complete their calls without necessarily exposing this information to the equipment of third-party service providers").

Likewise, courts have reached differing conclusions on whether cell phone users have a reasonable expectation of privacy in their historical cell site information. Compare *Davis*, 785 F.3d at 511 ("[L]ike the bank customer in *Miller* and the phone customer in *Smith*, Davis has no subjective or objective reasonable expectation of privacy in MetroPCS's business records showing the cell tower locations that wirelessly connected his calls"); *United States v. Benford*, 2010 WL 1266507, *3 (N.D. Ind. 2010) ("[D]efendant had no legitimate expectation of privacy in records held by a third-party cell phone company identifying which cell phone towers communicated with defendant's cell phone at particular points in the past"), with *Graham*,

2015 WL 4637931 at *11-12 (holding that cell phone users have an objectively reasonable expectation of privacy in their long-term cell site location information).

Here, I question whether Zodhiates had a reasonable expectation of privacy in the Service Location information collected. Unlike the cell site location records, which show an individual's location in proximity to the nearest cell tower,[7] or the GPS tracking addressed in *Jones*, the Service Location information at issue here provides only a very generalized vicinity (*i.e.*, town, city or county) when a cellular telephone is used. As noted by the government, Augusta County, Virginia, a Service Location identified here, covers 971 square miles. Government's Supplemental Submission [63], p. 3. By contrast, in *Graham*, the cell sites at issue covered a maximum radius of two miles. *Graham*, 2015 WL 4637931 at *6. Thus, even if aggregated and in real time, Service Location information is not sufficiently precise to provide a window into the details of an individual's life, such as political and religious beliefs or sexual habits. *See Davis*, 785 F.3d at 516 ("[N]o record evidence here indicates that the cell tower data contained within these business records produces precise locations or anything close to the 'intimate portrait' of Davis's life that he now argues"). *See also United States v. Scott*, 2015 WL 4644963, *7 n. 7 (E.D. Mich. 2015) (Although not

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7 "Each cell site operates at a particular location and covers a certain geographic range or cell. When a cellular telephone user places a call, sends a text message, or otherwise accesses a provider's network, his cell phone communicates with a cell site—often the one in closest proximity to the device." *United States v. Meregildo*, 2012 WL 3834732, *1 (S.D.N.Y. 2012).

addressing prolonged historical cell site data, the court held that the defendant "did not have a reasonable expectation of privacy in the data that revealed the general historical location. . . . Notably, the location data obtained . . . did not reveal the precise historical location of the Scott Phone; it only indicated whether the phone had been within a one-mile radius . . . at a specific period of time. . . . Thus, the Cell Tower Connection Records do not raise the same concerns as other types of tracking devices and records, such as a real-time GPS, which can pinpoint a person's exact location").

Moreover, Zodhiates knew (or reasonably should have known) in 2009 that nTelos tracked and relied upon general location information as part of its billing structure. For example, of the three cellular telephones subscribed to by Response Unlimited, one cellular telephone was subject to an additional charge for the inclusion of 400 roaming minutes. *See* [40-1], p. 5 of 5.[8] The monthly statements received also specifically stated that "[f]ree rate plan minutes are applicable for calls made according to your specific rate plan's 'home' area" (*id.*, p. 3 of 5). Thus, at minimum, it was evident that nTelos would be monitoring whether the cellular telephones were used within a certain vicinity. Indeed, in at least one instance, the nTelos monthly statement Response Unlimited received identified the Service Location for a cellular telephone call that resulted in additional charges. *See* [40-1], p. 5 of 5. Detailed monthly bills providing Service Location information were

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[8] Zodhiates relies upon a 2015 monthly statement [36-2], which utilizes a distinct billing plan from the 2009 statement. Yet, even that statement separately itemizes international roaming, suggesting that nTelos tracks call location (*id.*, p. 5 of 6).

also available to Response Unlimited. *See* Joyner Affidavit [35-1], ¶ 3.

The fact that Zodhiates was or should have been aware from his bills and cellular plan that Service Location was being tracked by his carrier also supports application of the third-party doctrine. As noted by the government, the Fourth Circuit's conclusion in *Graham* that cell phone users do not voluntarily disclose their cell site location information was based on the fact that those records exist behind the scenes, a consideration not present here. Government's Supplemental Submission [63], p. 3.

For these reasons, I believe that the government has the better of the argument in terms of whether the records ultimately produced by nTelsos in response to the grand jury subpoenas implicated the Fourth Amendment. However, as Zodhiates notes, a Fourth Amendment challenge "is directed toward the government's investigative conduct, *i.e.*, its decision to seek and inspect [cell site location information] records without a warrant" since the government has no way of knowing before the records are received "how granular the location data . . . would be". *Graham*, 2015 WL 4637931 at *12.[9] *See American Civil Liberties Union v. Clapper*, 785 F.3d 787 (2d Cir. 2015) ("a violation of the [Fourth] Amendment is fully accomplished at the time of an unreasonable governmental intrusion").[10]

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[9] This also appears to undermine the government's argument that the focus should be on the three days of relevant records (September 20-22, 2009), rather than the entire duration of records received. Government's Response [25], p. 4.

[10] The mandate in *Clapper* has been stayed to consider whether the plaintiffs' claims were rendered moot by the subsequent passage of the USA Freedom Act. 2015 WL 4196833 (2d Cir. 2015).

This suggests that the proper Fourth Amendment analysis considers what the subpoenas sought, rather than what was produced. In any event, it is not necessary for me to resolve whether the Fourth Amendment was implicated by either the records subpoenaed or received by the government, since even if there was a Fourth Amendment violation, I agree with the government that the good-faith exception negates any application of the exclusionary rule.

4. The Good-Faith Exception

The exclusionary "rule's sole purpose . . . is to deter future Fourth Amendment violations" *Davis v. United States*, ___ U.S. ___, 131 S. Ct. 2419, 2427 (2011), and its application "has been restricted to those situations in which its remedial purpose is effectively advanced". *Illinois v. Krull*, 480 U.S. 340, 348 (1987). Thus, the exclusionary rule is not a "strict-liability regime". *Davis*, 131 S. Ct. at 2429. Instead, suppression is to be the "last resort, not [the court's] first impulse". *Herring v. United States*, 555 U.S. 135, 140 (2009).

The "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *Herring v. United States*, 555 U.S. 135, 146 (2009). Although the good-faith exception was initially recognized by *United States v. Leon*, 468 U.S. 897 (1984) in the context of an invalid search warrant, this doctrine has since been applied to "an officer acting in objectively reasonable reliance on a statute" permitting a warrantless administrative search, *Krull*, 480 U.S. at 350 56, and to "searches conducted in objectively

reasonable reliance on binding appellate precedent". *Davis*, 131 S. Ct. at 2424. *See also Graham*, 2015 WL 4637931 at *21.

Zodhiates argues that "[t]he good faith exception . . . does not apply because the Government has identified no authority-statutory or otherwise-suggesting that location information can be obtained by grand jury subpoena and courts have consistently held that it cannot." Zodhiates' Reply Memorandum of Law [36], p. 5. While the grand jury subpoenas, which requested "[a]ll subscriber information", were arguably broader than what the SCA permits the government to obtain pursuant to 18 U.S.C. § 2703(c)(2), the subpoenas did not specifically seek any type of cell site data, much less location data.[11] Indeed, even nTelos did not interpret the subpoenas as seeking cell site records. *See* Affidavit of Annie Joyner (nTelos' custodian of records who participated in the production at issue) stating that while she would not provide "call detail records or cell site records in response to a subpoena request for subscriber information", she interpreted the subpoena to request "call detail information, that is a record of all calls made by the phone", but apparently not cell site records ([35-1], ¶¶ 1-2). Therefore, I accept the government's representation

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[11] Zodhiates argues that the fact that the government recently resubpoenaed Response Unlimited's Telos' bills for the period October through November 2009, "squarely contradicts the Government's good faith argument and the factual representations underlying it". Zodhiates' Supplemental Memorandum of Law [51-1], pp. 21-22 of 27. While that conduct may cut against the government's reliance upon the good-faith exception for the collection of those records, it does not undermine the government's representations concerning the records it was seeking when it issued the August 2011 subpoena.

that it "did not subpoena the records with the plan to obtain location information". Government's Response [25], p. 3.

In any event, even if the grand jury subpoenas impermissibly sought cell site location records, suppression is not a remedy for a violation of the SCA. *See Guerrero*, 768 F.3d at 358; *Davis*, 2011 WL 2036463 at *2. Moreover, "the Supreme Court's decisions *Miller* and *Smith* constitute binding appellate precedent" supporting the Government's contention that the seizure of this information does not implicate the Fourth Amendment. Government's Response [25], p. 18. Therefore, I conclude that suppression is not warranted, and recommend that this portion of Zodhiates' motion be denied.

C. Motion to Suppress Evidence Obtained by the Vermont Grand Jury

Zodhiates argues that the government impermissibly forum shopped by electing to pursue grand jury proceedings in Vermont and New York, rather than Virginia, which had a constitutional amendment banning same-sex marriage. Zodhiates' Supplemental Reply Memorandum of Law [57], p. 6-8. Zodhiates argues that by conducting grand jury proceedings in Vermont, "a state and district where no crime was allegedly committed" by him or others, and by using that grand jury to investigate crimes allegedly committed outside of Vermont, the government violated his Article III and Sixth Amendment rights, and seeks suppression of all evidence obtained during the Vermont grand jury investigation or derived from such evidence. Zodhiates' Supplemental Memorandum of Law [51-1], pp. 2, 9. In response, the government pri-

marily argues that "[v]enue is a trial right." Government's Response to Supplemental Motions [52], p. 2.

Article III's venue provision provides: "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." Art. III, § 2, cl. 3. The Sixth Amendment further states that "the accused shall enjoy the right to a . . . public trial, by an impartial jury of the State and district wherein the crime shall have been committed". *See also* Rule 18 ("[T]he government must prosecute an offense in a district where the offense was committed"). "Technically, Article III specifies 'venue' and the Sixth Amendment specifies 'vicinage,'[(the place from which jurors are to be selected)] but that refined distinction is no longer of practical importance." *United States v. Royer*, 549 F.3d 886, 893 (2d Cir. 2008), *cert. denied*, 558 U.S. 934 (2009). While the Sixth Amendment's reference to a "public trial" indicates that this is a trial right, Zodhiates cites authority that the Sixth Amendment's vicinage requirement applies to both grand juries and petit juries. *See United States v. Grisham*, 63 F.3d 1074, 1078 (11th Cir. 1995), *cert. denied*, 516 U.S. 1084 (1996) ("The Sixth Amendment guarantees a criminal defendant the right to be indicted and tried by juries drawn from a fair cross-section of the community").

In any event, Zodhiates was indicted by a grand jury convened in the Western District of New York, not Vermont. While at oral argument Zodhiates appeared to challenge whether venue was appropriate in this District, he had not previously raised this argument. Therefore, I will not consider it. *See Keefe v. Shalala*, 71 F.3d 1060, 1066 (2d Cir. 1995) ("Normally, we will not consider arguments raised for the first

time in a reply brief, let alone after oral argument"); *Harris v. Wu Tang Productions, Inc.*, 2006 WL 1677127, *3 (S.D.N.Y. 2006) ("This Court need not consider an argument raised for the first time at oral argument"). Though Zodhiates does argue that the government engaged in impermissible forum shopping to avoid the Western District of Virginia (the location where Lisa Miller's departure began), "our venue rules make clear that where venue lies, the choice among acceptable fora is one for the prosecution". *United States v. Smith*, 452 F.3d 323, 336 (4th Cir.), *cert. denied*, 549 U.S. 1065 (2006).[12]

Although Zodhiates argues that the grand jury materials from the Vermont grand jury investigation cannot be used against him in this litigation, he fails to cite any authority suggested that Article III or the Sixth Amendment prohibits evidence obtained by a grand jury from being shared and used at a trial in a different district. Government's Response to Supplemental Motions [52], p. 3. Indeed, this appears to be contemplated by Fed. R. Crim. P. ("Rule") 6 which,

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[12] The government has argued to the Second Circuit in Kenneth Miller's appeal that "if the removal of the child were considered under [18 U.S.C.] § 3237, venue could fall in the district involved in the foreign commerce, namely the Western District of New York. Trial in such an unrelated district would be illogical". *United States v. Miller*, No. 13-822 [44], p. 37 of 54 (emphasis added). While that statement is curious, the charges here include a conspiracy count, which was not charged in the Kenneth Miller prosecution. *See* Zodhiates' Supplemental Reply Memorandum of Law [57], p. 8 n. 2 ("Venue for a conspiracy prosecution 'is proper in any district in which an overt act in furtherance of the conspiracy' was allegedly committed" *quoting United States v. Geibel*, 369 F.3d 682, 695 (2d Cir. 2004)). Moreover, Zodhiates has not sought to challenge venue by way of dismissal or transfer.

among the exceptions to grand jury secrecy, permits disclosure of grand jury matters to "an attorney for the government for use in performing that attorney's duty" (Rule 6(e)(3)(A)(i)), and permits "[a]n attorney for the government . . . [to] disclose any grand-jury matter to another federal grand jury". Rule 6(e)(3)(C). *See Impounded*, 277 F.3d 407, 413 (3d Cir. 2002) ("The text of subsection (A)(i) authorizes an AUSA to disclose grand jury material to another AUSA 'for use in the performance of such attorney's [criminal] duties' without regard to his or her location" (emphasis added)).

Nor does Zodhiates cite any authority "suggesting that Article III or the Sixth Amendment limits in any way evidence gathering [by a grand jury] before trial". Government's Response to Supplemental Motions [52], p. 3. Whereas Zodhiates argues that "a grand jury's powers is limited by geographic scope" (Zodhiates' Supplemental Memorandum of Law [51-1], p. 8), that limitation restricts the grand jury's jurisdiction to "investigating any crime that is within the jurisdiction of the court". *Matter of Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir. 1983), *cert. denied*, 463 U.S. 1215 (1983). However, the grand jury's "duty to inquire cannot be limited to conduct occurring in the district in which it sits". *Matter of Marc Rich & Co., A.G.*, 707 F.2d at 667. *See Application of Linen Supply Cos.*, 15 F.R.D. 115, 118 (S.D.N.Y. 1953) ("A Grand Jury is not limited to investigation of matters over which it has been demonstrated the Court will have jurisdiction"); *Application of Radio Corp of America*, 13 F.R.D. 167, 170-71 (S.D.N.Y.1952) ("[T]he . . . grand jury ha[s] authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction").

Thus, "[t]here is no question that when the grand jury is investigating a possible federal offense within its jurisdiction, it is authorized to receive evidence as to any acts related to the offense even though they occurred outside of its jurisdiction". *LaRocca v. United States*, 337 F.2d 39, 43 (8th Cir. 1964). *See Blair v. United States*, 250 U.S. 273, 282 n. 5 (1919) ("It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning").

District Judge William K. Sessions previously denied Kenneth Miller's motion to dismiss the Vermont Indictment for improper venue. While he disagreed with the government's argument that venue existed pursuant to 18 U.S.C. § 3237[13] since part of the continuing offense involved obstruction of the Vermont court's order of parental rights, he concluded that venue was proper pursuant to 18 U.S.C. § 3238[14] since

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[13] 18 U.S.C. § 3237(a) provides, in relevant part, that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

[14] 18 U.S.C. § 3238 provides, in relevant part, that "[t]he trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender . . . is arrested or is first brought".

Kenneth Miller was first arrested in Vermont. *See Miller*, 2012 WL 1435310 at *4-9. At Kenneth Miller's trial, the question of venue pursuant to § 3238 was presented to the jury and Judge Sessions denied his motion for acquittal based upon the government's failure to prove venue. *See United States v. Miller*, 2013 WL 810097, *1 (D. Vt. 2013). Kenneth Miller's appeal of his conviction to the Second Circuit, which argues that the District of Vermont proceedings violated Article III, the Sixth Amendment and venue statutes, remains pending. *See* Zodhiates' Supplemental Memorandum of Law [51-1], p. 3. The government continues to argue on appeal both grounds (§§ 3237 and 3238) in support of venue. Government's Response to Supplemental Motions [52], p. 4.

Until this issue is resolved by the Second Circuit, there is no reason for me to determine what effect (if any) a lack of venue in the Vermont prosecution would have on the evidence gathered by the Vermont grand jury, which may have been investigating other possible crimes during the course of its investigation. Therefore, I recommend denying this portion of Zodhiates' motion, without prejudice.

D. Motion to Suppress Evidence Obtained from Civil Discovery

In 2012 Jenkins filed suit against Zodhiates and others in Vermont. Zodhiates' Supplemental Memorandum of Law [51-1], pp. 3-4. It is undisputed that Jenkins produced discovery exchanged in that case to the government, which it has used in the prosecution of this case. Government's Response to Supplemental Motions [52], p. 6.

Zodhiates argues that "while merely sharing unsolicited information obtained in a civil case is not an abuse of process . . . it 'may be improper for the Government to institute a civil action to generate discovery for a criminal case". Zodhiates' Supplemental Memorandum of Law [51-1], p. 9 (*quoting Doctor's Associates, Inc. v. Weible*, 92 F.3d 108, 116 (2d. Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997)). However, as the government argues, it "has not brought a civil action". Government's Response to Supplemental Motions [52], p. 5. It also points to Jenkins' submission in the Vermont civil action, which stated, in relevant part, that "[t]he Government has had absolutely no input on the discovery requests made in this case, and has not requested any information about the discovery sought. Plaintiff has been providing unsolicited information to the appropriate law enforcement officials since the time of her daughter's kidnapping. . . . To be clear, the only collaboration is Plaintiffs' intent to provide unsolicited information to the Government". [52-1], p. 4 of 8 (emphasis in original). Under these circumstances, I recommend that this portion of Zodhiates' motion be denied.

E. Dismissal of Count II and the Portion of Count I Challenging Removal

The IPKCA makes it a crime to "remove[] a child from the United States, or attempt[] to do so, or retain[] a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights". 18 U.S.C. § 1204(a). The statute provides an affirmative defense where "the defendant acted within the provisions of a valid court order granting the defendant legal custody or

visitation rights . . . in effect at the time of the offense". 18 U.S.C. § 1204(c)(1).

Zodhiates alleges that "Lisa Miller was awarded sole custody of [the child] subject to the visitation rights of Ms. Jenkins by a Vermont Family Court in June 2007" and that Jenkins' motion for transfer of custody was not granted until November 20, 2009, approximately two months after Lisa Miller's alleged removal of the child from the United States. Zodhiates' Supplemental Memorandum of Law [51-1], p. 19. Since the Superseding Indictment "does not allege that Lisa Miller could not legally remove [the child] from the United States", Zodhiates argues that Count 2 "should be dismissed in its entirety, and Count [1] should be dismissed to the extent it challenges the removal of [the child], for failure to state an offense" (*id.*, p. 18).

Judge Sessions rejected a similar challenge to Kenneth Miller's Indictment, concluding that "[t]he indictment plainly is not facially defective; it 'track[s] the language of the statute charged and states the time and place (in approximate terms) of the alleged crime.'" *Miller*, 2012 WL 1435310 at *2-3 (*quoting United States v. Pirro*, 212 F.3d 86, 92 (2d Cir. 2000)). The same holds true here.

"To establish a violation of the IPKCA, the government must prove that [the child] was previously in the United States; that Lisa Miller took [the child] from the United States to another country; that she did so with the intent to obstruct the lawful exercise of Janet Jenkins's parental rights; and that [the defendant] aided and abetted Lisa Miller in the commission of that crime." *Miller*, 2012 WL 1435310 at *2. Zodhiates does not argue that any of these elements are lacking in the Superseding Indictment. Instead,

his challenge appears to be to premised on the Superseding Indictment's failure to allege the inapplicability of the affirmative defense provided by § 1204(c)(1) for individuals who act within the provisions of a valid court order in effect at the time of the offense. However, "[i]t has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses". *United States v. Sisson*, 399 U.S. 267, 288 (1970). *See also United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1230-31 (D. Mont. 2006) ("[T]he obligation imposed upon the government by Rule 7(c)(1) that it must allege all elements of a statutory offense does not require an indictment to allege the inapplicability of an affirmative defense").

Moreover, "[a]n individual with parental rights may commit an international kidnapping. *See, e.g.*, *United States v. Miller*, 626 F.3d 692, 690-91 (2d Cir. 2010). . . . The issue is not whether it was legal for Lisa Miller to travel to Nicaragua with her daughter, but whether it was legal for Lisa Miller to remove [the child] from the United States with the intent to obstruct the lawful exercise of . . . Jenkins's parental rights." *Miller*, 2013 WL 810097 at *2. Therefore, I recommend that this portion of Zodhiates' motion be denied.

F. Motion to Dismiss for the Government's Cumulative Misconduct

Relying on the other grounds of raised in his pretrial motion, Zodhiates seeks dismissal of the Superseding Indictment by arguing that "at each stage of its investigation, the Government has violated [his] constitutional rights". Zodhiates' Supplemental Memorandum of Law [51-1], pp. 20-21. However, since

I have recommended denying the other portions of Zodhiates' motion, I likewise recommend denying this portion of his motion.

G. Motion to Confirm the Scope of Previous Court Orders

In his supplemental motions, Zodhiates renews his motion for a ruling on the proper jury instructions for the intent element of the offense "with the understanding that [it] will be addressed closer to the anticipated trial date if this action proceeds to trial". Zodhiates' Supplemental Motion [51-1], pp. 21-22. As reflected in my March 25, 2015 Text Order [31], the parties previously agreed that this portion of Zodhiates' motion could be denied, without prejudice to renewal before the trial judge. That remains my recommendation.

CONCLUSION

For these reasons, I recommend that Zodhiates' pretrial motions [19, 51] be denied. Unless otherwise ordered by Judge Arcara, any objections to this Report and Recommendation must be filed with the clerk of this court by October 2, 2015 (applying the time frames set forth in Fed. R. Crim P. ("Rules") 45(a)(1)(C), 45(c), and 59(b)(2)). Any requests for extension of this deadline must be made to Judge Arcara. A party who "fails to object timely . . . waives any right to further judicial review of [this] decision". *Wesolek v. Canadair Ltd.*, 838 F. 2d 55, 58 (2d Cir. 1988); *Thomas v. Arn*, 474 U.S. 140, 155 (1985).

Moreover, the district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were

not, presented to the magistrate judge in the first instance. *Patterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co.*, 840 F. 2d 985, 990-91 (1st Cir. 1988).

The parties are reminded that, pursuant to Rule 59(b)(2) of this Court's Local Rules of Criminal Procedure, "[w]ritten objections . . . shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection, and shall be supported by legal authority", and pursuant to Local Rule 59(b)(3), the objections must include "a written statement either certifying that the objections do not raise new legal/factual arguments, or identifying the new arguments and explaining why they were not raised to the Magistrate Judge". Failure to comply with these provisions may result in the district judge's refusal to consider the objection.

/s/ Jeremiah J. McCarthy
United States Magistrate Judge

Dated: September 15, 2015

ORDER OF THE SECOND CIRCUIT DENYING PETITION FOR REHEARING EN BANC (OCTOBER 10, 2018)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

PHILIP ZODHIATES,

Defendant-Appellant.

No. 200 WAL 2014

Docket No: 17-839

Appellant, Philip Zodhiates, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:

/s/ Catherine O'Hagan Wolfe
Clerk

RELEVANT STATUTORY PROVISIONS
18 U.S.C. § 2703(a)-(d)

18 U.S.C. § 2703(a)
Contents of Wire or Electronic Communications in Electronic Storage.

A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

18 U.S.C. § 2703(b)
Contents of Wire or Electronic Communications in a Remote Computing Service.

(1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection—

(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the proce-

dures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity—

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section; except that delayed notice may be given pursuant to section 2705 of this title.

(2) Paragraph (1) is applicable with respect to any wire or electronic communication that is held or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for pur-

poses of providing any services other than storage or computer processing.

18 U.S.C. § 2703(c)
Records Concerning or Remote Computing Service.

(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction;

(B) obtains a court order for such disclosure under subsection (d) of this section;

(C) has the consent of the subscriber or customer to such disclosure;

(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title); or

(E) seeks information under paragraph (2).

(2) A provider of electronic communication service

or remote computing service shall disclose to a governmental entity the—

(A) name;

(B) address;

(C) local and long distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) means and source of payment for such service (including any credit card or bank account number), of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1).

(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

18 U.S.C. § 2703(d)
Requirements for Court Order.

A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers 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. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

SUBPOENA TO TESTIFY BEFORE A GRAND JURY #20WR00025-2389 (AUGUST 25, 2011)

AO 110 (Rev. 06/09) Subpoena to Testify Before Grand Jury — 20WR00025-2389

United States District Court

for the

District of Vermont

SUBPOENA TO TESTIFY BEFORE A GRAND JURY

Subpoena for ☐ Person ☑ Document(s) or Object(s)

To: Attn: Annie Joyner
nTelos
719 High Street
Portsmouth, VA 23704

FAX: (866) 275-5837
PHONE (877) 468-3567

YOU ARE COMMANDED to appear in this United States District Court at the time, date, and place shown below to testify before the Court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place: U.S. Post Office and Courthouse
11 Elmwood Avenue., 2nd Floor
Burlington, VT 05402

Date and Time 8/25/2011 9:00:00 AM

You must also bring with you the following documents, electronically stored information, or objects

(blank if not applicable)

See Attachment.

Date: 8/9/2011

CLERK OF COURT

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Signature of Clerk or Deputy Clerk

AO 110 (Rev. 06/09)
Subpoena to Testify Before Grand Jury

20WR00025-2389

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Subpoena for Document(s)

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Burlington, VT 05402

Date and Time

8/25/2011 9:00:00 AM

You must also bring with you the following documents, electronically stored information, or objects *(blank if not applicable)*

See Attachment.

/s/
Clerk of the Court

Date: 8/9/2011

The name, address, e-mail, and telephone number of the United States Attorney, or Assistant United States Attorney, who requests this subpoena are.

/s/ Paul Van de Graaf
First Assistant U.S. Attorney-
Paul Van de Graaf
Reference number 2010R00025-2389
11 Elmwood Avenue (PO Box 570)
Burlington, VT 05402
Phone: (802) 951-6725
Fax: (802) 951-6540
Email: Karen.arena-leene@usdoj.gov

For (540) 241-9887, for the period May 1, 2009, through present, please provide:

1. All subscriber information, including but not limited to account number, phone numbers serviced by your company, subscriber name, social security number, billing and service addresses, alternate/other contact phone numbers including "Can-Be-Reached" (CBR) numbers, email addresses, text messaging addresses, and other identifying information;

2. Means and source of payments for services and payment history, including but not limited to any credit card and/or bank account numbers;

3. Length of service (including activation/start date) and types of services utilized;

4. Detail records of phone calls made and received (including local and incoming call records if a cellular account) and name of long distance carrier if not your company;

5. Detail records of "push-to-talk" or "direct connect" transmissions made and received;

6. Numeric (non-content) detail records of text messages (including SMS), multimedia messages (including MMS), and other data transmissions made and received (including any IP address assigned for each session or connection);

7. All of the foregoing information and records for:

(a) other phone numbers or accounts involving the same ESN, MEID, IMEI and/or IMSI as the phone number identified above;

(b) other phone numbers associated with the same account as the phone number identified above and/or the subscriber for the phone number identified above; and

(c) other accounts and phone numbers billed or provided to any subscriber at the same billing or service address as for the phone number identified above.

Provide all detail records electronically on a CD-R in ASCII, comma separated values (.csv), or fixed field length (SDF) format. If the foregoing is not possible, provide the detail records in "print image" format (i.e., textual or graphical representation of a customer bill) in ASCII (preferable), text-convertible .pdf format,

or graphical format .pdf or .tif files. If none of the forgoing formats can be produced, provide information in dark, clean typeface, machine-scanable/OCR-interpretable hardcopy. Should call detail records not be available in an electronic format, please provide all call details on the phone number invoice(s) and/or another suitable format.

Provide a declaration or certification that these records (A) were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (B) were kept in the course of the regularly conducted activity; and (C) were made by the regularly conducted activity as a regular practice.

SUBPOENA TO TESTIFY BEFORE A GRAND JURY #2010R00025-2390 (AUGUST 25, 2011)

AO 110 (Rev. 06/09) Subpoena to Testify Before Grand Jury ✓ 2010R00025-2390

United States District Court

for the

District of Vermont

SUBPOENA TO TESTIFY BEFORE A GRAND JURY

Subpoena for ☐ Person ☑ Document(s) or Object(s)

To: Attn: Annie Joyner
nTelos
719 High Street
Portsmouth, VA 23704

FAX: (866) 275-5837
PHONE (877) 468-3567

YOU ARE COMMANDED to appear in this United States District Court at the time, date, and place shown below to testify before the Court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place: U.S. Post Office and Courthouse
11 Elmwood Avenue., 2nd Floor
Burlington, VT 05402

Date and Time 8/25/2011 9:00:00 AM

You must also bring with you the following documents, electronically stored information, or objects
(blank if not applicable)
See Attachment.

Date: 8/9/2011

CLERK OF COURT

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Signature of Clerk or Deputy Clerk

AO 110 (Rev. 06/09)
Subpoena to Testify Before Grand Jury

20WR00025-2390

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Subpoena for Document(s)

To:

Attn: Annie Joyner
nTelos
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Portsmouth, VA 23704
Fax: (866) 275-5837
Phone (877) 468-3567

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U.S. Post Office and Courthouse
11 Elmwood Avenue., 2nd Floor
Burlington, VT 05402

Date and Time

8/25/2011 9:00:00 AM

You must also bring with you the following documents, electronically stored information, or objects *(blank if not applicable)*

See Attachment.

/s/
Clerk of the Court

Date: 8/9/2011

The name, address, e-mail, and telephone number of the United States Attorney, or Assistant United States Attorney, who requests this subpoena are.

/s/ Paul Van de Graaf
First Assistant U.S. Attorney-
Paul Van de Graaf
Reference number 2010R00025-2389
11 Elmwood Avenue (PO Box 570)
Burlington, VT 05402
Phone: (802) 951-6725
Fax: (802) 951-6540
Email: Karen.arena-leene@usdoj.gov

For (540) 649-1999, for the period May 1, 2009, through present, please provide:

1. All subscriber information, including but not limited to account number, phone numbers serviced by your company, subscriber name, social security number, billing and service addresses, alternate/other contact phone numbers including "Can-Be-Reached" (CBR) numbers, email addresses, text messaging addresses, and other identifying information;

2. Means and source of payments for services and payment history, including but not limited to any credit card and/or bank account numbers;

3. Length of service (including activation/start date) and types of services utilized;

4. Detail records of phone calls made and received (including local and incoming call records if a cellular account) and name of long distance carrier if not your company;

5. Detail records of "push-to-talk" or "direct connect" transmissions made and received;

6. Numeric (non-content) detail records of text messages (including SMS), multimedia messages (including MMS), and other data transmissions made and received (including any IP address assigned for each session or connection);

7. All of the foregoing information and records for:

(a) other phone numbers or accounts involving the same ESN, MEID, IMEI and/or IMSI as the phone number identified above;

(b) other phone numbers associated with the same account as the phone number identified above and/or the subscriber for the phone number identified above; and

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