No. 18-9485

In The

Supreme Court of the United States

DANTE TAYLOR,

Petitioner,

--v.--

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE
APPELLATE DIVISION, FOURTH DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rules 14.1(b)(iii), (d), and 15.2, the following is a list of all state court proceedings, in chronological order, with the information required by the Rules in the order specified. No federal court proceedings occurred prior to the filing of the petition for certiorari.

1. New York State Supreme Court, Ind. No. 13-76, People v. Dante Taylor, Judgment of Conviction rendered Nov. 20, 2014.

2. New York State Supreme Court, Appellate Division, Fourth Department, People v. Dante Taylor, conviction affirmed Feb. 2, 2018 (reported at 158 A.D.3d 1095, 72 N.Y.S.3d 256).

3. New York State Supreme Court, Appellate Division, Fourth Department, Dkt. No. KA 15–00214, People v. Dante Taylor, motion for reargument denied, April 30, 2018 (reported at 160 A.D.3d 1506).

4. New York Court of Appeals, no docket number, People v. Taylor (Dante), applications for leave to appeal denied, Aug. 6, 2018 (reported at 32 N.Y.3d 941, 109 N.E.3d 1168, 84 N.Y.S.3d 868).

5. New York Court of Appeals, no docket number, People v. Taylor (Dante), applications for leave to appeal denied, Jan. 3, 2019 (reported at 32 N.Y.3d 1178, 121 N.E.3d 243, 97 N.Y.S.3d 616).

6. New York State Supreme Court, Appellate Division, Fourth Department, Dkt. No. KA 15–00214, People v. Dante Taylor, motion for reargument dismissed as untimely and coram nobis petition denied, June 7, 2019 (reported at 173 A.D.3d 1721, 99 N.Y.S.3d 895).

STATEMENT OF THE CASE

Petitioner was convicted in New York State Supreme Court of four counts of Murder in the First Degree, two counts of Burglary in the First Degree, and Arson in the Second Degree[1] for stabbing Stacey and Terri Moulton to death when they interrupted petitioner's burglary of a house belonging to the Moulton's neighbor. The evidence against petitioner included the victims' DNA

[1]The count of Arson in the Second Degree was modified on appeal to Arson in the Third Degree. *People v. Taylor*, 158 A.D.3d 1095 (4th Dept. 2018).

found in a blood stain in petitioner's car and on property stolen in the burglary that was recovered from petitioner's apartment; the victims' phones found in a bag with a receipt for goods purchased by petitioner's girlfriend; and three witnesses' identifications of petitioner's car in the driveway of the burglarized house just before the murders. Petitioner also lied to police when he was arrested, telling them that he was home all day on the day of the murders with his girlfriend, but his girlfriend testified at trial, pursuant to a material witness order, that he had left home before the murders occurred and returned after. The prosecution also presented evidence that petitioner's cell phone used cell site towers near the burglarized house around the time of the murder -- information which the state police first obtained before petitioner's arrest by using a provision of the Stored Communications Act for disclosures based on exigent circumstances.

Petitioner now seeks review of several issues in connection with the cell site location information ("CSLI") obtained by police prior to his arrest, arguing that he had an expectation of privacy in the four days of CSLI requested, that exigent circumstances did not exist to obtain his CSLI, that they violated the Stored Communications Act, requiring suppression of that evidence; and that New York's highest court was required to grant discretionary review after *Carpenter v. United States,* 138 S.Ct. 2206 (2018), was decided because his case was still on direct appeal.

This Court should deny certiorari for several reasons. First, the police had a good faith belief at the time they acted that petitioner had no expectation of privacy in the CSLI. Indeed, this Court has previously denied certiorari, after *Carpenter*, where law enforcement agents relied on pre-*Carpenter* case law in good faith. Second, there were ample exigent circumstances to obtain the information in any event, as petitioner had evaded physical surveillance and the police feared his escape, destruction or disposal of the proceeds of the burglary, and possible harm to others. Third, the Stored Communications Act, by its terms, does not permit suppression as a remedy for any supposed violation, as every federal circuit court of appeals to have reviewed the issue has held. And fourth, for all these reasons, as well as others, the New York Court of Appeals was not obligated to grant petitioner further, discretionary review after *Carpenter* was decided.

The Double-Homicide and the State Police Investigation.

On July 14, 2013, mother and daughter Terri and Stacey Moulton went to feed their neighbor's cat at the neighbor's house, located in Sodus, New York, while the neighbor was away. When they entered the house sometime after 12:15 p.m., the two women unknowingly interrupted petitioner's broad-daylight burglary of the home. Petitioner, a two-time violent felon on parole, stabbed the daughter, Stacey, in the heart, breast, liver, and skull, removed her top and bra, and pulled her pants down. He stabbed Terri multiple times, including through the full thickness of her neck. Petitioner also ransacked the home and attempted to set the bodies and the house on fire using an accelerant at eight different locations. Although family members arrived that afternoon before the home was engulfed in flames, the two women were already dead; their bodies lay on the floor charred from the fire.

State police quickly arrived and the fire department extinguished the fire. Police later interviewed the victims' family members, who disclosed that shortly before Stacey and Terri left to feed the cat, the family members had observed an unfamiliar vehicle parked in the driveway of the neighbor's house. They had taken special note of the vehicle because the neighbor was supposed to be away. Jason Moulton, Terri's son and Stacey's sister, described it as a model year 2004 to 2007 Mercury Mountaineer, dark colored with gold trim.[2]

The next day, the police traced the victims' cell phones to the area of two empty lots in Rochester, New York, about 45 minutes away, and recovered the phones as part of a physical grid search of those lots. The victims' phones were found in a bag with a receipt for goods purchased with a public benefits card, which, upon further investigation, police learned belonged to petitioner's girlfriend.[3] Police promptly conducted surveillance of the girlfriend's residence and, on the night

[2]One witness, Amy Hurley, observed what she thought was a white sedan in the driveway, but her husband, who observed the vehicle at the same time, described it as a dark SUV. Ms. Hurley also described a thin black male, under six feet tall, wearing a red baseball cap, at the back of the vehicle looking surprised when the Hurleys passed by.

[3]Contrary to petitioner's assertion (Pet. at 8), the receipt was not 90 days old at the time of its discovery by police. The receipt was dated May 14th, 2013, and thus was 60 days old at the time

of July 17th, three days after the homicide, observed, adjacent to her residence, an SUV matching the description of the vehicle in the driveway of the burglarized house – a 2004 Mercury Mountaineer, dark colored with gold trim.[4]

The police then learned that the Mountaineer was registered to petitioner, whose name had not previously come up in the course of the investigation. When petitioner exited the home, entered the Mountaineer, and drove off, police followed.[5] After a while, however, petitioner attempted evasive maneuvers, causing police to terminate the surveillance for officer safety.

Police also obtained petitioner's criminal history sheet, which revealed his six arrests, including charges of attempted escape in the first degree, robbery in the first degree causing serious physical injury with a weapon, and robbery in the first degree while displaying what appeared to be a weapon. Petitioner had two prior violent felony convictions, had previously violated probation, and was on parole for a conviction of Attempted Robbery in the First Degree.

Investigators then located petitioner's parole officer, Douglas Rusinko, whom they interviewed on the night of July 17th, after 8:15 p.m., at state police barracks. The parole officer provided background on petitioner, including his address, which was the same as the girlfriend's, his cell phone number, his work address, and that he had previously lived in Sodus, the location of his mother's last known address. The police also questioned Rusinko about different ways to access petitioner's home, apparently for tactical reasons associated with effectuating his arrest. After further investigation, the police learned that petitioner's cell phone was serviced by AT&T.

The police, fearing petitioner's flight, destruction of the stolen property or other evidence of the murders, and possible violence toward others, planned to arrest petitioner as quickly as possible.

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of the crime.

[4]Petitioner erroneously states in the petition that he was under surveillance for two days (Pet. at 9, 13). The evidence at the hearing showed that physical surveillance was attempted on the evening of July 17th but suspended later that night when he attempted evasive maneuvers.

[5]Petitioner, who was listed on his criminal history sheet as five feet, eleven inches tall, was wearing a predominantly red baseball hat at that time, roughly fitting Amy Hurley's description.

This was particularly urgent because petitioner might have been alerted that he was a suspect. For these reasons, police needed to determine petitioner's whereabouts after surveillance had ended, in order to facilitate the arrest, and also wanted to confirm petitioner's presence in Sodus around the time of the murders, to ensure they had probable cause for the arrest before apprehending petitioner. On the morning of July 18th at 6:57 a.m., Investigator Eric Hurd used a provision of the Stored Communications Act ("SCA") that allows cell phone companies to provide CSLI to law enforcement under exigent circumstances.[6] They requested four days worth of CSLI from AT&T, from the time of the crime up to the time of the request, explaining that petitioner was a suspect in a double murder and that he had attempted to avoid detection when followed. Investigator Hurd also indicated that the police would prepare, obtain, and serve a warrant for this information later in the day.

A few hours later, AT&T provided information confirming petitioner's presence in Sodus at the time of the murders, and the police promptly arrested petitioner. The police also obtained search warrants for petitioner's car and residence, for petitioner's person, and, as promised, for the CSLI, as well as for all of AT&T's information with regard to petitioner's phone, including text messages and searches. The applications for the warrants included a recitation of the information state police had learned during their investigation, but the only CSLI mentioned in the application referred to the location of petitioner's phone in Sodus, New York, near the time of the murders.

When police executed the search warrants, they found Stacey Moulton's DNA in a blood stain on the left side of the console of petitioner's car and in blood on multiple liquor bottles stolen from the burglarized house that were recovered from petitioner's home. The police found Terri Moulton's DNA on a laundry basket in petitioner's apartment that had also been taken from the burglarized

[6] 18 U.S.C. § 2702(b)(8). *See* AT&T Exigent Circumstances Form, Exhibit 10 to Hearing Exhibit 1 (time-stamped faxed page). Just prior to this request, on the night of July 17th, the police filed a "preservation" letter under the Stored Communications Act, 18 U.S.C. § 2703(f), asking the wireless provider not to destroy any records in connection with petitioner's account. Contrary to petitioner's assertions (Pet. at 8, 16-17), no information was requested at that time, nor was any provided to police. *See* Urgent Preservation Request, Exhibit 8 attached to Hearing Exhibit 1.

premises. Other items from the burglarized house were also found in petitioner's apartment, including an Apple laptop that the owner had drawn circles on in pencil.

Petitioner was charged with four counts of first-degree murder, two counts of first-degree burglary, and second-degree arson.

The Motion to Suppress

Petitioner moved to suppress all of the evidence obtained through the warrants, as well as the CSLI obtained through the exigency provision. As to the latter, petitioner argued that he had an expectation of privacy in the location information, that the police did not have exigent circumstances to obtain the CSLI, and that the police violated the SCA in obtaining the information. The state opposed, arguing that petitioner had no expectation of privacy in the CSLI under this Court's decisions in *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979), that the police in any event had ample exigent circumstances to justify a search, and that suppression was not a remedy for any potential violation of the SCA. The state also argued that even if the CSLI were improperly obtained, the subsequent warrants, including the warrant covering the same information, were valid.

A hearing was held at which the state called ten witnesses describing the course of the investigation. They also entered into evidence the search warrants, search warrant applications, and exhibits attached to the applications. The applications described the investigation in detail, and the exhibits included, among other things, a sworn statement from Jason Moulton describing the vehicle parked in the driveway of the burglarized house as a 2004 to 2007 dark-colored Mercury Mountaineer with gold trim, a printout of a government record of petitioner's vehicle showing that it was a 2004 black Mercury Mountaineer with gold trim,[7] a copy of a receipt for goods purchased by petitioner's girlfriend that was found with the victims' phones, and petitioner's criminal history sheet obtained on July 17th, showing six arrests, two convictions for violent felony offenses, and his status as a parolee.

[7] *See* Printout of NYDMV Information, Exhibit 7 attached to Hearing Exhibit 1.

The suppression court ultimately rejected petitioner's claims that the CSLI was illegally obtained. The court held that petitioner had no expectation of privacy in the CSLI, citing this Court's decisions in *Miller* and *Smith* on the third-party doctrine and other federal precedent applying the third-party doctrine to CSLI. On the question of exigent circumstances, the court concluded that the police could "reasonably infer that the suspect committed the murders and posed a danger if not successfully taken into custody and taken into custody in a timely manner." Decision at 10. The court also held that suppression was not a remedy for any purported violation of the Stored Communications Act.

The Trial and Sentence

The evidence at trial implicating petitioner included the DNA evidence that Stacey Moulton's blood was recovered from petitioner's car, the additional DNA evidence that Stacey's blood was found on six different liquor bottles that had been taken from the burglarized house and were recovered from petitioner's apartment, and DNA evidence that Terri's Moulton's blood was found in three places on a laundry basket taken from the burglarized house that was also found in petitioner's apartment.

Three witnesses also identified petitioner's dark-colored 2004 Mercury Mountaineer as being in the driveway of the burglarized premises shortly before the murders, explaining that they had taken special note of the car because the neighbor was away at the time. Another witness saw the SUV, which he identified from the same photo, heading towards the burglarized house shortly before the murders. That witness had seen petitioner in the same SUV a few months earlier and had spoken to petitioner, whom he knew from childhood, for 20 or 30 minutes.

The prosecution also introduced testimony concerning the recovery of the victims' phones in the bag with a receipt for goods purchased by petitioner's girlfriend. In addition, video surveillance recordings from various businesses along the route between Rochester and Sodus, made on the day of the murders, were admitted in evidence, each showing an SUV matching petitioner's Mercury Mountaineer. Investigators traveled the route to confirm that the time frames were consistent with

the travel of a single vehicle to and from Sodus, given the likely speed of travel of the Mountaineer, before and after the murders. Still other evidence established that on the day after the murders, petitioner asked a co-worker whether DNA could be burned or found in sweat.

Although petitioner told police at the time of his arrest that he had been home all day on the day of the murders and that his girlfriend would verify this, petitioner's girlfriend, who testified at trial pursuant to a material witness order, told the jury that petitioner left the apartment between 10:30 and 11:00 a.m. and did not return until after 3:00 p.m. that day – the precise time period during which the murders occurred. Petitioner also told police that his cell phone and his car were with him all day on the day of the murders.

The prosecution also introduced text messages from petitioner's girlfriend to petitioner. One, sent at 12:22 p.m., said, "You said you'd be back in an hour," while another, sent at 3:12 p.m., said, "I believe you can take it to a cell phone shop. Most of them unlock phones." Petitioner's CSLI for the time of the murder was also introduced into evidence, showing that the victims' phones and petitioner's phones were all connecting to the same cell site at 1:51 p.m. By 3:39 p.m., Stacey Moulton's phone was in Rochester near the vacant lot where it was later found by police.

The jury convicted petitioner of the first-degree murders of Stacey and Terri Moulton, the two burglary counts, and second-degree arson. Petitioner was sentenced to consecutive sentences of life without parole on the first degree murder counts, as well as concurrent lesser sentences on the other offenses.

The State Court Appeal

On appeal, petitioner argued, among other things, that petitioner had an expectation of privacy in his CSLI, that the state police did not have exigent circumstances to dispense with a warrant, and that they misused the statutory exigent circumstances procedure. The prosecution responded that the CSLI was a third-party record in which he had no expectation of privacy under this Court's decisions in *Miller* and *Smith*, as well as *United States v. Knotts*, 460 U.S. 276 (1983); that the police had exigent circumstances and complied with the statutory procedure; and that, in any event, suppression

was not a remedy for any violation of the SCA. The state also argued that, regardless of whether the CSLI was legally obtained, the subsequent warrants were valid.

On February 2, 2018, the Appellate Division rejected petitioner's claims that the CSLI was illegally obtained, finding petitioner had no expectation of privacy in the CSLI, citing this Court's decision in *Miller* as well as several federal decisions holding that cell phone users had no expectation of privacy in CSLI, including *United States v. Davis*, 785 F.3d 498, 513 (11th Cir. 2015); *In re United States for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013); and *In re Application of United States*, 620 F3d 304, 313-317 (3d Cir. 2010). *People v. Taylor*, 158 A.D.3d 1095 (4th Dept. 2018). The Court also cited another Appellate Division's decision, *People v. Hall*, 86 A.D.3d 450 (1st Dept. 2011), in which that court distinguished longer term CSLI requests from shorter ones and held that the defendant in that case had no expectation of privacy in a request for three days of CSLI. 158 A.D.3d at 1098. The court also held that suppression was not a remedy for any purported violation of the Stored Communications Act. *Id.*

The Appellate Division reduced the charge of Arson in the Second Degree to Arson in the Third Degree, however, because there was legally insufficient evidence to prove the victims were alive at the time the fire was set, as required for conviction on the greater count.

Petitioner moved for second-tier, discretionary review to the New York Court of Appeals. The judge considering the application waited several months for the impending decision in *Carpenter*, and took written arguments on the effect of the decision on this case. Petitioner argued that *Carpenter* was controlling and that the court should grant leave to address the issues. The state argued that petitioner had failed to show an expectation of privacy in the limited CSLI obtained under the facts of this case, that the police in any event had exigent circumstances to obtain the information, and that any violation of the SCA could not result in suppression because the SCA precludes suppression as

a remedy. The judge considering the application denied leave to appeal.[8] *People v. Taylor*, 32 N.Y.3d 941 (2018), *reconsideration denied*, 32 N.Y.3d 1178 (2019).

The Petition for Certiorari

Petitioner now raises various challenges to the acquisition of the CSLI. He argues that this Court should consider whether there is an exception to *Carpenter* for short periods of location information, whether the police had exigent circumstances to obtain the CSLI, and whether the purported violation of the Stored Communications Act should have resulted in suppression, despite the language of the SCA itself. He also argues the state's highest court was compelled to grant him further, discretionary review after *Carpenter* was decided.

This Court should deny certiorari. The police here acted in a good faith belief that petitioner had no expectation of privacy in the cell phone carrier's third-party records, under controlling precedent at the time they made their request, and this Court has denied certiorari in similar cases where the police acted in good faith reliance on pre-*Carpenter* case law. In any event, there were ample exigent circumstances for the request, obviating the need for a warrant. Indeed, this Court in *Carpenter* expressly stated that this doctrine applies in the context of CSLI, and any issue over whether exigent circumstances existed here presents a predominantly factual question, not a legal one. Moreover, by the terms of the SCA itself, suppression is not a remedy for any supposed violation of Act, as every circuit court that has addressed the issue has held. Finally, for all these reasons, the state's highest court was not required to grant further, discretionary review after *Carpenter* was decided.

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[8]Petitioner twice moved for reargument in the Appellate Division. The first motion was filed before *Carpenter* was decided, and that motion was denied. *People v. Taylor*, 160 A.D.3d 1506 (2018). Petitioner again moved after *Carpenter*, but that motion was made more than 30 days after that court's decision and more than 30 days after *Carpenter* was decided, and so failed to comply with court rules about the timing of reargument motions. *See* Practice Rule of the Appellate Division 1250.16(d), 22 NYCRR 1250.16(d). The Court denied that motion as untimely. *People v. Taylor*, 173 A.D.3d 1721 (4th Dept. 2019). Petitioner also filed a petition for coram nobis relief attacking the effectiveness of appellate counsel, which was denied as part of the second decision. *Id.*

REASONS FOR DENYING THE WRIT

This Court should decline to grant certiorari. This case falls squarely within the good faith doctrine precluding the remedy of suppression in this Court, as the police acted under the reasonable belief that petitioner had no expectation of privacy in his CSLI pursuant to this Court's decisions in *United States v. Miller,* 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979). Indeed, the Appellate Division in this case and every federal circuit court to finally determine the issue prior to *Carpenter* held that this Court's decisions in *Miller* and *Smith* dictated the conclusion that cell phone customers lacked any expectation of privacy in CSLI. The police in this case cannot be faulted for concluding likewise.

And even if the good faith doctrine did not apply, this case would not be suitable for review of petitioner's issues. Peculiar facts and circumstances of this case relevant to petitioner's expectation of privacy would likely lessen the precedential value of any decision. These include petitioner's vastly reduced expectation of privacy as a parolee, the fact that petitioner showed little concern for the privacy of his location information at the time of the crime, as he drove his own car to the burglarized house and parked it in the driveway, and the fact that petitioner was actually subject to surveillance for part of the period in question.

Moreover, the conclusion that the police possessed exigent circumstances to obtain the information is inescapable. The police reasonably determined that they needed to arrest petitioner as quickly as possible, that they needed to know his whereabouts after surveillance had ended, and that they needed to confirm petitioner's location at the time of the murder to preclude any challenge to the probable cause to arrest. Indeed, petitioner, a parolee with six prior arrests, two violent felony convictions, and a prior charge of attempted escape, had just committed a double homicide of two innocent, unarmed women, set a fire to destroy evidence, and had, it appeared, been alerted to the fact that he was a suspect by police surveillance. The police thus reasonably concluded petitioner might imminently either flee or destroy evidence, or both, and posed a danger to anyone who, like Stacey and Terri Moulton, got in his way. The CSLI, which covered the period from the time of the crime

to the time of the request on the day of the arrest, confirmed petitioner's guilt, providing indisputable cause for the arrest, and helped locate petitioner's movements after surveillance ended in order to effectuate the arrest.

Nor should this Court grant review of the issue of whether suppression is a remedy for a violation of the SCA. The language of the SCA provides specific remedies, not including suppression, and expressly precludes any other remedies. Indeed, no conflict of authority exists in this regard, as the state court decision here holding that suppression is not a remedy is consistent with every federal circuit court to have considered the issue.

Finally, for all these reasons stated above, the Court of Appeals was not required to grant discretionary review.

A. The Good Faith Doctrine Would Preclude the Remedy of Suppression in This Court.

This Court has uniformly held for more than three decades that the "harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.'" *Davis v. United States*, 564 U.S. 229, 241 (2011), quoting *United States v. Leon*, 468 U.S. 897, 919 (1984). Indeed, this Court, since its decision in *Leon*, "has never applied the exclusionary rule to nonculpable, innocent police conduct." *Davis*, 564 U.S. at 240. Under this unbroken line of cases, this Court has held that the remedy of suppression does not lie under the Fourth Amendment where the police operate in good faith reliance on a warrant, on an invalid or unconstitutional statute, or on a database containing mistaken information, even if that database is maintained by police. *Id.* at 239.

The reasoning behind the "good faith" doctrine is that the conduct of the police must be weighed against the considerable costs of the exclusionary rule, including the judicial costs in ignoring reliable, trustworthy evidence and the societal cost of allowing a guilty person to go free. *Id.* at 237. When the police exhibit "deliberate," "reckless" or "grossly negligent" conduct, the deterrent effect of the rule is strong, and tends to outweigh the heavy costs. *Id.* at 238. But when the police act with "'an objectively reasonable good faith belief' that their conduct is lawful," or when

their conduct involves only "simple, isolated negligence," the "deterrence rationale loses much of its force." *Id.*

In *Davis v. United States*, 564 U.S. at 229, this Court extended the good faith doctrine to binding appellate precedent. In that case, the police conducted a search of a car in good faith reliance on then-existing Eleventh Circuit precedent interpreting this Court's decision in *New York v. Belton*, 453 U.S. 454 (1981). That decision was overruled by *Arizona v. Gant*, 556 U.S. 332 (2009), making the search in *Davis* a concededly unlawful one Nevertheless, this Court refused to apply the exclusionary rule. Relying on *Leon*, this Court reiterated that the exclusionary is designed to punish the misdeeds of police, not the mistakes of appellate judges. 564 U.S. at 241. The Court held that "[a]n officer who conducts a search based on binding appellate precedent does no more than act as a reasonable officer would and should act under the circumstances." *Id.* at 241 (citations omitted). Indeed, when appellate precedent authorizes a search, an officer not only can but should "use that tool to fulfill their crime detection and public safety responsibilities." *Id.*

This case falls squarely within the good faith doctrine. The search in this case took place almost five years before *Carpenter* was decided. At that time, this Court had uniformly applied the third-party doctrine to hold that individuals who divulged information to businesses in exchange for services had no expectation of privacy in that information, even when it was highly personal or private in nature. The controlling cases on this issue from this Court were *United States v. Miller,* 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979). In *Miller*, this Court found no Fourth Amendment search when the government obtained information contained in banking records without a warrant, holding that no Fourth Amendment search took place, despite the objection of the dissenters that financial records may divulge personal information, including, for example, religious or political associations. *Miller*, 425 U.S. at 451 (financial records " 'revea[l] ... personal affairs, opinions, habits and associations.' ") (Brennan, J., dissenting). Similarly, this Court held in *Smith* that customers do not have an expectation of privacy in phone numbers that they call, despite the dissent's protest that they "easily could reveal the identities of the persons and the places called, and

thus reveal the most intimate details of a person's life." *Id.* at 748 (Stewart, J., dissenting). *See also Smith*, 442 U.S. at 751 (majority decision will "impede certain forms of political affiliation and journalistic endeavor") (Marshall, J., dissenting).

Applying this precedent to CSLI, every circuit Court of Appeals to finally determine the issue held, prior to *Carpenter*, that this Court's third-party decisions compelled the conclusion that consumers had no expectation of privacy in CSLI, because location information was conveyed to third-party carriers in order to obtain cell phone services. This included the Fourth Circuit, *United States v. Graham*, 824 F.3d 421, 427-432 (4th Cir. 2016); the Fifth Circuit, *In re United States for Historical Cell Site Data*, 724 F.3d 600, 613-615 (5th Cir. 2013); the Sixth Circuit, *United States v. Carpenter,* 819 F.3d 880, 885-887 (6th Cir. 2016), *rev'd*, 138 S.Ct. 2206 (2018); the Tenth Circuit, *United States v. Thompson*, 866 F.3d 1149, 1155-1160 (10th Cir. 2017); and the Eleventh Circuit, sitting *en banc*, *United States v. Davis*, 785 F.3d 498, 513 (11th Cir. 2015), *cert. denied*, 136 S.Ct. 479 (2015).

Similarly, at the time of the search in this case and for years after, state law, applying this Court's decisions, held that petitioners had no expectation of privacy in CSLI. *See, e.g., People v. Jiles*, 158 A.D.3d 75, 80 (4th Dept. 2017); *People v. Sorrentino*, 93 A.D.3d 450, 451 (1st Dept. 2012); *People v. Hall*, 86 A.D.3d 450, 451-452 (1st Dept. 2011), *leave denied*, 19 N.Y.3d 961 (2012), *cert. denied*, 568 U.S. 1163 (2013). And while no Fourth Department case had directly ruled on the issue before 2013 when the request in this case was made, the First Department had so held in both *Hall* and *Sorrentino*, cited above, and, under New York law, appellate precedent from one department is binding on lower courts in all departments that have not considered the issue. *People v. Turner*, 5 N.Y.3d 476, 482 (2005) (Third Department case was "a valid precedent, binding on all trial-level courts in the state"); *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (2d Dept. 1984) ("the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule").

Moreover, because virtually every appellate court to consider the issue prior to *Carpenter*, including the Fourth Department in *People v. Jiles*, 158 A.D.3d at 80, came to interpret this Court's precedent in *Miller* and *Smith* to negate any expectation of privacy in CSLI, the police in this case simply cannot be faulted for concluding likewise. There is no reason that the police should be held to a higher standard of legal knowledge than virtually every state and federal appellate court deciding the issue.

Thus, when the police requested four days of cell site location information in this case, they had no reason to believe they were conducting a search under the Fourth Amendment, particularly one that would require a warrant, as *Carpenter* eventually concluded with respect to seven days or more of CSLI. Indeed, the state police did precisely what they should have done – confirmed that petitioner was in Sodus at the time of the murders in order to ensure, beyond any question, that they had probable cause to make the arrest. If anything, the police were overly solicitous of petitioner's Fourth Amendment rights as they existed at the time, requesting and obtaining confirmation to ensure that their next action – the arrest of petitioner, which they knew with certitude was a constitutionally significant event – complied with Fourth Amendment requirements. This is simply not the type of good faith conduct that the exclusionary rule should be used to deter.[9]

And the application of the good faith doctrine to pre-*Carpenter* CSLI requests is not unique to this case. Federal circuit courts of appeals have, almost without exception, applied the good faith doctrine in this context. *See, e.g., United States v. Dorsey*, __Fed. Appx.__, 2019 WL 3063995, at *2 (9th Cir. July 12, 2019); *United States v. Walker*, __ Fed. Appx.__, 2019 WL 2375185, at *2 (3d Cir. June 5, 2019); *United States v. Walsh*, 174 F.3d Fed. App. 706 (2d Cir. 2019); *United States v. Korte*, 918 F.3d 750, 758 (9th Cir. 2019); *United States v. Goldstein,* 914 F.3d 200, 202 (3d Cir.

[9]It is of no moment for petitioner's Fourth Amendment claim that the police decided not to use an order pursuant to section 2703 of the SCA to obtain the data, but instead used the exigent circumstances provision of the statute. In either case, no Fourth Amendment violation occurred under this Court's or lower courts' Fourth Amendment jurisprudence at the time the request was made. And, as explained below, suppression is not a remedy even if any statutory violation had occurred, which the state has consistently maintained it did not.

2019); *United States v. Curtis*, 901 F.3d 846, 848 (7th Cir. 2018); *United States v. Joyner,* 899 F.3d 1199, 1205 (11th Cir. 2018); *United States v. Chavez*, 894 F.3d 593 (4th Cir.), *cert. denied*, 139 S.Ct.278 (2018).

And this Court has at least twice denied certiorari in cases that have so held. *See United States v. Zodhiates*, 901 F.3d 137 (2d Cir. 2018), *cert. denied*, 139 S.Ct. 1273 (2019); *United States v. Chavez*, 894 F.3d 593 (4th Cir.), *cert. denied*, 139 S.Ct. 278 (2018). *See also Sims v. State*, 569 S.W.3d 634 (Tex. Crim. App. 2019) (applying good faith exception to warrantless cell tower "dump"), *cert. denied*, 139 S.Ct. 2749 (2019). No different conclusion should apply here, because, as in those cases, this case presents a straightforward application of *Davis* and there is no conflict of authority on this issue necessitating the intervention of this Court.[10]

Nor do petitioner's assertions that the police acted in bad faith (Pet. at 3, 13, 20) warrant certiorari. No record support exists for such an assertion, the suppression court and Appellate Division rejected it, and the issue, at most, presents a factual question, not a legal one.

In short, *Davis's* admonition is equally applicable here: "About all that exclusion would deter in this case is conscientious police work." 564 U.S. at 241.[11] Because the good faith doctrine precludes suppression for any possible Fourth Amendment violation, certiorari is not warranted.

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[10]As this Court explained in *Davis*, the good faith issue is different from the question of retroactivity, also raised by petitioner here. A case may be retroactive to a petitioner's conviction because it is still on direct review, but the question whether a remedy should be imposed for nonculpable police conduct still remains. 564 U.S. at 243-44. Here, exclusion would serve no purpose, as the police acted reasonably at all times and followed controlling precedent, which held that cell phone customers do not have an expectation of privacy in CSLI.

[11]It is true that New York law does not recognize a good faith exception to the warrant requirement, and for this reason the issue of good faith was not briefed below. Nevertheless, because this Court would not apply the remedy of suppression for any violation, New York courts should not be seen to have committed constitutional error in failing to impose a remedy, even though they relied on other grounds. And because this Court would impose no remedy for a constitutional violation, the Court's resources would not be well utilized by a discretionary grant of certiorari.

B. This Case is Ill-Suited to Resolve the Expectation of Privacy Issue, Given Its Peculiar Facts and Circumstances.

Even if this Court were to ignore the good faith doctrine here, this case would not present an appropriate vehicle to decide the issue presented by petitioner of whether there is "a limited time period for which the Government may obtain an individual's historical CSLI from Fourth Amendment scrutiny, and if so, how long must that period be in order to constitute a Fourth Amendment. .violation[]" Pet. at 3. This is due to several facts and circumstances peculiar to this case that might limit the precedential value of any decision of the Court.

First, because four days of CSLI are in issue here, even if this Court were to rule in petitioner's favor, the decision would in all likelihood not resolve the general question proposed by petitioner. Instead, just as in *Carpenter*, the decision would likely address the four days at issue and not lesser periods not presented by the case. *See Carpenter*, 138 S.Ct. at 2217, fn. 3. Indeed, there is no reason to believe that this Court would act differently now, only one year after *Carpenter* was decided, than in *Carpenter* itself in this respect. A more appropriate case, then, might be one in which a truly short period, less than 24 hours, was requested, to help settle the question definitively. This would be preferable to expending this Court's resources to again fail to resolve the issue definitively.

Second, other unusual facts of this case with regard to petitioner's expectation of privacy might make any ruling from this Court highly fact dependent, and thus of less precedential significance. Most important among these may be petitioner's sharply reduced expectation of privacy as a parolee. This Court has recognized that, under the Fourth Amendment, parolees have lesser expectations of privacy than ordinary citizens, and even than that of probationers. *See Samson v. California*, 547 U.S. 843 (2006). This is because "parole is an established variation on imprisonment of convicted criminals" and "parole is more akin to imprisonment than probation." *Id.* at 850. Moreover, any Fourth Amendment interest of the defendant must be balanced against the state's legitimate interest in keeping close track of parolees, who may be more likely to commit crimes than ordinary citizens. *Id.* at 853.

Similarly, under New York law, parolees do not have the same expectation of privacy as ordinary citizens. New York parolees agree, in writing and as a condition of parole, to permit the search and inspection of their person, place, or residence, Title 9 New York Code of Rules and Reg. §8003.2; may not travel outside of New York State without prior approval; and must submit to a whole host of reporting requirements and regulations. *See* New York State Department of Corrections and Community Supervision Handbook, Section Three, ¶¶ 4, 24, available at http://www.doccs.ny.gov/ CommSup_Handbook.html (accessed August 10, 2019). And the New York Court of Appeals has held that "in any evaluation of the reasonableness of a particular search or seizure," whether undertaken by parole or police officers, "the fact of defendant's status as a parolee is always relevant and may be critical." *People v. McMillan*, 29 N.Y.3d 145, 148–49 (2017) (internal quotation marks and citations omitted). Thus, a parolee's rights are not violated, under New York law, when the state conducts a warrantless search of the parolee's person, place, residence, or vehicle that is rationally and reasonably related to the performance of the functions of parole. *Id.* at 148 (upholding police officer's search of parolee's vehicle based on reasonable suspicion, where conducted by police officer rather than parole officer, because related to functions of parole).

Here, petitioner's diminished expectation of privacy as a parolee, and any rights he had under state law as a parolee, were not violated, as the police had ample reason to believe petitioner had murdered Terri and Stacey Moulton. The investigation of this new crime, as well as a determination as to whether petitioner, after having realized he was a suspect, had left the state or crossed the border into Canada (only a short drive from Rochester), was reasonably and rationally related to violations of parole. Moreover, the hearing evidence showed that the police actively worked with parole prior to the request, that parole officers were present at the search of petitioner's home, and that parole served a notice of parole violations on petitioner soon after he was arrested (Hearing Trans. at pp. 136-40, 142-44, 151).

Other facts here also bear on petitioner's reasonable expectation of privacy. Indeed, petitioner showed little or no expectation of privacy in his location during the critical period surrounding the

actual commission of the crimes. To the contrary, petitioner drove his own vehicle, registered to him, to and from the crime scene over several hours and parked the car in the driveway of the premises he was about to burglarize, and in which he murdered the Moultons. In addition to the three witnesses who observed petitioner's vehicle there, petitioner's public travel was captured on surveillance videos – a form of surveillance that this Court expressly exempted from *Carpenter*'s reach, 138 S.Ct. at 2220 – going to and from the crime scene. Petitioner thus voluntarily exposed his location information to the public, and could not have had any legitimate expectation of privacy in his location during this period of time. *See Knotts*, 460 U.S. at 282.

Also peculiar to this case is the fact that during part of the period requested, petitioner was in fact under surveillance by police. The four-day CSLI request included July 17th, when police conducted surveillance of petitioner's residence, observed him get into his SUV, and followed him when he drove off. Petitioner, who apparently recognized he was being followed, hardly had a legitimate expectation of privacy in his whereabouts during this period.

Because these unusual facts directly impact petitioner's expectation of privacy, they are likely to skew any decision this Court might render, making it less likely to resolve the general question petitioner poses, and less likely to have broad legal significance.[12]

A grant of certiorari would also be improvident because petitioner failed to establish a sufficient expectation of privacy in the limited location information requested to implicate the Fourth Amendment. As the touchstone of its analysis, this Court has sought to "assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter*, 138 S. Ct. 2206, 2214, quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001). And while

[12] In addition, the record here is deficient in at least one important respect – it does not reveal how much information the police obtained as a result of their request. While the police requested four days of information, it is unclear whether they obtained anything more than petitioner's location in the few-hour period encompassing the time of the murders. Because the actual search conducted by AT&T may have been limited to this few-hour period, and because the subjective intention of the police to cause a greater search would ordinarily have no Fourth Amendment significance, *Whren v. United States*, 517 U.S. 806, 813 (1996), this lesser period may be the dispositive one for the purposes of constitutional analysis. But the record here does not elucidate this potentially important fact.

the Court in *Carpenter* declined to address this issue regarding less than seven days of location information, the Court did address founding era expectations of privacy in location information in *Knotts*, 460 U.S. at 282, as did four concurring members of the Court in *United States v. Jones*, 565 U.S. 400, 430 (2012).

As noted above, in *Knotts*, this Court upheld the use of a beeper during the defendant's interstate car ride spanning several hours to a remote cabin, even though the accompanying physical surveillance was suspended due to petitioner's evasive measures, leaving only the device to track petitioner's location. 460 U.S. at 279. The surveillance, continuously by beeper and intermittently by physical surveillance, in fact went on for three days before the police obtained a warrant. This Court found that no search occurred, focusing on the fact that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 282. Since the movements of the vehicle and its final destination had been "voluntarily conveyed to anyone who wanted to look," Knotts could not assert a privacy interest in the information obtained.

In *United States v. Jones*, 565 U.S. at 430, Justice Alito's concurrence, speaking for four members of the court, again addressed the question of whether individuals have an expectation of privacy in short-term location information. Justice Alito, who wrote the opinion for the majority in *Carpenter*, applied the rubric of the framers' expectations, concluding that "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable." *Id.* And while Justice Alito refused to draw a bright line under which individuals had no expectation of privacy in their location information, he noted that "prolonged GPS monitoring" might be permissible "in the context of investigations involving extraordinary offenses" because "long-term tracking might have been mounted using previously available techniques." *Id.* at 430-31.

When the Court next addressed acquisition of location information, in *Carpenter*, it found that extended requests for CSLI implicated constitutionally cognizable expectations of privacy. The Court

acknowledged, quoting Justice Alito's concurrence in *Jones*, that "[p]rior to the digital age, law enforcement might have pursued a suspect for a brief stretch," although "doing so 'for any extended period of time was difficult and costly and therefore rarely undertaken.'" 138 S.Ct. at 2217 (citations omitted). "For that reason," the Court continued, "'society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.'" *Id.* (citations omitted). The Court explained that the privacy concerns implicated in *Carpenter* did not simply involve "a person's movement at a particular time," but rather the "detailed chronicle of a person's physical presence compiled every day, every moment, over several years." *Id.* at 2220. It was this ongoing "chronicle" that "implicate[d] privacy concerns far beyond those considered in *Smith* and *Miller*." In light of the capacity for such "tireless and absolute surveillance" the government could not "call upon the results of that surveillance without regard to the constraints of the Fourth Amendment." *Id.* at 2218, 2220. Thus, it was because of this "depth, breadth, and comprehensive reach" of CSLI, *id.* at 2223, that the Court held that requests for extended periods of CSLI contravened ordinary expectations of privacy.[13]

Allowing access to just a few days worth of CSLI does not implicate these same concerns. It does not preclude all Fourth Amendment protections for location information, as the government sought to do in *Carpenter*, as those protections remain in place for any extended request – indeed, any request of seven days or more. And a short-term request does not threaten to produce the kind of "tireless and absolute surveillance" provided by a "detailed chronicle" of a person's "physical presence compiled every day, every moment over several years" that *Carpenter* identified, but merely

[13]Petitioner notes that the government in *Carpenter* actually received only two days of location information, suggesting that the four days involved here necessarily implicated the same concerns as in *Carpenter*. Pet. at 18. But as the Court made clear in *Carpenter*, its holding extended only to requests for seven days or more of information. 138 S.Ct. at 2217 n. 3 ("It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search."). Petitioner leaves the word "seven" out of his quotation of this footnote. *See* Pet. at 18.

a small slice of information over a narrow period of time. Nor does it have the same "depth, breadth, and comprehensive reach" as longer requests.

Moreover, this case is precisely the type of "extraordinary offense" Justice Alito referred to in his concurrence in *Jones* – one that would have warranted the expenditure of resources and assignment of personnel associated with extended surveillance in any era. It was, after all, a brutal double homicide of two women who did nothing more than try to take care of their neighbor's cat. And petitioner, in order to avoid a violation of parole and prosecution for his burglary, repeatedly stabbed them and sought to set them, and the premises, on fire. It is hard to imagine what sort of offense would warrant more resources or justify more extended surveillance. Indeed, the police here did in fact undertake surveillance for part of the time period in which CSLI was requested, but were forced to end it for officer safety. Because the limited CSLI request did little more than provide a safer means of what they, or any law enforcement agency, would have done, in any era, the four days of CSLI "surveillance" would not have offended the framers or contravened the ordinary expectations of virtually any citizen.

Add to this the facts described above and their can be little doubt that the request did not contravene any actual expectation of privacy of the petitioner. Again, as a parolee, petitioner had a vastly reduced expectation of privacy. His movements, indeed the conduct of his life, were subject to supervision, regulation, and inspection, unlike any ordinary citizen. He thus could not have had a reasonable expectation of privacy in any way comparable to an ordinary citizen.

And, again, as to the critical time period surrounding the murder, petitioner showed no expectation of privacy in his whereabouts at all, as he drove his own vehicle, registered to him, to and from the burglarized house. In this regard, the analogy to *Knotts* is inescapable. By driving his own vehicle on public thoroughfares, petitioner "voluntarily conveyed [his whereabouts] to anyone who wanted to look" during this period of several hours, just as Knotts did when he drove his vehicle across state lines with the government beeper in it. 460 U.S. at 281-82. In neither case did the defendant have a legitimate expectation of privacy in his whereabouts.

This is all the more so in an era where video camera surveillance by private businesses, apartment complexes, and individual homeowners are so common place, and capture so many of our movements in public. Indeed, in this case, video surveillance cameras from business and homes were able to track the movements of petitioner's car back and forth between Rochester and Sodus quite effectively.

And, significantly, the sum total of the "surveillance" here, four days, was not appreciably more than that in *Knotts*, in which the government beeper was monitored for three days after the defendant arrived at his location. 460 U.S. at 279. If Knotts' expectation of privacy was not offended by three days of government surveillance by active beeper, neither was petitioner's by the four days of location information routinely collected by petitioner's cell phone provider. This is particularly true given petitioner's status as a parolee and the state troopers' fully supported belief that he had just committed a double homicide.

In sum, the short-term CSLI request did not impinge on any reasonable expectation of privacy of the petitioner under the facts of this case. There is then no cause to grant certiorari, and, even if the Court did, any decision would, in all likelihood, be limited in its precedential effect to the particular circumstances here.

C. This Court Already Announced in *Carpenter* That the Exigent Circumstances Doctrine Applies to CSLI Searches, and Any Issue as to its Application in This Individual Case Presents a Question of Fact, Not Law. In Any Event, There Were Ample Exigent Circumstances Here to Dispense With a Warrant.

In *Carpenter*, this Court noted that even where a defendant has a clear expectation of privacy in cell site location information, other Fourth Amendment doctrines may apply to obviate the need for a warrant. One of these is the exigent circumstances doctrine. The *Carpenter* Court expressly acknowledged that "[o]ne well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." 138 S.Ct. at 2222 (citations and internal quotation marks omitted). The Court expounded that "[s]uch exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of

evidence." *Id.* at 2222-23. There is thus no question that the doctrine applies in the context of requests for CSLI.

Petitioner, however, seeks review of the exigent circumstances issue as applied to the particular facts of this case. This Court has avoided review of the application of the exigent circumstances doctrine to individual cases, however. Indeed, all of this Court's cases in the past two decades dealing with exigent circumstances address whether the doctrine applies in an entire class of cases, or whether there exists a legal exception to the doctrine in a class of cases. Thus, in *Michigan v. Tyler*, 436 U.S. 499, 501 (1978), this Court "granted certiorari to consider the applicability of the [exigent circumstances doctrine] to official entries onto fire-damaged premises." And in *Missouri v. McNeely*, 469 U.S. 141 (2013), this Court granted certiorari to determine whether the dissipation of alcohol in the blood created a *per se* exigency allowing non-consensual blood testing. *See also Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019) (Court granted certiorari to determine whether exigency may be shown where blood alcohol is dissipating and some other factor "creates pressing health, safety, or law enforcement needs . . . ."; noting that the validity of implied-consent laws in 49 states was at issue). *Id.* at 2537. And in *Kentucky v. King*, 563 U.S. 452 (2011), this Court granted certiorari to address whether there was an exception to the exigent circumstances doctrine for "police-created exigency" cases, and specifically declined to rule on the issue of whether the facts of that case out established an exigency. *Id.* at 461-70. *See also Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (cert. granted to determine whether exigent circumstances might justify a temporary seizure pending a warrant); *Richards v. Wisconsin*, 520 U.S. 385, 391–396 (1997) (rejecting a *per se* exception to the knock-and-announce requirement for felony drug investigations based on presumed exigency").

Here, petitioner seeks review of whether the doctrine applies to the facts and circumstances present in this case, making factual complaints that the police "submitted false claims of exigency" (Pet. at 3), that "the police lied" (Pet. at 17), and that "there were no exigent circumstances" (Pet. at 17). But those issues were factually resolved against petitioner below, and the case presents no legal

question regarding the application of the doctrine to a class of cases. Indeed, even petitioner does not argue that the exigent circumstances doctrine does not apply to requests for CSLI. Nor is there any difference among lower courts as to the standard to be applied. *Cf. Brigham City, Utah v. Stuart*, 547 U.S. 398, 402 (2006) (granting certiorari to resolve "differences among state courts and the Courts of Appeals concerning the appropriate Fourth Amendment standard governing warrantless entry").

Moreover, the suppression court's exigent circumstances determination was amply supported by the record. At the time that state police made the request for the CSLI, they had strong reasons to believe that petitioner had murdered, in the most brutal fashion, two innocent bystanders who happened upon his burglary of a neighbor's house. It was reasonably inferable that he had done so to escape apprehension and inevitable return to jail as a parolee. It was also reasonably inferable that he then attempted to destroy any evidence associated with his crimes by committing the further crime of arson, as he deliberately used accelerants in eight different locations, including, apparently, on the bodies of the victims. The police also knew that petitioner had six prior arrests, two prior convictions for violent felonies, including a guilty plea in a case in which he was charged with causing serious physical injury to the victim, and had previously been charged with attempted escape. On the basis of this information, petitioner presented a danger to anyone who might, deliberately or inadvertently, implicate him in this crime in any way (as had the victims' family members and others who saw his car in the driveway).

He was also highly likely to destroy evidence; indeed, defendant had manifested his readiness to destroy evidence linking him to the crimes when he set fire to the premises where the murder occurred. He even went to the trouble of using eight separate points of origin for the fire, including both of the victims' bodies. The inevitable conclusion, then, was that, if petitioner was in fact aware that the police suspected him (as it indeed appeared), he would destroy the proceeds of the burglary and attempt to erase or eliminate any other evidence in his car or home linking him to the murders.

Moreover, as this Court has recognized, probationers and parolees are generally more disposed to destroy evidence than ordinary citizens: "'probationers have even more of an incentive to conceal

their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation.'" *Samson*, 547 U.S. at 849 (citations omitted). Here, when petitioner had violated probation on his first felony, he had to serve a two-to-four year term of incarceration in state prison. He was thus acutely aware of the consequences that would ensure from a violation of parole.

Even more importantly here, petitioner had, on the night before the request, evaded ordinary physical surveillance, thus making it likely that he knew he was a suspect. The police thus understandably believed that petitioner had an immediate and powerful incentive to flee and to destroy evidence, magnifying the urgency of the need for police action.

It therefore became imperative, once police learned petitioner's identity and connected him to the crime, to apprehend petitioner as quickly as possible. But police could not do so until they were sure they had probable cause for the arrest. While it was likely that the evidence they had so far – including the recovery of the victims' cell phones in a bag with a receipt from a purchase made by petitioner's girlfriend and his ownership of a vehicle precisely like the one seen in the driveway of the burglarized house just before the murders – would be sufficient, they could not be sure. This is particularly true because in New York, courts often define probable cause as requiring proof that the defendant is guilty "more likely than not" – essentially a preponderance-of-the-evidence standard – as opposed to this Court's formulation of probable cause as a "substantial chance" that the defendant has committed the crimes. *Compare People v. Vandover,* 20 N.Y.3d 235, 237 (2012) ("it must appear to be at least more probable than not that a crime has taken place and that the one arrested is the perpetrator") and *People v. Carrasquillo*, 54 N.Y.2d 248 (1981) (same) *with District of Columbia v. Wesby*, 138 S.Ct. 577, 586 (2018) (probable cause requires only a "substantial chance of criminal activity, not an actual showing of such activity."). *See also Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) (contrasting probable cause with preponderance standard). And petitioner did indeed argue in the state courts that the evidence of probable cause was insufficient without the CSLI, citing the more-probable-than-not standard, and citing *People v. Carrasquillo*, *supra*. *See* Petitioner's

Memorandum of Law and Argument, filed 12/24/13, at 7. In any event, assuming that the police already had probable cause, this Court has recognized that "'[l]aw enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause.'" *Hoffa v. United States*, 385 U.S. 293, 310 (1966). "Faulting the police for failing to [arrest a defendant] at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution." *Kentucky v. King*, 563 U.S. at 467.

Thus, in order to effectuate the arrest, prevent harm to others, forestall the destruction of evidence, and preclude petitioner's escape, the police requested CSLI from the time of the crime to the time of the arrest. The CSLI would, in all likelihood, confirm petitioner's presence in Sodus at the time of the murders, providing unassailable probable cause and allowing police to make the arrest.

In addition, because the request included location information up to the moment the request was made, the results would inform police where petitioner had gone after they were forced to end the surveillance the night before, facilitating his apprehension. It would also reveal other locations petitioner might frequent, such as a bar or a friend's residence, also potentially assisting in locating and apprehending petitioner. That the police were concerned with obtaining petitioner's whereabouts and locating him in the event he tried to flee was also evident from the fact that the police requested, on the exigent circumstances form, that AT&T make available real-time location information if they asked for it. Although the police never needed to use this procedure because petitioner was located and apprehended before he could abscond, it showed that the exigent circumstance request was motivated, in substantial part, by their concern with apprehending petitioner in a timely manner and preventing his flight. This well-founded need provided, by itself, sufficient support for an exigent circumstances determination.

Nor would it have been practical to get a warrant under the circumstances. It was not until late on the night of July 17th, the day before petitioner was arrested, that the police even knew petitioner's name or identity. It was only when police conducted surveillance of petitioner's girlfriend's residence that night, which also turned out to be petitioner's residence, that they saw the

Mercury Mountaineer at all and later observed petitioner. After that, the police still had to obtain petitioner's criminal history sheet, learned that petitioner was on parole, and contacted petitioner's parole officer. Indeed, it was not until 8:15 p.m. that were able to interview petitioner's parole officer (Hearing Trans. at p. 30), until 9:00 p.m. when they concluded that interview (*id*. at 137), and after that that they were able, as a result of further investigation, to determine which cellular carrier serviced petitioner's phone.

Moreover, there were many other urgent tasks that had to be conducted once the police completed their interview with the parole officer that took precedence over the preparation of a warrant application, not the least of which was to prepare a tactical plan for petitioner's arrest . The police had information about petitioner's residence, and the various means of entrance and exit, from petitioner's parole officer, and they had an address for petitioner's work (Hearing Trans. at p. 31), but they needed to formulate a plan that would pose the least risk to civilians and to police officers in order to take petitioner into custody (Hearing Trans. at p. 103). Indeed, the police could reasonably fear that petitioner would take desperate measures in attempting to escape, as he had already murdered two civilians in order to escape apprehension for the burglary that the victims caught him committing. They thus had to be particularly cautious in apprehending petitioner to avoid injuries to civilians or any potential hostage or barricade stand off.

Moreover, there were at least four locations where the arrest might be effectuated; petitioner could have been at home, at work, in his SUV, or at his mother's house in Sodus. And this was assuming that petitioner had made no attempt to flee or hide. The precautions associated with the arrest would also require that considerable personnel be briefed, prepared, and ready for deployment prior to the time of arrest. Indeed, at least four different state police barracks were involved in the arrest and its aftermath, including those at Lyons, Rochester, and Canandaigua, as well as Troop E's Major Crimes Division, and actions had to be coordinated with officials of the Department of Corrections and Community Supervision, which ran the parole department. And, of course, any effort to apprehend petitioner would need to be coordinated with the City of Rochester Police Department.

All of these essential preparations, necessary to effectuate the arrest as quickly as possible, were precisely the type of "other factor[] [that] creates pressing health, safety, or law enforcement needs that would take priority over a warrant application" and permit delay in obtaining the warrant. *Mitchell v. Wisconsin*, 139 S. Ct. at 2537 (need to take defendant to hospital took precedence over preparation of warrant).

Also significant in the exigent circumstances analysis is the nature of the intrusion. *See Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) (despite dissipation of alcohol in blood stream, blood draw to determine BAC required warrant while less intrusive breath test did not); *United States v. Caraballo*, 831 F.3d 95, 103 (2d Cir. 2016) ("Significantly, in making an exigency determination, we have also considered the degree to which the officers, in conducting the search, intruded on a defendant's privacy interests."). In this case, the police did not enter petitioner's home without a warrant, or effectuate a blood draw, or even search the property of petitioner. All they did was obtain location information over a short period of time, during part of which petitioner traveled in public to and from the crime scene and during part of which petitioner was observed by police conducting physical surveillance. Thus, the exigency far outweighed the minimal intrusion.

And, while all this was occurring, the police were in fact assembling the evidence necessary to apply for multiple warrants to be executed upon arrest (Hearing Trans. at p. 58). Indeed, the police had to draft warrant affidavits for petitioner's home and SUV and put together dozens of exhibits, including the depositions of a number of civilians, at the same time as they were attempting other urgent tasks. This included a warrant for CSLI from petitioner's wireless carrier for a broader period of time than previously requested and petitioner's text messages, which the police promptly completed by 1:57 p.m. The police thus properly effected a limited intrusion by obtaining a slice of CSLI information necessary to effectuate the arrest while preparing a warrant for a broader, and more intrusive, search that followed shortly after. *See Illinois v. McArthur*, 531 U.S. 326, 331-332 (2001) (seizing suspect by denying him access to his trailer home was permissible limited intrusion pending search warrant).

But perhaps the most important practical reason why the police were compelled to use the exigent circumstances procedure was that it would produce quick results, while the cellular carrier's response to a warrant would likely take days or weeks. *See United States v. Caraballo*, 831 F.3d 95, 105 (2d Cir. 2016) (exigency rested on fact that carrier would respond much less quickly —" to the tune of days or weeks" — if they used a warrant). Typically, carriers "distinguish[] between requests made with a warrant and requests—through [their] emergency process—made without a warrant. The latter category of requests would be acted on rapidly, but the former would be processed in the order in which they were received, which could result in significant delay." *Id.* at 105. This difference was, of course, critical, given the urgent need to apprehend petitioner.

Because the police needed the CSLI to properly effectuate the arrest and because the need to apprehend petitioner was extremely urgent, there were ample grounds for the suppression court's exigent circumstances determination. For this reason, and because the determination is overwhelmingly fact-bound, this Court should deny certiorari on this issue.

D. The SCA Precludes Suppression as a Remedy for Any Purported Violation, and No Conflict Among State or Federal Courts Exists on This Issue Warranting Review.

Despite the extreme exigency that petitioner's violent conduct and possible escape and destruction of evidence presented, petitioner argues that the police violated the provision of the SCA permitting law enforcement requests under exigent circumstances, 18 U.S.C. § 2702(b)(8),[14] and asks this Court to consider whether this violation should result in suppression. Petition at 3, 19-20. But the SCA itself specifies the remedies available under the Act, provides that they are the exclusive remedies available for violations of the Act, and does not include suppression as one of those remedies. For this reason, every court that has considered the issue has found that a violation of the SCA cannot result in suppression, as did the Appellate Division here. Thus, there exists no conflict of authority or other serious dispute on this issue warranting this Court's intervention.

[14]That section allows a cellular carrier to provide relevant information, without a court order, to "a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency." 18 U.S.C. § 2702(b)(8).

This Court has held that "the availability of the suppression remedy for . . . statutory, as opposed to constitutional, violations . . . turns on the provisions of [the statute] rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights" *United States v. Donovan*, 429 U.S. 413, 432 n. 22 (1977). *See also Sanchez–Llamas v. Oregon*, 548 U.S. 341 (2006) (examining text of treaty for judicial remedy, and finding that suppression is not a remedy for violation of Article 36 of the Vienna Convention).[15] Turning to the statute at issue here, Section 2707 lists the remedies available for a violation of the Act, which include damages, equitable or declaratory relief in a civil action, and disciplinary proceedings directed toward federal employees who violate the Act. Conspicuously absent from the list of possible remedies or sanctions, however, is the remedy of suppression. Moreover, Section 2708 of the SCA provides: "The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." Congress's exclusion of suppression as a remedy, then, is clear.

This stands in stark contrast to, for example, the Wiretap Act. That Act provides that evidence obtained in violation of the Act may not "be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof . . . ." 18 U.S.C. § 2515. Had Congress wished to impose a similar remedy for violations of the SCA, it undoubtedly could have done so, instead of expressly excluding non-enumerated remedies.[16]

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[15]While this Court has on rare occasions imposed suppression as a remedy for statutory violations in federal prosecutions, the basis of those decisions is this Court's supervisory authority over federal judicial proceedings. As this Court has acknowledged, it has no parallel supervisory authority, on non-constitutional issues, over state proceedings. *Sanchez-Llamas v. Oregon*, 548 U.S. 326, 345 (2006), quoting *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension").

[16]Nor can it be argued that Congress did not anticipate, and therefore did not exclude, the use of unlawfully obtained information under the statute in a criminal proceeding. Sections 2707 and 2708, after all, appear as part of a Chapter 121 of Title 18, making it a crime to obtain unauthorized access to information under the Act. The Wiretap Act too appears as part of Title 18, addressing crimes and criminal procedure, and makes unauthorized interceptions a crime.

For these reasons, every federal court to have considered the issue has held that a violation of the SCA will not result in suppression. *See, e.g.,United States v. Gasperini,* 894 F.3d 482, 488 (2d Cir. 2018); *United States v. Guerrero*, 768 F.3d 351, 358 (5th Cir. 2014), *cert. denied*, 135 S.Ct. 1548, 191 L.Ed.2d 643 (2015); *United States v. Corbitt*, 588 Fed. Appx. 594, 595 (9th Cir. 2014); *United States v. Singleton*, 565 Fed. Appx. 108, 112 (3d Cir.), *cert. denied*, 135 S.Ct. 274 (2014); *United States v. Thousand*, 558 F. Appx. 666, 669 (7th Cir. 2014). The same is true of state courts, like the Appellate Division here. *See, e.g., Sims v. State*, 569 S.W.3d 634, 641 (Tex. Crim. App. 2019), *cert. denied*, 139 S.Ct. 2749 (2019); *State v. Marinello*, 49 So. 3d 488, 508 (La. App. 3 Cir. 2010). And, as many of the above citations reflect, this Court has denied certiorari when presented with the issue.

Any violation of the SCA, then, would not have affected the outcome of the case. Nor does the issue of whether the remedy of suppression should be applied to the SCA present an issue worthy of this review, as there is no conflict of authority or dispute warranting it.

E. Even if the State's Initial Request for the CSLI were Defective, This Evidence Did Not Affect the Subsequent Warrants for Petitioner's Car, Residence, or Cell Phone Information, Which Overwhelmingly Proved His Guilt and Rendered Any Error Harmless.

Even if the initial police request for the CSLI using the exigent circumstances form were defective, that conclusion would not affect the warrants obtained for petitioner's car or residence, as the warrant applications established probable cause even excising the CSLI evidence. Nor would it have affected the subsequent warrant directed to AT&T for all of the information pertaining to petitioner's cell phone account, including the CSLI. As such, the warrants were valid, and produced more than enough DNA evidence to fully sustain the conviction here and render any error regarding the initial request harmless.

In examining the effect that unlawfully obtained evidence has on a warrant that recites that evidence, this Court has held that "if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nevertheless valid." *United States v. Karo*, 468 U.S. 705, 719 (1984). *See also Kyllo v. United States*, 533 U.S. 27, 40 (2001) (where tainted

evidence is included in a warrant, the proper analysis is for the court "to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause . . . ."); *Franks v. Delaware*, 438 U.S. 154, 172 (1978) (false statements in affidavit do not render warrant invalid if there is sufficient evidence, independent of the false statements, to support probable cause).

This Court has held that "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *D.C. v. Wesby*, 138 S. Ct. 577, 586 (2018), quoting *Illinois v. Gates*, 462 U.S. 213, 245 (1983). The determination rests on "common-sense conclusions about human behavior" and the evidence is weighed "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Illinois v. Gates*, 462 U.S. 213, 230–32 (1983). The reviewing judge must view the "totality of circumstances, not "each fact 'in isolation,'" and cannot simply dismiss facts because they are "susceptible of innocent explanation." *Wesby*, 138 S.Ct. at 588 (citations omitted). This probable cause standard is "undemanding" and "not a high bar; It requires only the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'" *Kaley v. United States*, 571 U.S. 320, 338 (2014) (citations omitted).

The search warrants here met that standard without any CSLI information. The application to search petitioner's SUV detailed the discovery of the Moultons' bodies at the neighbor's house, the evidence that a burglary had occurred (the house had been ransacked), and the description of the SUV in the driveway of the premises as a 2004 to 2007 dark-colored Mercury Mountaineer with gold trim. The application also detailed the recovery of the victims' cell phones in a bag with a receipt from petititoner's girlfriend, and the discovery, upon arrival at the girlfriend's residence, of a 2004 Mercury Mountaineer with gold trim. Nor was it irrelevant that the owner of the Mountaineer at the girlfriend's residence was a parolee with a history of violent felonies, including assault during a felony, as parolees, like probationers, are more likely to commit crimes than citizens in the general population. *Samson*, 547 U.S. at 853.

This alone provided ample reason to believe that the Mountaineer was the one used in the homicide/burglary/arson; indeed, it persuasively distinguished the particular dark-colored 2004 Mercury Mountaineer with gold trim to be searched from all other dark-colored Mercury Mountaineers with gold trim of a similar vintage, because this one, when observed by police, was parked in the driveway of the residence of the person (his girlfriend) whose receipt was found in a bag with the murder victims' stolen phones the day after the crime. Even assuming this evidence failed to provide sufficient cause to arrest the SUV's owner, it unmistakably linked the car to this crime and provided at the very least a "substantial chance" that a search of the vehicle would produce relevant evidence in the form of the victims' blood, stolen property, or traces of accelerants used in the arson. And this is so even without any reference to the CSLI obtained in response to the exigent circumstances form.

Similarly, the warrant for the residence shared by petitioner and his girlfriend was amply supported by probable cause. The vehicle persuasively linked to the robbery was, after all, in the driveway of the residence to be searched, which was shared by the individual whose receipt was in the bag with the stolen phones and the owner of the dark-colored 2004 Mercury Mountaineer with gold trim, matching the vehicle seen in the driveway of the house where the crimes occurred. Because, as a common sense matter, stolen property transported by car will often be removed to a more permanent place, like a residence, there was, again, at least a "substantial chance" that stolen property and/or the victims' DNA would appear at the residence of petitioner and his girlfriend. Thus, here too, there was ample probable cause even without any reference to the CSLI.

Moreover, the CSLI information contained in these warrant applications was minimal. The only assertion regarding CSLI in these warrant applications was that petitioner's phone was in the town of Sodus near the time of the murders (Hearing Trans. at p. 120; Hearing Exh. 1 [Warrant Application, p.10] . It did *not* specify, for example, that petitioner's phone utilized the tower closest to the burglarized house, nor did it suggest that petitioner's and the victims' phone ever utilized the same towers. The simple fact that petitioner's phone may have been in Sodus added little to the clear

inference from the applications that petitioner's 2004 Mercury Mountaineer, dark colored with gold trim, was in the driveway of the burglarized house and the victims' cell phones were found in the bag with the receipt from his girlfriend's purchase.

Still further, the warrant prepared for the CSLI and other information regarding petitioner's phone was also sufficient without the inclusion of information about the CSLI obtained in response to the exigent circumstances form. The police had ample reason to believe that petitioner's car had been in the driveway of the burglarized house just before the murders, he lived with the person whose receipt was together with the stolen phones, and thus there was, at the least, a substantial chance that petitioner, as the registered owner of the car, was either driving or in the car when it appeared at the scene of the crime. Moreover, petitioner took evasive maneuvers when followed on the 17th, evincing some consciousness of guilt. This provided ample probable cause to believe, independent of the CSLI returned in response to the exigent circumstances form, that location data from AT&T would likely reflect petitioner's presence in Sodus. Moreover, the police intended from the outset to obtain a warrant, as soon as practicable, for the CSLI, as they told AT&T precisely that in the exigent circumstances form, and promptly followed up on it later the same day, when they were able to assemble the appropriate affidavits and paperwork, while attending to the other critical functions of preparing for the arrest and obtaining the warrants for petitioner's SUV, residence, and person. Because the CSLI information was obtained via a warrant that was valid, independent of any tainted information, this evidence should also have been admissible at trial, despite any initial illegality. *See United States v. Christy,* 739 F.3d 534 (10th Cir. 2014), *cert. denied*, 574 U.S. 844 (2014); *United States v. Price*, 558 F.3d 270, 280-83 (3d Cir. 2009), *cert. denied*, 558 U.S. 892 (2009); *United States v. Perez*, 280 F.3d 318, 338-41 (3d Cir. 2002), *cert. denied*, 537 U.S. 859 (2002); *United States v. Souza*, 223 F.3d 1197, 1205-06 (10th Cir. 2000).

But even if the CSLI evidence were excluded entirely from the sum total of evidence adduced at trial, the remaining proof obtained by valid warrants presented overwhelming evidence of petitioner's guilt and was easily sufficient to render the introduction of any CSLI evidence harmless.

This Court has held that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *See Neder v. United States*, 527 U.S. 1, 15–16 (1999); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Here, the evidence at trial included, among other things, the DNA evidence placing Stacey Moulton's blood in petitioner's car and on liquor bottles taken from the burglarized house found in petitioner's premises; DNA evidence placing Terri Moulton's blood on a laundry basket also taken in the burglary and found in petitioner's home; the receipt for goods purchased by petitioner's girlfriend that was in the bag in which the victims' phones were found in Rochester; petitioner's statement that his car was with him at all times on the day of the murders, excluding the use of the car by others that day; the surveillance-video tracking of petitioner's travel to and from Sodus before and after the murders, and petitioner's false alibi provided to police and negated by petitioner's girlfriend. Thus, any error in obtaining the CSLI would not affect the outcome here.

F. The State's Highest Court Was Not Required to Grant Further, Discretionary Review after *Carpenter* Was Decided.

For all the reasons set forth above, as well as others, the State's highest court was not required to grant discretionary review of petitioner's case after *Carpenter* was decided, either under the Supremacy Clause or under principles of retroactivity.

At the outset, contrary to petitioner's suggestion, the Court of Appeals judge considering discretionary review in this case did not simply ignore this Court's decision in *Carpenter*. To the contrary, the judge specifically held onto the application for several months waiting for a decision in *Carpenter*, and then took briefing on the application of this Court's decision in *Carpenter* to this case. *Cf. Joseph v. United States*, 574 U.S. 1038 (2014) (denying certiorari, even though lower court refused to accept briefing on new rule on direct appeal) (statement respecting denial of certiorari, Kagan, J.). Indeed, had the judge simply denied the petition when it was initially briefed, direct review would have been concluded and *Carpenter* would have no application to this case at all. *Teague v. Lane*, 489 U.S. 288 (1989).

Moreover, having considered the issue, the judge hearing the application could readily have concluded that *Carpenter* did not compel further review, as it either did not require suppression or would not have changed the outcome of the case. This is so for several reasons.

First, as the state argued in its papers, *Carpenter* expressed no opinion with regard to less than seven days of CSLI, while this case dealt with no more than four days. *Carpenter v. United States*, 138 S. Ct. 2206, 2217 n. 3 (2018) ("we need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search."). Thus, *Carpenter*'s ruling simply did not reach the issue presented here, and, consequently could not have bound the court, under the Supremacy Clause or principles of retroactivity, to grant discretionary review.

Second, the judge considering the application could well have believed for the reasons stated above that, if this Court had considered the issue, it would have concluded that the four days of CSLI in this case did not implicate *Carpenter*'s concerns over the "depth, breadth, and comprehensive reach" of the CSLI, 138 S.Ct. at 2223, or attain the same level of "tireless and absolute surveillance," *id.* at 2218, as in *Carpenter*. This assessment of petitioner's expectation of privacy, in comparison to Carpenter's, would have been particularly compelling considering petitioner's status as a parolee and his lack of interest in his privacy at the time of the crime (having driven his own car to the scene and parked it in the driveway). Add to this the video and physical surveillance of petitioner during part of the four-day period, and petitioner's expectation of privacy during the remaining period would not materially have exceeded the three days of electronic surveillance that this Court upheld in *Knotts*, a decision which was not overruled or repudiated by *Carpenter*.

Third, the judge considering the application could readily have concluded that it was unnecessary to decide whether the four days of surveillance implicated the Fourth Amendment, as it was clear that state police had exigent circumstances to dispense with a warrant. Having just learned of petitioner's identity and his phone number late on July 17th, and considering the compelling

evidence of his involvement and the resulting need to make a prompt and unchallengeable arrest, the police sought confirmation of his presence in Sodus, as well as information about where petitioner went after the physical surveillance was aborted so that he could be arrested. And obtaining a warrant was impractical, as 1) the police had ample concerns taking precedence, such as making a coordinated tactical plan for his arrest, and 2) proceeding only by warrant would have taken days or weeks, rendering the information useless in the time frame the police had to act.

Fourth, the Court could have concluded that neither of these questions had to be decided because any possible error was harmless. This is particularly true given the compelling DNA evidence linking petitioner to the crime, as well as his false alibi. If the judge considering the application so concluded, then even a favorable ruling on the issue would not have changed the outcome. There would then be little point in deciding potentially controversial issues so soon after *Carpenter* was decided, before virtually any other courts had the opportunity to sort out its meaning and implications, if petitioner's conviction would stand in any event. *Cf. Montgomery v. Louisiana*, 136 S. Ct. 718, 731–32 (2016), as revised (Jan. 27, 2016) (holding that "States cannot refuse to give retroactive effect to a substantive constitutional right *that determines the outcome of that challenge*." [emphasis added]).

Nevertheless, petitioner argues that the "Court of Appeals had a duty to accept the case and decide its merits . . . ." Pet. at 15. But petitioner has no constitutional right to second-tier discretionary appellate review, *see, e.g., United States v. MacCollom,* 426 U.S. 317, 323 (1976); *Ross v. Moffitt*, 417 U.S. 600 (1974), and he cites to no case for the proposition that a state court must grant discretionary review to consider any issue, particularly one that is not clearly dispositive of the validity of the conviction.[17]

[17]Indeed, if there were a proper remedy, it would have been to make a timely application for reargument in the Appellate Division. This petitioner did not do, as he filed his motion more than 30 days after the decision in this case and more than 30 days after *Carpenter* was decided. The Appellate Division thus denied petitioner's motion on timeliness grounds, *People v. Taylor*, 173 A.D.3d 1721 (2019), and petitioner does not challenge that determination here. And even if he did, review of the issue would be barred by an adequate and independent state procedural ground. *Sochor v. Florida*, 504 U.S. 527, 534 (1992).

Nor would the judge considering the application have any legitimate fear that the Appellate Division decision would have any particular precedential value. Having been decided before *Carpenter*, no future court taking up the issues would consider the lower court decision authoritative on the CSLI question. And, contrary to petitioner's argument, the Fourth Department did not hold that "it was AT&T domain [*sic*] to determine what is exigency." Pet. at 17. Indeed, nowhere does such language appear in the Fourth Department's decision. The Court merely held that even if there had been a violation of the statute providing for exigent circumstances requests, petitioner would not be entitled to suppression. *Taylor*, 158 A.D.3d at 1099.

In short, the New York Court of Appeals did not disregard *Carpenter*; it simply thought that *Carpenter* was not dispositive here. Because there were ample grounds supporting this belief, the Court of Appeals could properly deny further review.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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