NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

ERIC BEVERLY,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, **ERIC BEVERLY**, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:
February 12, 2020.

Respectfully submitted,
/s/Cornel Williams
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QUESTIONS PRESENTED

I. The district court granted Petitioner's motion to suppress. (ROA.295-298). the district court suppressed a warrant and a § 2703(d) order used to obtain cell site location information and related data. It found that the cell-site location data and all evidence that had been derived from them were not obtained in "good faith". (ROA.298).

The government appealed arguing that the district court erred in suppressing Petitioner's historical CSLI because the district court failed to apply the good-faith exception. (ROA.306).

The Fifth Circuit reversed the suppression order and analyzed the case under Illinois v. Krull, 480 U.S. 340 (1987 and United States v. Leon, 468 U.S. 897, 906 1984). The Fifth Circuit held that a portion of the suppressed evidence met the good faith exception under Illinois v. Krull, 480 U.S. 340 (1987). The Fifth Circuit also held that the remaining of the suppressed evidence met the good faith exception under United States v. Leon, 468 U.S.897 (1984).

In light of the foregoing, the question presented is as follows:

Whether Petitioner's rights under the Fourth Amendment were violated when the government used misleading information to seek a warrant for evidence it already had and concealed this information from the magistrate issuing the warrant. Because the proper application of the Fourth Amendment and the good faith exceptions applied in Krull and Leon are of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption of the case before the Court.

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PRAYER

The Petitioner, **ERIC BEVERLY**, respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on **November 14, 2019.**

OPINIONS BELOW

The original judgment granting a motion to suppress, **United States v. Beverly, No. Criminal H-16-215-1, 2018 U.S. Dist. LEXIS 183539 (S.D. Tex. Oct. 25, 2018)** is attached as **(Exhibit A).** On November 15, 2019, the United States Court of Appeals for the Fifth Circuit reversed the district court's judgment which granted Petitioner's motion to suppress evidence. **United States v. Eric Beverly, Nos. 18-20729, 943 F.3d 225, 2019 WL 5997589, 2019 U.S. App. LEXIS 33977, (5th Cir. November 14, 2019) (affirmed). (Exhibit B).**

On appeal, the United States government argued that trial court abused its discretion when it suppressed cell site-location information ("CSLI") for the phone of suspected serial bank robber Eric Beverly, Petitioner. Beverly argued that the district court's judgment suppressing the CSLI evidence and other related evidence should be affirmed because the government acted in "bad faith" when obtaining a warrant for the evidence.

The Fifth Circuit reversed the district court's suppression

order. The Fifth Circuit held that a portion of the suppressed evidence met the good faith exception under Illinois v. Krull, 480 U.S. 340 (1987). See United States v. Eric Beverly, 943 F.3d 225,234 (5th Cir. 2019). The Fifth Circuit also held that the remaining of the suppressed evidence met the good faith exception under United States v. Leon, 468 U.S.897 1984). Id. at 235.

No petition for rehearing was filed.

JURISDICTION

On November 14, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment reversing the trial court's suppression order in this case. This petition is filed within ninety days after entry of the judgment. See. Sup. Ct. R. 13.1 and 13.3. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

FEDERAL STATUTES INVOLVED

U.S. Const. Amendment IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 2703(d) provides:

d) Requirements for Court Order.—
A court order for disclosure under subsection (b) or (c) may be

issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider. (See Also, Appendix C).

STATEMENT OF THE CASE

A. Course of Proceedings And Facts

1. Nature of the Case and Statement of Facts.

On May 25, 2016, Petitioner, Eric Beverly was charged by indictment with multiple offenses stemming from the government's unproven allegations that he participated in a series of armed bank robberies and two attempted bank robberies in the Houston area in 2014 and 2015. Gregory Barbers, Julien Francis, and Jarrick Hoskins were charged in the same indictment. On October 25, 2017, Beverly alone was charged by superseding indictment with armed bank robbery, attempted bank robbery, and brandishing a firearm during a crime of violence. (ROA.161-171).

On May 28, 2015, the government filed an application pursuant to 18 U.S.C. § 2703(c), 18 U.S.C. § 2703(d), and 47 U.S.C. § 1002 directing the service provider for telephone number (346) 932-1846, to provide records and other information for said telephone number. As amended in 1994, the SCA Permits a law enforcement agency to obtain a court order compelling the disclosure of certain

telecommunications records when the agency "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

The government alleged in the 2703(d), application that the telephone number belonged to Jeremy Davis who is not charged in the instant case. United States Magistrate Judge Francis Stacey signed an order on May 28, 2018 directing the telephone service provider, T-Mobile, to disclose the information set forth in the order provided as part of the 18 U.S.C. § 2703(d)application. (ROA.236-252).

As a result of the information obtained via § 2703(d) for telephone number (346) 932-1846, the government then filed a subsequent application on July 8, 2015, requesting the identical information be provided for five other telephone numbers, including two telephone numbers which were alleged to belong to Petitioner. (ROA.208, 249-252).

In a motion to suppress, Petitioner argued that the Government prepared cell phone data charges which it intended to introduce during the trial of Petitioner. The charts display historical cell phone location data in order to show that a telephone registering to Petitioner was in the vicinity of the bank at issue on the dates and times the banks were robbed. (ROA.227).

On June 22, 2018, before trial of this case, the United States Supreme Court released its opinion in Carpenter v. United States, 138 S. Ct. 2206 (2018), holding that "an order issued under

Section 2703 (d) is not a permissible mechanism for accessing historical cell site record. Carpenter held that the Fourth Amendment requires a warrant based upon probable cause be issue by a neutral magistrate in order to obtain historical cell cite data. Id. In response, to Carpenter, the government applied for a search warrant with a supporting affidavit intending to create sufficient probable cause for the issuance of the warrant to obtain the identical information that had previously been obtained via the 2703 (d) order. (ROA.209, 253-259, 260-265).

On August 8, 2018, Petitioner moved to suppress cell site location information ("CSLI") and other cell phone data, relying heavily on Carpenter. (ROA.226-235). It is undisputed in this case that Carpenter was decided by the U.S. Supreme Court before the district court's decision granting Petitioner's motion to suppress and also before any trial or conviction on the allegations in this case.

In his motion to suppress, Petitioner argued that the evidence obtained by the government should be suppressed because the information contained in the affidavit to establish probable cause included misleading information which led the Magistrate issuing an order for the search of the telephone number 281-623-8877, alleged to have belonged to Petitioner. (ROA.228).

In his motion to suppress, Petitioner also argued that the government's supporting affidavit for the search warrant contains conclusory statements with reckless disregard for the truth, in addition to material omissions made with reckless disregard for the

accuracy of the affidavit. (ROA.229). Specifically, Petitioner argued that the affidavit states:

> **"Follow up investigations revealed that Eric Beverly utilized cellular telephone number 281-624-8877 at points during the August 25, 2014. The affiants use of 'at points' is a broad, conclusory statement that does not give the magistrate sufficient information to determine probable cause." (ROA.230).**

Material Omissions

Additionally, Petitioner, also argued in his motion to suppress that the government's affidavit made material omissions, made with a reckless disregard for the accuracy of the affidavit. Petitioner contended that the government's search warrant affidavit failed to state that Petitioner's case was currently set for trial. The affidavit also did not reflect that the government had previously obtained the cell site information for which the search warrant application was sought. Petitioner argued that the material omissions, were done with a reckless disregard for the accuracy of the affidavit, and mislead the Magistrate in her determination of probable cause. (ROA.230, 232). Petitioner maintained, that based upon the statements in the affidavit, a Federal Magistrate would not have sufficient information to determine that the government's primary reason for submitting the search warrant application was to comply with Carpenter, as opposed to obtaining evidence of a crime. (ROA.230-231).

Furthermore, Petitioner argued that the government withheld material information that had transpired since the 2703(d) order was sought and granted. The Government failed to disclose that co-

defendants Davis and Barbers post-arrest confessions were made pursuant to plea agreements with the government. The government failed to disclose that the plea agreements contained the potential for 5K.1 downward departures. The government did not disclose in the affidavit that prior to Davis' and Barber's plea agreement, they initially denied being involved in any bank robberies. Petitioner argued that the government's failure to disclosed these material omissions constitute a reckless disregard for the accuracy of the affidavit. (ROA.231).

Fruit of the Poisonous Tree

With respect to the 2015 2703(d) order attributable to Jeremy Davis, the government was only able to offer one telephone number, 346-932-1846, which belonged to co-defendant Davis to obtain cell-site information. There were no other telephone numbers offered to the lower court in support of the order and no other names of co-conspirators mentioned in the 2703(d) court order application. Petitioner argued in his motion to suppress that the government reviewed cell phone record of alleged co-defendants who the informing defendant called close in time to the robberies, to determine possible suspects involved. The government then applied for an order pursuant to 2703(d) as to Petitioner and some of the suspects and co-conspirators including Barbers. (ROA.234).

The record reveals that Petitioner argued in his motion to suppress that the additional numbers, cell site information and names derived from the government's investigation from Davis's and Petitioner's 2703 (d) orders constitute " fruit of the poisonous

tree." (ROA.235) See also, United States v. Beverly, No. Criminal H-16-215-1, 2018 U.S. Dist. LEXIS 183539, at *4 (S.D. Tex. Oct. 25, 2018). The district court's order also reveals that the district court suppressed the warrant and the order. It found that the cell-site location data and all evidence that had been derived from them were infected by the same virus as well. (ROA.298). Thus, the district court intended to suppress the information obtained from Davis's cell phone as well.

Petitioner maintained that the government failed to disclose to the determining court for probable cause how it received the numbers allegedly belonging to Petitioner referenced in the affidavit. Furthermore, the Federal Magistrate would not have been put on notice regarding this information because she did not previously issue the 2703(d) orders for phone information attributable to Davis and others. Petitioner contended that it is likely that if the government had not received the cell-site information from Davis' 2703(d) order, the government would not have been able to apply for an order pursuant to 2703(d) as to Petitioner. (ROA.234). Thus, Petitioner maintained that the search warrant application is invalid because the telephone numbers and related information used in the affidavit for the search warrant are fruit of a "poisonous tree." (ROA.235).

In relevant motions and at the hearing on the motion to suppress, the government argued that Carpenter has no implication in the instant case, because the evidence Petitioner sought to exclude was obtained pre-Carpenter under then existing binding

precedent and therefore the good faith exception to the exclusionary rule applies in this case. (ROA.267-269, 278-280). The government on the other hand argued that Carpenter applies in the instant case and that the government acted in bad faith by misleading the Magistrate court. (ROA.226-235,693-695).

The district court granted Petitioner's motion to suppress. (ROA.295-298). The district court suppressed the warrant and the order. It found that the cell-site location data and all evidence that had been derived from them were infected by the same virus as well. (ROA.298).

The government appealed arguing that the district court erred in suppressing Petitioner's historical CSLI because the district court failed to apply the good-faith exception. ROA.306). United States v. Beverly, 943 F.3d 225 (5th Cir. 2019.

The Fifth Circuit reversed the suppression order and analyzed the case under Illinois v. Krull, 480 U.S. 340 (1987 and United States v. Leon, 468 U.S. 897, 906 (1984).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This case was brought as a federal criminal prosecution involving armed robber, attempted armed robbery, and brandishing a firearm during the commission of a crime of violence in violation of 18 U.S.C. §§ 924 (c)(2),and (1)(A)(ii); and 18 U.S.C. §§ 2113(a),(d), and (d)(2). The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

REASON FOR GRANTING THE WRIT

This Court should grant certiorari in this case in order to determine whether Petitioner's rights under the Fourth Amendment were violated when the government used misleading information to seek a warrant for evidence it already had and concealed this information from the issuing magistrate. Because the proper application of the Fourth Amendment and the good faith exceptions applied in Krull and Leon are of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

The issues in this case arose before trial and as a result of a newly decided Supreme Court case, Carpenter v. United States, 138 S.CT.2206 (2018). In Carpenter this Court held that if the government wanted CSLI it needed a valid search warrant because obtaining CSLI evidence constituted a search, subject to the Fourth Amendment of the United States Constitution. Id at 2220-2221. The controversy in the district court surrounded whether CSLI evidence and related evidence that the government sought to use at trial against Eric Beverly, Petitioner, should be suppressed because it was not obtained in "good faith." After hearing argument of counsel on Petitioner's motion to suppress, the district court suppressed the CSLI evidence and all related evidence as "fruit of the poisonous tree." ROA.235) See also, United States v. Beverly, No. Criminal H-16-215-1, 2018 U.S. Dist. LEXIS 183539, at *4 (S.D. Tex. Oct. 25, 2018).

On May 28, 2015, the government applied for an order pursuant

to the Stored Communications Act, 18 U.S.C. § 2703(d), directing T-mobile to provide subscriber information, toll records, and historical CSLI for a cell phone belonging to Jeremy Davis, a bank robbery suspect. A federal magistrate judge issued the requested order that same day. Armed with the order pursuant to 18 U.S.C. § 2703(d), the government did not seek a warrant for Davis's historical CSLI. United States v. Beverly, 943 F.3d 225, 230 (5th Cir. 2019)

The government subsequently associated four other phone numbers with Davis's co-conspirators and submitted a second § 2703(d) application requesting subscriber information, toll records, and historical CSI for those phone numbers. Id. at 230-231. The same magistrate judge issued and order for the additional phone numbers on July 8, 2015 requiring T-Mobile to provide CSLI for the period between January 24, 2015 and May 5, 2015. Subscriber information confirmed that one of the numbers was registered to Beverly, Petitioner in this case. Petitioner was taken into federal custody on June 1, 2016. Id. at 231.

On June 22, 2018 less that two months before the start of Petitioner's federal trial this Court handed down its decision in Carpenter v. United States, 138 S.CT.2206 (2018). That very same day, the government applied for and obtained a search warrant for Beverly's cell phone information, including historical CSLI

subscriber information, and toll records associated with his T-Mobile account. This time, the government's warrant application sought historical CSL for the period extending from August 25, 2014 until May 2, 2015– more than double the amount of time covered by the previous § 2703(d)order. Id.

In response to Carpenter and the government's contemporaneous search warrant, Beverly moved to suppress the warrant and the "numbers, cell site information, and the names" gathered as fruit of the two § 2703(d) orders. The district court granted the motion on October 25, 2018, voiding the "warrant and the order," and suppressing the "cell-site location data and all evidence that has been derived from them…as infected by the same virus." The government appealed. United States v. Beverly, 943 F.3d 225, at 231.

In Beverly's case, The district court suppressed two categories of evidence in this case: (1) the 102 days' worth of CSLI records covering January 24, 2015 through May 5, 2015(the ("2015 CSLI") first authorized by the § 2703(d)order in July 2015; and (2) the 152 days' worth of CSLI records covering August 25, 2014 through January 23, 2015 (the "2014 CSLI"), first authorized by the post-Carpenter search warrant in 2018. Id. at 234.

The Fifth Circuit reversed the suppression order an analyzed the two categories of evidence differently under Illinois v. Krull,

480 U.S. 340 (1987 and United States v. Leon, 468 U.S. 897, 906 (1984). United States v. Beverly, 943 F.3d 225, at 234-239.

The 2015 CSLI covering January 24, 2015 through May 5, 2015

With respect to the 2015 CSLI, the Fifth Circuit held that the Krull strand of the good-faith exception properly applies since it was obtained pursuant to a pre-Carpenter warrantless order authorized by statute, 18 U.S.C. § 2703(d) in this case. United States v. Beverly, at 234-235 (5th Cir. 2019. It went on to say that "[b]ecause the government pursued the statutory order in good faith, the CSLI should not have been suppressed." Id. at 235.

The Fifth Circuit, citing Krull, 480 U.S. at 350 opined that like Krull, the investigators who obtained Beverly's CSLI in 2015 conducted a warrantless search authorized by statute that was not found to be unconstitutional until after the search. Furthermore, the Court opined that like in Davis v. United States, 564 U.S. 229, 235, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011), the operative statue had been deemed unconstitutional at the time of the search by then-controlling judicial precedent. United States v. Beverly, 943 F.3d 225 at 235.

The 2014 CSLI, records covering August 25, 2014 through January 23, 2015

With respect to the 2014 CSLI, the Fifth Circuit held that the Leon strand of the good-faith exception applied because those records were first sought and obtained under a post-Carpenter

search warrant. It went on to say that, "even if the government acted in good faith when applying for the search warrant, and even if the government did not act in good faith, the warrant was supported by probable cause. Id.

This Court should grant certiorari in this case because the analysis presented in the Fifth Circuit's opinion ignores the deferential standard of review afforded to the Petitioner here. On review of a motion to suppress, the Fifth Circuit typically reviews the district court's factual findings for clear error and questions of law de novo. United States v. Jones, 234 F.3d 234, 236 (5th Cir. 2000). See, e.g., United States v. Hernandez, 670 F.3d 616, 620 (5th Cir. 2012). A factual finding "is clearly erroneous if the Court is 'left with a definite and firm conviction that a mistake has been committed.'" United States v. Mendez, 885 F.3d 899, 907 (5th Cir. 2018)(quoting United States v. Scroggins, 599 F.3d 433, 440 (5th Cir. 2010)). On appeal, the evidence is viewed in the light most favorable to the prevailing party in the district court. Scroggins at 440; Jones at 239. Thus, in the instant appeal the evidence must be viewed in the light most favorable to Beverly, Petitioner in this case.

In rendering its decision in Petitioner's case, the Fifth Circuit opined that the good faith exceptions under Krull and Leon applied here. In doing so, the Fifth Circuit did not give the

requisite preferential deference to the district court's factual findings ascertained at hearing on the motion to suppress. The Fifth Circuit's analysis misses the mark because the facts of the instant case do not fall "neatly within" Krull or Leon. The instant case is unique because after the government had already obtained the 2015 CSLI pursuant to a § 2703(d), it then went before the magistrate a second time to obtain a warrant for evidence it already had.

In response, to Carpenter, the government applied for a search warrant with a supporting affidavit intending to create sufficient probable cause for the issuance of a warrant to obtain the *identical* information that had previously been obtained via the 2703 (d) order. Neither Leon nor Krull address the application of a good-faith exception where the government requests a search warrant for evidence it already has where the government failed to inform the magistrate judge that it already has the evidence.

When rendering its decision on the motion to suppress the district court highlighted the unique factual circumstances of this case that demonstrate that the government did not act in good faith. The district court observed that in Beverly's case, the application for the order under § 2703(d) asks for cell-tower records from 2015-January 24th through May 5th. The application for the warrant asks for those cell-tower records and those from

five earlier months to-August 25, 2014, through May 2, 2015. The district court also pointed out that the "late warrant does not save even the added months because its justification cannot be separated from the existing knowledge from the original acquisition." The district court went on to state the following: "The warrant from June of 2018 was not served, and the return has no description of the obtained record except 'phone records.' The return gives the date of the warrant's execution, but does not say where or on whom it was served. These irregularities illustrate that the whole business was feigned." (ROA.296).

The district court's opinion on the motion to suppress clearly demonstrates that the court was aware of the good faith exception and that the district court considered the exception when deciding the motion to suppress. Thus, there was no incorrect view of the law on the part of the district court. The district court's opinion also states the following:

> **"An exception to this rule allows the evidence when an officer makes a modest mistake honestly. In this case, the government did nothing honestly and the scope of the intrusion was anything but modest. Although the law did change, they defeated any claim of good faith by meretriciously applying for a search warrant after they had already obtained the evidence. The evidence is tainted by their attempt to evade the law." (ROA.296).**

The district court ultimately concluded that while the exclusionary rule could apply in this case, "no exigency exists

here." The district court noted that Petitioner's phone records were subject to two searches and with respect to the searches stated the following:

> **"The first was authorized by a constitutionally inform statute that did not require a warrant, and the second was through a warrant for information the government had already seized. Both searches are invalid." (ROA.297).**

During the hearing on the motion to suppress the district court stated the following:

> **"Ma'am, the search warrant was not based on full disclosure. If you tell a judge that you're seeking a search warrant for some information you already have, you don't get a search warrant." (ROA.696)**

The foregoing discussion on the motion to suppress demonstrates that the district court was aware of the Krull good faith exception applied to evidence obtained pursuant to a constitutional statue. The foregoing discussion also demonstrates that the district court was aware of the Leon good faith exception applicable to searches conduct pursuant to a warrant.

This Court has identified four situations in which the good faith exception does not apply: (1) when the issuing magistrate was misled by information in an affidavit that the affiant knew or reasonably should have known was false; (2) when the issuing magistrate wholly abandoned his judicial role; (3) when the warrant

affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable; and (4) when the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that executing officers cannot reasonably presume it to be valid." United States v. Woerner, 709 F.3d 527,533-34 (5th Cir. 2013).

Petitioner's arguments are relevant to the first circumstance, whether the issuing magistrate was misled by information in an affidavit that the affiant knew or reasonably should have known was false. The following discussion occurred during the motion to suppress hearing:

Court: Good morning. Can you explain to me how you can get a search warrant for something that's in the FBI's desk already? (ROA.689).
****

Prosecutor: The information is still with T-Mobile as well as in the possession of the government.

Court: T-Mobile has what you have and you want a search warrant for it?

Prosecutor: We obtained a search warrant for it, yes, Your Honor? ROA.696).

The district court then informed the prosecutor that "[y]ou can't have a warrant to get something that you've already got." (ROA.698-699).

As previously mentioned, the government would not have been able to obtain the search warrant had it told the Magistrate court

that it already had the information. As stated beforehand, in this case, this district court correctly concluded that the magistrate judge, in the case at hand, was misled by the government's failure to disclose that it already had the information it sought.

Furthermore, in rendering its decision the Fifth Circuit stated, "the 2014 CSLI should not have been suppressed because the government acted in good faith when applying for the search warrant and, even if the government did not act in good faith, the warrant was supported by probable cause." United States v. Beverly, 943 F.3d 225, 235 (5th Cir. 2019).

The factual findings of the district court on the issues surrounding "good faith" and "probable cause" are fact intensive. As stated previously, on review of a motion to suppress, the Fifth Circuit typically reviews the district court's factual findings for clear error. Moreover, the evidence is viewed in the light most favorable to the prevailing party in the district court United States v. Jones, 234 F.3d 234, 236 (5th Cir. 2000). A factual finding "is clearly erroneous if the Court is 'left with a definite and firm conviction that a mistake has been committed.'" Thus, in the instant appeal the evidence must be viewed in the light most favorable to Beverly, Petitioner in this case. See United States v. Restrepo, 994 F.2d 173, 183 (5th Cir. 1993) (holding that, on appeal, court must give credence to the credibility choices and

findings of fact of the district court). In Beverly's case, the district court was in a better position to judge the contexts of statements made by defense counsel at the motion to suppress. "Of course, deference is accorded the district court's credibility determinations."

As stated beforehand, on appeal, the Fifth Circuit was required to give credence to the credibility choices and findings of fact of the district court. See United States v. Restrepo, 994 F.2d 173, 183 (5th Cir. 1993); United States v. Tellez, 11 F.3d 530, 532 (5th Cir. 1993) ("The district court's ruling to deny the suppression motion should be upheld if there is any reasonable view of the evidence to support it.")(internal citations and quotations omitted); United States v. Gonzales, 236 F. App'x 1, 5 (5th Cir. 2007). Therefore, the questions of (1) whether the government acted in good faith and (2) whether there was sufficient probable cause for the issued warrant involve factual determinations reserved for the district court. Those factual determinations are only reversible for clear error under a standard of review deferential to the Petitioner.

The Fifth Circuit also opined that "any suppression of tool records and subscriber information under Carpenter was erroneous because Carpenter only applies to evidence that can be used to track a person's physical movements over time. United States v.

Eric Beverly, 943 F.3d at 235 (5th Cir. 2019). As stated beforehand, the instant case involves toll records and subscription information that the government doubtless desired to and will attempt to utilize in an attempt to track Petitioner's physical location over a period of time. It involves toll records and subscription information that the government knows will be used in an attempt to track Petitioner's physical location over a period of time. The government admitted this in its motions before the district court on this point. For, example in the government's motion in response to Petitioner's motion to suppress the government states the following:

> **Pursuant to a Court Order filed on May 28, 2015, under Case No. H-15-724M, in the United States District Court for the Southern District of Texas, agents obtained subscriber, call detail, and cell site record for telephone number 346-932-1846, known to be utilized by Davis. (ROA.208).**
>
> **Analysis of the cellular telephone records for Davis showed calls to the other members of the crew during the time of the robberies. The records also provided historical cell cite information, which placed Jeremy Davis at or near the banks during the time of the robberies. (ROA.208).**
>
> **Pursuant to a Court order filed on July 8, 2015 under Case Nos. 41-5-mj-972, in the United States District Court for the Southern District of Texas, agents obtained subscriber, call detail cell cite record for telephone numbers 218-624-8877 and 832-808- 8557, both believed to have been utilized by the defendant Eric Beverly. Davis's statements as well as subscriber information, confirmed these numbers to be associated with Eric Beverly. Analysis of these records showed calls to members**

> **of the robbery crew during the time of the robberies. (ROA.208). The cell site information showed Eric Beverly's pone to be at or near the banks during the time of the robberies. (ROA.208-209).**

Moreover, the government argued on appeal that "[t]he lawfully obtained data from Davis's phone corroborated that Davis had communicated with Beverly during some of the robberies, while Davis's phone was at or near the robbery locations.

The Fifth Circuit's analysis on this point is incorrect because his this is exactly the type of evidence and use that Carpenter forbids, evidence that reveal a defendant's location over a period of time. As stated beforehand, the factual determination by the district court are afforded deferential preference. See United States v. Restrepo, 994 F.2d 173, 183 (5th Cir. 1993); United States v. Tellez, 11 F.3d 530, 532 (5th Cir. 1993). The district court was in the best position to decide the government's credibility on this point and to determine whether the evidence would be used at trial to show that the government had indeed used the data to track Beverly's location over a period of time.

This Court should grant certiorari in this case in order to determine whether Petitioner's rights under the Fourth Amendment were violated when the government used misleading information to seek a warrant for evidence it already had and concealed this information from the issuing magistrate. Because the proper

application of the Fourth Amendment and the good faith exceptions applied in Krull and Leon are of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

CONCLUSION

For the foregoing reasons, petitioner **ERIC BEVERLY** respectfully prays that this Court grant certiorari, to review the judgment of the Fifth Circuit in this case.

Date: February 12, 2020.

Respectfully submitted,

/s/Cornel A. Williams
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

ERIC BEVERLY,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

Cornel A. Williams, is not a member of the Bar of this Court but was appointed under the Criminal Justice Act 18 U.S.C. § 3006 A(b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit, certifies that, pursuant to Rule 29.5, **On February 12,2020**, he served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid, **Certified Mail No. 7019 0160 0001 0081 5571** return receipt requested, and depositing the envelope in the United States Postal Service located at Almeda Post Office, 4110 Almeda Road ,Houston, Texas77004 and further certifies that all parties required to be served have been served and copies addressed to:

The Honorable Noel J. Francisco
Solicitor General of the United States

Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

/s/Cornel A. Williams
CORNEL A. WILLIAMS

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APPENDIX

Warning
As of: February 11, 2020 10:25 PM Z

United States v. Beverly

United States District Court for the Southern District of Texas

October 25, 2018, Decided; October 25, 2018, Filed

Criminal H-16-215-1

Reporter
2018 U.S. Dist. LEXIS 183539 *; 2018 WL 5297817

United States of America, Plaintiff, versus ***Eric Beverly***, Defendant.

Subsequent History: Reversed by *United States v. **Beverly**, 2019 U.S. App. LEXIS 33977 (5th Cir., Nov. 14, 2019)*

Core Terms

suppressed, cell-tower, searches, records, good-faith, cell-site, banks, exclusionary rule, search warrant, phone records, Fourth Amendment, telephones, honestly, Seizure, robbing, masked, modest, seized, print

Counsel: [*1] For ***Eric Beverly***, Custody, Defendant: Cornel A Williams, LEAD ATTORNEY, Williams Assoc, Houston, TX.

For Gregory Babers, Custody, Defendant: David Adler, LEAD ATTORNEY, David Adler PC, Bellaire, TX.

For Julien Francis, Custody, Defendant: Brian Edward Warren, LEAD ATTORNEY, Attorney at Law, Houston, TX.

For Jarrick Hoskins, Custody, Defendant: George Michael DeGeurin, Jr, LEAD ATTORNEY, Foreman DeGeurin et al., Houston, TX.

For USA, Plaintiff: Carrie Wirsing, LEAD ATTORNEY, Financial Litigation, Jill Jenkins Stotts, US Attorneys Office, Houston, TX; US Marshal - H, US Pretrial Svcs - H, US Probation - H.

Judges: Lynn N. Hughes, United States District Judge.

Opinion by: Lynn N. Hughes

Opinion

Opinion on Suppression

1. *Background.*

In the spring of 2015, surveillance cameras recorded a group of masked men robbing banks and fleeing in a car. On April 15th, one man left a palm print on a door during the robbery. Identified by the print, Jeremy Davis was arrested for robbing a series of banks. He confessed. Davis named several others with whom he had robbed the banks. One of them was ***Eric Beverly***.

On July 8, 2015, from a magistrate judge, the government obtained an order allowing it to subpoena the cell-site location data of **[*2]** telephones that it thought belonged to ***Beverly*** under *§ 2703(d)* of the Stored Communications Act.[1] Those data are: (a) which towers the telephones pinged and (b) when. On June 22, 2018, the Supreme Court decided that that statute was unconstitutional.[2] It held that the government had to get a warrant if it wanted cell-tower data.[3] Because this case is pending and not yet final, the new insight applies.

2. *Warrant.*

The day of that decision — three years after the government had seized the data — the government obtained a warrant for cell-tower data it already had. T-Mobile still has its copy of the data. The government still had its copy. Re-seizing data from a fully cooperative, third-party witness is a negation of the warrant requirement. Every time a motion to suppress is filed, the prosecutors would get the agency a search warrant, and that would cure the lapse. The Constitution requires actual protection, not cosmetic masks.

The application for the order under *§ 2703(d)* asks for cell-tower records from 2015 - January 24th through May 5th. The application for the warrant asks for those cell-tower records and those **[*3]** from five earlier months too — August 25, 2014, through May 2, 2015. The late warrant does not save even the added months because its justification cannot be separated from the existing knowledge from the original acquisition.

The warrant from June of 2018 was not served, and the return has no description of the obtained records except "phone records." The return gives the date of the warrant's execution, but does not say where or on whom it was served. These irregularities illustrate that the whole business was feigned. The warrant and the information derived from it will be suppressed.

3. *Exclusion.*

Evidence obtained illegally must be

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[1] *18 U.S.C. § 2703(d)*.

[2] *Carpenter v. United States, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018)*.

[3] *Id.*; *see also In re: Applications of the United States of America for Historical Cell Site Data*, No. 11-223 (S.D. Tex., November 11, 2011) (Hughes, J.), ECF No. 3.

excluded. An exception to this rule allows the evidence when an officer makes a modest mistake honestly. In this case, the government did nothing honestly and the scope of the intrusion was anything but modest. Although the law did change, they defeated any claim of good faith by meretriciously applying for a search warrant after they had already obtained the evidence. The evidence is tainted by their attempt to evade the law.

While the exception to the exclusionary rule could apply to this information, no exigency exists here. The cell-site location data **[*4]** and all of the evidence obtained through the use of that data will be suppressed.

The good-faith exception to the exclusionary rule allows a court to admit evidence obtained in compliance with a law later ruled unconstitutional, as occurred here. But to apply the good-faith exception here would render the *Fourth Amendment* empty. Arbitrary searches authorized by this statute are one of the things the *Fourth Amendment* expressly and precisely forbids.[4] Use of the good-faith exception would mean, in essence, that a statute found unconstitutional still applies in every pending case except the one that happened to announce the new rule.[5]

4. *Conclusion.*

Beverly's phone records were subjected to two searches. The first was authorized by a constitutionally infirm statute that did not require a warrant, and the second was through a warrant for information the government had already seized. Both searches are invalid. The warrant, order, searches, seizures, and uses are void. The cell-site location data and all evidence that has been derived from them will be suppressed as infected by the same virus.

Signed on October 25, 2018, at Houston, Texas.

/s/ Lynn N. Hughes

Lynn N. Hughes

United States District Judge

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[4] *See Illinois v. Krull, 480 U.S. 340, 364-65, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987)* (O'Connor, J., dissenting); 1 WAYNE LAFAVE, SEARCH AND SEIZURE § 1.3(h) (5th ed. 2012).

[5] *Davis v. United States, 564 U.S. 229, 254-55, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011)* (Breyer, J., dissenting).

Neutral
As of: February 10, 2020 4:31 PM Z

United States v. Beverly

United States Court of Appeals for the Fifth Circuit

November 14, 2019, Filed

No. 18-20729

Reporter
943 F.3d 225 *; 2019 U.S. App. LEXIS 33977 **; 2019 WL 5997389

UNITED STATES OF AMERICA, Plaintiff - Appellant v. ERIC BEVERLY, Defendant - Appellee

Prior History: [**1] Appeals from the United States District Court for the Southern District of Texas.

United States v. Beverly, 2018 U.S. Dist. LEXIS 183539 (S.D. Tex., Oct. 25, 2018)

Disposition: REVERSED.

Core Terms

records, good-faith, suppress, phone, search warrant, district court, toll, probable cause, subscriber, warrant application, Fourth Amendment, investigators, good faith, strand, exclusionary rule, bank robbery, bad faith, warrantless, phone number, searched, expectation of privacy, robberies, argues, teller, armed

Case Summary

Overview
HOLDINGS: [1]-The Krull strand of the good-faith exception properly applied to the 2015 cell-site location information (CSLI), since it was obtained pursuant to a pre-Carpenter warrantless order authorized by statute. Because the government pursued the statutory order in good faith, the CSLI should not have been suppressed; [2]-As for the 2014 CSLI, the Leon strand of the good-faith exception applied because those records were first sought and obtained under a post-Carpenter search warrant. The 2014 CSLI should not have been suppressed because the government acted in good faith when applying for the search warrant and, even if the government did not act in good faith, the warrant was supported by probable cause.

Outcome
Order reversed.

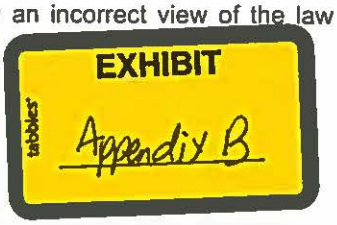
LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Motions to Suppress

HN1 **De Novo Review, Motions to Suppress**

On appeal of a motion to suppress, legal conclusions are reviewed de novo while factual findings are reviewed for clear error. A factual finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been committed. But when influenced by an incorrect view of the law or an



incorrect application of the correct legal test, a factual determination is reviewed de novo.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Evidence > Burdens of Proof > Preponderance of Evidence

HN2[] Pretrial Motions & Procedures, Suppression of Evidence

The party seeking suppression has the burden of proving, by a preponderance of the evidence, that the evidence in question was obtained in violation of his *Fourth Amendment* rights. Evidence is viewed in the light most favorable to the prevailing party.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN3[] Search & Seizure, Probable Cause

The *Fourth Amendment* guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. *U.S. Const. amend. IV*. The basic purpose of the Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. It protects against government intrusion into areas where people have reasonable expectations of privacy. Where the government seeks to intrude upon such private spheres, it generally needs a warrant supported by probable cause.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Rule Application & Interpretation

HN4[] Search & Seizure, Exclusionary Rule

The *Fourth Amendment* contains no provision expressly precluding the use of evidence obtained in violation of its commands. The reason is that exclusion of such evidence would not cure the wrong condemned by the Amendment: the unlawful search or seizure itself. However, courts have embraced the so-called "exclusionary rule"—a judicially created remedy that precludes the use of evidence obtained from an unconstitutional search or seizure—in order to safeguard *Fourth Amendment* rights generally through its deterrent effect.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

HN5[] Exceptions to Exclusionary Rule, Good Faith

An exception to the exclusionary rule exists where government investigators acted with an objectively reasonable good-faith belief that their conduct was lawful. This "good-faith exception" to the exclusionary rule is grounded in the observation that where official action is pursued in complete good faith the deterrence rationale loses much of its force.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

HN6[] Exceptions to Exclusionary Rule, Good Faith

The good-faith exception to the exclusionary rule has been applied to a range of cases. In Leon itself, the exception was applied where police acted in reliance on a warrant that was later held to be unsupported by probable cause. However, there are several limitations on the good-faith exception. The good-faith exception will not apply: (1)When the issuing magistrate was misled by information in an affidavit that the affiant knew or reasonably should have known was false; (2)When the issuing magistrate wholly abandoned his judicial role; (3)When the warrant affidavit is so lacking in indicia

of probable cause as to render official belief in its existence unreasonable; and (4)When the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that executing officers cannot reasonably presume it to be valid.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

HN7[] Exceptions to Exclusionary Rule, Good Faith

The good-faith exception to the exclusionary rule has been applied to evidence obtained from warrantless searches later held to be unconstitutional. If a statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future *Fourth Amendment* violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. Similarly, the U.S. Supreme Court has applied the good-faith exception to a warrantless search that complied with binding appellate precedent that was later overruled.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

HN8[] Federal Acts, Stored Communications Act

The Stored Communications Act permits a law enforcement agency to obtain a court order compelling the disclosure of certain telecommunications records when the agency offers specific and articulable facts showing that there are reasonable grounds to believe that the records sought are relevant and material to an ongoing criminal investigation. *18 U.S.C.S. § 2703(d)*. This standard is less stringent than the probable cause standard generally required for a search warrant.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause

HN9[] Federal Acts, Stored Communications Act

18 U.S.C.S. § 2703(d) is unconstitutional. Obtaining cell-site location information (CSLI) from a wireless carrier amounts to a search under the *Fourth Amendment* because an individual has a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. To acquire CSLI records "the Government must generally obtain a warrant supported by probable cause, unless the search falls within a specific exception to the warrant requirement.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

HN10[] Search & Seizure, Exclusionary Rule

Courts apply a two-step test to determine whether to suppress evidence under the exclusionary rule: first, the court asks whether the good faith exception to the rule applies, and second, the court asks whether the warrant was supported by probable cause.

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

HN11[] Exceptions to Exclusionary Rule, Good Faith

The Leon exception comes with a number of limitations, the first of which dictates that the good-faith exception will not apply if the warrant application is misleading. The party challenging the good-faith exception bears the burden of establishing that material misstatements or omissions are contained in the supporting affidavit and that if those statements were excised (or the omitted information included), the affidavit would be insufficient to support the warrant.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause

HN12 **Search & Seizure, Probable Cause**

Probable cause means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense. A search warrant application must show probable cause to justify listing those items as potential evidence subject to seizure.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN13 **Search & Seizure, Scope of Protection**

Fourth Amendment rights may not be vicariously asserted.

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellant: Amy Howell Alaniz, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX; Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX.

For ***ERIC BEVERLY***, Defendant - Appellee: Cornel Amos Williams, Esq., Cornel A. Williams & Associates, Houston, TX.

Judges: Before CLEMENT, ELROD, and DUNCAN, Circuit Judges.

Opinion by: STUART KYLE DUNCAN

Opinion

[*229] STUART KYLE DUNCAN, Circuit Judge:

Armed with a court order but no warrant, FBI agents obtained historical cell-site location information ("CSLI") for the phone of a suspected serial bank robber, ***Eric Beverly***. Before the government could use that information at trial (to show that ***Beverly***'s phone was at or near the banks at the time they were robbed) the Supreme Court held in *Carpenter v. United States* that if the government wants CSLI it needs a valid search warrant. *138 S. Ct. 2206, 2221, 201 L. Ed. 2d 507 (2018)*. So, on the same day *Carpenter* was decided, federal prosecutors applied for—and got—a search warrant for the CSLI they already had (plus quite a bit more). ***Beverly*** moved to suppress **[**2]** the CSLI and other related evidence, claiming the warrant was obtained in bad faith. The district court agreed, suppressing the **[*230]** CSLI and declaring the court order and warrant void. The government appeals that order. Because the district court should have applied various strands of the good-faith exception to the warrant requirement, we reverse.

I.

In the summer of 2014, surveillance cameras across the Houston area began capturing a string of armed bank robberies. The robberies consistently involved a group of masked individuals, two or three of whom would enter a bank, hold up the lobby, and empty the teller drawers—all in less than sixty seconds—before driving off in a black Dodge Ram pickup with chrome nerf bars[1] and two bullet holes in the back. Sometimes other vehicles were also used, including a silver Infiniti SUV. During the holdups, the robbers would communicate via three-way cell phone calls. They never entered the bank vaults, but instead took money only from teller drawers. Still, the robbers managed to steal as much as $20,000-$30,000 from some of the banks, all of which were FDIC insured.

The government finally caught a break in the investigation on January 24, 2015, when **[**3]** agents lifted a palm print from a spot where one of the robbers had vaulted over a teller counter (as recorded in the security footage). The FBI matched the print to Jeremy Davis, who was arrested on May 5, 2015, while driving

[1] Nerf bars are tubular running boards that attach to the sides of pickup trucks.

the black Dodge Ram seen in the videos. The truck turned out to be registered to Davis's mother. Davis confessed, admitting participation in twenty bank robberies and three jewelry store smash-and-grabs. He also named five of his accomplices, one of whom was ***Eric Beverly***. According to Davis, ***Beverly*** was responsible for handing out the guns, masks, and gloves before each robbery, and ***Beverly*** along with another accomplice did most of the planning.

Investigators later tied ***Beverly*** to the silver Infiniti SUV seen on some of the surveillance tapes. They learned that ***Beverly*** had bought the vehicle from a Craigslist seller in a Target parking lot for $9,000 but had never changed over the registration. The government also interviewed at least two people who indicated that Davis and ***Beverly*** were friends.

Meanwhile, on May 28, 2015, the government applied for an order pursuant to the *Stored Communications Act*, *18 U.S.C. § 2703(d)*, directing TMobile to provide subscriber information, toll records, **[**4]** and historical CSLI for Davis's iPhone.[2] A federal magistrate judge issued the requested order that same day. Armed with the order, the government did not seek a warrant for Davis's historical CSLI. The government subsequently associated four **[*231]** other phone numbers with Davis's co-conspirators and submitted a second *§ 2703(d)* application requesting subscriber information, toll records, and historical CSLI for those phone numbers. The same magistrate judge issued an order for the additional phone numbers on July 8, 2015, requiring T-Mobile to provide CSLI for the period between January 24, 2015 and May 5, 2015. Subscriber information provided by T-Mobile confirmed that one of the numbers was registered to ***Beverly***.

Sometime in August 2015, ***Beverly*** was arrested for an unrelated probation violation and placed in a Texas state jail. On May 26, 2016, while ***Beverly*** was still incarcerated in the state facility, he was charged by federal indictment with multiple counts of conspiracy, armed bank robbery, attempted armed bank robbery, and brandishing a firearm during a crime of violence. ***Beverly*** was transferred into federal custody on June 1, 2016.

On June 22, 2018, less than two months before the start **[**5]** of ***Beverly***'s federal trial, the Supreme Court handed down its decision in *Carpenter*, in which the Court held that obtaining CSLI constituted a "search" under the *Fourth Amendment* and therefore required a valid warrant supported by probable cause. *138 S. Ct. at 2220-21*. Out of "an abundance of caution" the government applied for and obtained a search warrant that very day for ***Beverly***'s cell phone information, including historical CSLI, subscriber information, and toll records associated with his T-Mobile account. Notably, the government's warrant application sought historical CSLI for the period extending from August 25, 2014 until May 2, 2015—more than double the amount of time covered by the previous *§ 2703(d)* order. Although the application omitted the fact that the government already possessed some of the information to be searched, the issuing magistrate judge was apparently aware of *Carpenter* and agreed that obtaining a search warrant was a "good idea."

In response to *Carpenter* and the government's contemporaneous search warrant, ***Beverly*** moved to suppress the warrant and the "numbers, cell site information, and names" gathered as fruit of the two *§ 2703(d)* orders. The district court granted the motion on October 25, 2018, voiding the **[**6]** "warrant and the order," and suppressing the "cell-site location data and all evidence that has been derived from them . . . as infected by the same virus." The government timely appealed. We have appellate jurisdiction pursuant to *28 U.S.C. § 1291* and *18 U.S.C. § 3731*. *See United States v. Wise, 877 F.3d 209, 215 (5th Cir. 2017)*.

II.

HN1[↑] On appeal of a motion to suppress, legal conclusions are reviewed *de novo* while factual findings are reviewed for clear error. *United States v. Mendez, 885 F.3d 899, 907 (5th Cir. 2018)*. "A factual finding 'is

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[2] "Subscriber information" includes the name, address, and other identifying information for the person to whom the phone number is registered. "Toll records," also known as call detail records, are records of calls placed and received on the subscriber's account (including the time, duration, and phone number dialed, but not the content of the calls). "Historical CSLI" consists of a series of time-stamped records created as a mobile phone continuously pings nearby cell towers, pinpointing the location of the phone within a relatively small area (currently a radius of about 50 meters). *See Carpenter, 138 S. Ct. at 2211, 2219*. CSLI should not be confused with GPS data, which is far more precise location information derived by triangulation between the phone and various satellites. Even in 2015, the government would have likely needed a search warrant to obtain GPS data from ***Beverly***'s phone, assuming such data was available. *See United States v. Jones, 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)* (holding that attaching a GPS device to a suspect's car constituted a search under the *Fourth Amendment*).

clearly erroneous if we are left with a definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *United States v. Hernandez, 670 F.3d 616, 620 (5th Cir. 2012)*). "But when influenced by an incorrect view of the law or an incorrect application of the correct legal test, a factual determination is reviewed *de novo*." *United States v. Toussaint, 838 F.3d 503, 507 (5th Cir. 2016)* (citing *United States v. Mask, 330 F.3d 330, 335 (5th Cir. 2003)*).

HN2[↑] "The party seeking suppression 'has the burden of proving, by a preponderance of the evidence, that the evidence in question was obtained in violation of his *Fourth Amendment* rights.'" *United States v. Wallace, 885 F.3d 806, 809 (5th Cir. 2018)* (quoting *United States v. Smith, 978 F.2d 171, 176 (5th Cir. 1992)*). Evidence **[*232]** is viewed in the light most favorable to the prevailing party. *Mendez, 885 F.3d at 907*.

III.

A.

HN3[↑] The *Fourth Amendment* guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. Const. amend. IV*. The basic purpose of the Amendment "is to safeguard the privacy and security of individuals against arbitrary **[**7]** invasions by governmental officials." *Carpenter, 138 S. Ct. at 2213* (citing *Camara v. Mun. Court of City and Cty. of San Francisco, 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)*). It protects against government intrusion into areas where people have reasonable expectations of privacy. *Smith v. Maryland, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979)*; *Katz v. United States, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)*. Where the government seeks to intrude upon such private spheres, it generally needs a warrant supported by probable cause. *Carpenter, 138 S. Ct. at 2213*.

HN4[↑] "The *Fourth Amendment* contains no provision expressly precluding the use of evidence obtained in violation of its commands . . . ." *United States v. Leon, 468 U.S. 897, 906, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)*. The reason is that exclusion of such evidence would not cure the wrong condemned by the Amendment: the unlawful search or seizure itself. *Id.* However, courts have embraced the so-called "exclusionary rule"—a judicially created remedy that precludes the use of evidence obtained from an unconstitutional search or seizure—in order "to safeguard *Fourth Amendment* rights generally through its deterrent effect." *Id.* (citing *United States v. Calandra, 414 U.S. 338, 348, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)*).

HN5[↑] An exception to the exclusionary rule exists where government investigators acted with an objectively reasonable good-faith belief that their conduct was lawful. *Davis v. United States, 564 U.S. 229, 238, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011)*. This "good-faith exception" to the exclusionary rule is grounded in the observation that where official action is "pursued in complete good faith . . . the deterrence rationale loses much of its force." *Leon, 468 U.S. at 919* (quoting *United States v. Peltier, 422 U.S. 531, 539, 95 S. Ct. 2313, 45 L. Ed. 2d 374 (1975)*); *see also United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980)* (en **[**8]** banc) ("[T]he exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones.").

HN6[↑] The good-faith exception to the exclusionary rule, first articulated over forty years ago in *Leon*, has been applied to a range of cases. *See Davis, 564 U.S. at 238-39*. In *Leon* itself, the exception was applied where police acted in reliance on a warrant that was later held to be unsupported by probable cause. *Leon, 468 U.S. at 922*. However, the Court in *Leon* recognized several limitations on the good-faith exception. *Id. at 923*. As distilled in later cases, the good-faith exception will not apply:

> (1)When the issuing magistrate was misled by information in an affidavit that the affiant knew or reasonably should have known was false;
> (2)When the issuing magistrate wholly abandoned his judicial role;
> (3)When the warrant affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable; and
>
> **[*233]** (4)When the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that executing officers cannot reasonably presume it to be valid.

United States v. Woerner, 709 F.3d 527, 533-34 (5th Cir. 2013) (citing *United States v. Payne, 341 F.3d 393, 399-400 (5th Cir. 2003)*). For clarity and convenience, we refer—in this opinion—to the warrant-without-probable-cause **[**9]** strand of the good-faith exception as the "*Leon* exception."

HN7[↑] The good-faith exception has also been applied

to evidence obtained from *warrantless* searches later held to be unconstitutional. In *Illinois v. Krull*, for example, the Supreme Court applied the good-faith exception where officers had "act[ed] in objectively reasonable reliance upon a *statute* authorizing warrantless administrative searches, but where the statute [was] ultimately found to violate the Fourth Amendment." 480 U.S. 340, 342, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987). The Court reasoned that if a "statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." Id. at 350. Similarly, the Supreme Court has applied the good-faith exception to a warrantless search that complied with binding appellate precedent that was later overruled. Davis, 564 U.S. at 232. In *Davis*, police conducted a vehicle search in reasonable reliance on binding circuit precedent, but several years later—while the defendant's criminal appeal was still pending—the Supreme Court held that such searches were unconstitutional. Id. at 239. The Court applied the good-faith exception **[**10]** on the ground that excluding the relevant evidence would not foster the appropriate deterrent effect. Id. at 241.

To distinguish it from the *Leon* exception, we refer to this strand of the good-faith exception—where a warrantless search is authorized by statute or binding precedent later ruled unconstitutional—as the "*Krull* exception."

B.

In 1986, Congress enacted the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701-2711. As amended in 1994, HN8[↑] the SCA permits a law enforcement agency to obtain a court order compelling the disclosure of certain telecommunications records when the agency "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). This standard, which is less stringent than the probable cause standard generally required for a search warrant, is derived from the Supreme Court's decision in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See United States v. Perrine, 518 F.3d 1196, 1202 (10th Cir. 2008).

In 2013, when the constitutionality of § 2703(d) was challenged in the Fifth Circuit, a divided panel held that the statute was constitutional even when applied to the disclosure of historical CSLI. In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600, 602 (5th Cir. 2013). The majority reasoned that CSLI records were business records of cell service providers and that, **[**11]** under the third-party doctrine, cell phone users did not have a reasonable expectation of privacy in those records. Id. at 610-12.

Eventually the same question reached the Supreme Court, which, as noted above, held on June 22, 2018 that HN9[↑] § 2703(d) was unconstitutional. Carpenter, 138 S. Ct. at [*234] 2220-21. The Court determined that obtaining CSLI from a wireless carrier amounts to a search under the Fourth Amendment because an individual has "a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." Id. at 2217. The Court rejected the argument that because CSLI was shared with and retained by wireless carriers, the request for such information amounted to "a garden-variety request for information from a third-party witness." Id. at 2219-20 (relying on the exhaustive, detailed nature of CSLI records and the indispensable need to carry a cell phone in modern society). The Court concluded that to acquire CSLI records "the Government must generally obtain a warrant supported by probable cause," id. at 2221, unless the search "falls within a specific exception to the warrant requirement." *Id.* (quoting Riley v. California, 573 U.S. 373, 382, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).

IV.

In the present appeal, the United States argues that the district court erred in suppressing ***Beverly***'s historical CSLI because it failed to apply the **[**12]** good-faith exception. ***Beverly*** responds that the good-faith exception does not apply because investigators acted in bad faith when they sought a warrant—the day *Carpenter* was decided—for CSLI they already had. Confusion arises because each party uses the term "good-faith exception" to refer to a different strand of the exception, without realizing that the other side is operating on a different wavelength. The United States approaches the case under the *Krull* exception and therefore focuses its good-faith arguments on the pre-*Carpenter* warrantless § 2703(d) order. ***Beverly*** treats the case under the *Leon* exception, devoting his attention to the post-*Carpenter* search warrant. As a result, the parties' arguments often pass in the night.

Complicating matters, the parties treat the suppressed CSLI evidence as a single unit, but really it is two: (1) the 102 days' worth of CSLI records covering January 24, 2015 through May 5, 2015 (the "2015 CSLI"), first

authorized by the § 2703(d) order in July 2015; and (2) the 152 days' worth of CSLI records covering August 25, 2014 through January 23, 2015 (the "2014 CSLI"), first authorized by the post-*Carpenter* search warrant in 2018.[3] Because the issues differ, we deal **[**13]** with the two units of CSLI evidence separately, beginning with the CSLI evidence that was obtained first—the 2015 CSLI—and then turning to the CSLI evidence that was obtained three years later—the 2014 CSLI.

We hold that the *Krull* strand of the good-faith exception properly applies to the 2015 CSLI, since it was obtained pursuant to a pre-*Carpenter* warrantless order authorized by statute. Because the government pursued the statutory order in good faith, the CSLI should not have been **[*235]** suppressed. As for the 2014 CSLI, we hold that the *Leon* strand of the good-faith exception applies because those records were first sought and obtained under a post-*Carpenter* search warrant. The 2014 CSLI should not have been suppressed because the government acted in good faith when applying for the search warrant and, even if the government did not act in good faith, the warrant was supported by probable cause. Finally, we hold that any suppression of toll records and subscriber information under *Carpenter* was erroneous because *Carpenter* only applies to evidence that can be used to track a person's physical movements over time.

A.

The government obtained the 2015 CSLI for ***Beverly***'s phone pursuant to a **[**14]** § 2703(d) order issued on July 8, 2015. Three years later, on the day *Carpenter* was decided, the government applied for—and got—a search warrant for this same CSLI. The district court characterized the government's warrant application as "meretricious" and stated that "the whole business was feigned." While acknowledging that the good-faith exception "allows a court to admit evidence obtained in compliance with a law later ruled unconstitutional," the court declined to apply the exception, reckoning that to do so "would render the *Fourth Amendment* empty."

We reject the district court's analysis because the good-faith exception—specifically, the *Krull* exception—properly applies. Just like in *Krull*, the investigators who obtained ***Beverly***'s CSLI in 2015 conducted a warrantless search authorized by a statute that was not found to be unconstitutional until after the search—in this case, years after. *480 U.S. at 350*. Furthermore, just like in *Davis*, the operative statute had been deemed constitutional at the time of the search by then-controlling judicial precedent. *564 U.S. at 235*. By all accounts, the FBI investigators acted in good faith *in 2015* when they reasonably relied on the authorization provided by § 2703(d).[4] Moreover, as in *Krull* and *Davis* **[**15]**, the deterrent rationale behind the exclusionary rule is inapplicable here: there is no reason to deter law enforcement officers from acting pursuant to federal statutes, especially those that have been upheld as valid by the relevant circuit court of appeals. *Davis, 564 U.S. at 231*; *Krull, 480 U.S. at 349*.

We find additional support for our holding in the fact that every one of our sister courts to have considered this question since *Carpenter* has agreed that the good-faith exception—specifically, the *Krull* exception—applies to CSLI obtained under § 2703(d) prior to *Carpenter*. *See United States v. Chambers, 751 F. App'x 44, 47 (2d Cir. 2018), cert. denied, 139 S. Ct. 1209, 203 L. Ed. 2d 233 (2019)*; *United States v. Goldstein, 914 F.3d 200, 204 (3d Cir. 2019)*; *United States v. Chavez, 894 F.3d 593, 608 (4th Cir. 2018), cert. denied, 139 S. Ct. 278, 202 L. Ed. 2d 184 (2018)*; *United States v. Carpenter (Carpenter II), 926 F.3d 313, 317-18 (6th Cir. 2019)*; *United States v. Curtis, 901 F.3d 846, 848-49 (7th Cir. 2018)*; *United States v. Korte, 918 F.3d 750, 757-59*

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[3] The district court found, and the record indicates, that the government sought the 2014 CSLI only when it applied for the search warrant in 2018. However, the government made statements at oral argument suggesting that it already possessed both the 2015 CSLI *and* the 2014 CSLI by the time it applied for the warrant. Referring to the 2018 search warrant, the government said, "the dates are a little bit different, but we didn't get anything new," and later added, "we're not trying to recover what we got from the search warrant because it's the same thing we got back in 2015." The government's speculation notwithstanding, the record plainly shows that the § 2703(d) order sought only the 2015 CSLI. In any event, for purposes of resolving the issues in this appeal, we accept the district court's finding that the government did not seek the 2014 CSLI until the search warrant application in 2018.

[4] The district court never considered whether investigators acted in good faith in 2015, instead focusing exclusively on the government's warrant application in 2018. ***Beverly*** likewise never argues that the investigators who obtained his CSLI in 2015 acted in bad faith. At the suppression hearing, ***Beverly*** conceded that these investigators "complied with the law that was in effect at the particular time." When asked at oral argument whether he was arguing that investigators acted in bad faith when they got the § 2703(d) order in 2015, ***Beverly***'s counsel responded, "I have no information."

[*236] (9th Cir. 2019), cert. denied, 140-- S. Ct. 264, 205 L. Ed. 2d 166, 2019 WL 4923188 (2019); United States v. Joyner, 899 F.3d 1199, 1204-05 (11th Cir. 2018).

Of particular salience is the Sixth Circuit's decision in *Carpenter II*. On remand after the Supreme Court announced its new rule in *Carpenter* that § 2703(d) was unconstitutional, the Sixth Circuit affirmed Timothy Carpenter's conviction and, citing *Krull*, held that the CSLI evidence obtained pursuant to § 2703(d) was still admissible *against Carpenter himself* because of the good-faith exception. Carpenter II, 926 F.3d at 317-18. The same logic applies here: the district court should have applied the *Krull* strand of the good-faith exception and denied **Beverly**'s motion to suppress the 2015 CSLI.

B.

The 2014 CSLI presents a slightly different [**16] issue. Unlike **Beverly**'s 2015 CSLI (which the government first obtained back in 2015 under the § 2703(d) order), the record reflects that the government never sought or obtained the 2014 CSLI until it applied for the search warrant the day *Carpenter* came down Case: 18-20729 Document: 00515198884 Page: 12 Date Filed: 11/14/2019 in 2018.[5] Because the government never obtained the 2014 CSLI under a pre-*Carpenter* statutory order, the Krull exception does not apply. Instead, we must subject the 2014 CSLI to a separate exclusionary rule analysis, the proper focus of which is the 2018 search warrant.[6] "We HN10 [↑] apply a two-step test to determine whether to suppress evidence under the exclusionary rule: first, we ask whether the good faith exception to the rule applies, and second, we ask whether the warrant was supported by probable cause." United States v. Robinson, 741 F.3d 588, 594 (5th Cir. 2014) (citing United States v. Mays, 466 F.3d 335, 342-43 (5th Cir. 2006)).

As noted earlier, the parties do not bifurcate the CSLI in their arguments, with the result that neither party directly addresses how we should treat the 2014 CSLI in relation to the 2018 warrant. The government argues generally that investigators applied for the search warrant in good faith, and that the warrant was supported by probable cause. **Beverly**'s refrain [**17] is that "the government did not act in good faith" in obtaining the 2018 warrant. He also contends that the warrant is "fruit of the poisonous tree" because the evidence mustered in the warrant application was derived from Davis's CSLI, which—according to **Beverly**—was obtained via an unconstitutional § 2703(d) order.[7]

For its part, the district court interpreted the addition of the previously-unrequested 2014 CSLI to the 2018 warrant application as an underhanded attempt to "save" the government's bad-faith request for evidence it already had—namely, the [*237] 2015 CSLI. As a result, the district court suppressed the 2014 CSLI *and* the 2015 CSLI. But, as discussed above, the district court misapplied the *Krull* exception and should not have suppressed the 2015 CSLI. Because it was based on an error of law, we give no deference to the district court's finding that the government acted in bad faith in 2018. Toussaint, 838 F.3d at 507 ("But when influenced by an incorrect view of the law or an incorrect application of the correct legal test, a factual determination is reviewed *de novo*.").

Applying our two-step test, we hold that the good-faith exception—specifically, the Leon exception—properly applies to the 2014 CSLI. [**18] Because the government did not already possess the 2014 CSLI when it applied for the search warrant in 2018, its application was made in good faith. We further hold that even if the application was made in bad faith, the 2014 CSLI would still be admissible because the warrant was supported by probable cause.

The *Leon* strand of the good-faith exception applies

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[5] Presumably, the government wanted the extra CSLI data to connect **Beverly**'s phone to the earliest bank robberies—the ones that occurred between August 25, 2014 and January 24, 2015, the day the government lifted Davis's handprint from the teller counter.

[6] The government's statements at oral argument might be construed as an argument that because the dates were only "a little bit different" no separate analysis is required. But the dates are dramatically different, not "a little bit." The government sought over 250 days' worth of CSLI in its 2018 warrant application, more than double the 102 days' worth of CSLI it sought in the § 2703(d) order three years earlier. A separate analysis is necessary.

[7] **Beverly** claims that the district court's suppression order extended to the CSLI from Davis's phone. This is far from clear. The suppression opinion refers only to the § 2703(d) order pertaining to **Beverly**'s CSLI. While **Beverly** is correct to say that he *argued for* suppression of the data gained from Davis's phone, he fails to point to any language in the suppression opinion where the district court granted his request.

here because the government first sought and obtained the 2014 CSLI in reliance on a search warrant, which may or may not have been supported by probable cause. *See Leon, 468 U.S. at 918*. To be sure, HN11 the *Leon* exception comes with a number of limitations, the first of which dictates that the good-faith exception will not apply if the warrant application is misleading. *Woerner, 709 F.3d at 534*; *Mays, 466 F.3d at 343*. The party challenging the good-faith exception bears the burden of establishing "that material misstatements or omissions are contained in the supporting affidavit and that if those statements were excised (or the omitted information included), the affidavit would be insufficient to support the warrant." *United States v. Signoretto, 535 F. App'x 336, 339 (5th Cir. 2013)* (per curiam) (citing *United States v. Privette, 947 F.2d 1259, 1261 (5th Cir. 1991)*). **Beverly** does not meet this burden.

Beverly argues that the government's warrant application was misleading because the government "failed to disclose to the **[**19]** magistrate that it already had the information for which it sought a warrant." That argument would be worth considering if the focus here was the 2015 CSLI, which the government did indeed already possess. But, as discussed above, that evidence—the 2015 CSLI—comes in separately by means of the *Krull* exception, rendering the warrant irrelevant. With respect to the 2014 CSLI at issue here, where the warrant matters, the record reflects that the government did *not* already possess the information it sought. **Beverly**'s argument is therefore unpersuasive, and he offers no alternative reasons for thinking that the government's failure to reveal its possession of the 2015 CSLI triggers the first *Leon* limitation.

But even if the government's failure to reveal its possession of the 2015 CSLI amounted to bad faith with respect to the 2014 CSLI, the government would still prevail under step two: probable cause. HN12 Probable cause means "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Piazza v. Mayne, 217 F.3d 239, 245-46 (5th Cir. 2000)* (quoting **[**20]** *Michigan v. DeFillippo, 443 U.S. 31, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979)*). A search warrant application must show probable cause "to justify listing those items as potential evidence subject to seizure." *United States v. Sanjar, 876 F.3d 725, 735 (5th Cir. 2017)*.

Here, the government's search warrant application satisfies the probable **[*238]** cause standard.[8] The application describes the FBI's investigation and how Davis's palm print was lifted from a teller counter in January 2015. It recounts Davis's subsequent arrest and how the Dodge Ram he was driving matched the truck used in the bank robberies. It further describes how Davis provided investigators with his phone number and fingered his co-conspirators, including **Beverly**, saying they participated in every one of the robberies between August 24, 2014 and May 2, 2015. The application highlights Davis's admission that the robbers communicated by cell phone immediately before, during, and after the bank robberies. Finally, the application states that "follow up investigations" confirmed **Beverly**'s phone number—the one for which the government was requesting CSLI data. A prudent person looking at these facts and circumstances would be justified in believing that **Beverly** participated in the bank robberies.

Beverly's "fruit of the poisonous tree" response is unavailing. **[**21]** For one thing, there is no poisonous tree: the CSLI obtained for Davis's phone pursuant to § *2703(d)* would be admissible under the *Krull* exception, just like **Beverly**'s 2015 CSLI.[9] More fundamentally, though, **Beverly** lacks standing to assert that the search of Davis's phone records was unconstitutional. **Beverly** had no expectation of privacy in Davis's phone data, even if the search was unconstitutional as to Davis. *See United States v. Powell, 732 F.3d 361, 374 (5th Cir. 2013)* (HN13 "*Fourth Amendment* rights . . . may not be vicariously asserted." (quoting *Alderman v. United States, 394 U.S. 165, 174, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969)*)); *United States v. Ibarra, 948 F.2d 903, 905 (5th Cir. 1991)* (holding that to establish a *Fourth Amendment* violation, defendants must show a legitimate expectation of privacy in the domain

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[8] For this reason, the 2014 CSLI would be admissible even if, *contra* the district court's factual recounting, the government somehow came to possess the 2014 CSLI before ever being authorized to do so, and even if that meant that its warrant application was made in bad faith.

[9] Besides, the evidence from Davis's phone that brought **Beverly**'s number into suspicion was not Davis's CSLI, it was Davis's toll records. As **Beverly** concedes, "it appears the Government reviewed cell phone records of alleged co-defendants who the informing defendant called close in time to the robberies, to determine possible suspects involved." **Beverly** fails to appreciate that CSLI and toll records are different, and that toll records are not "poisonous" under *Carpenter*—see part IV.C, *infra*.

searched).

In sum, the district court should have applied the *Leon* strand of the good-faith exception and denied ***Beverly***'s motion to suppress the 2014 CSLI. Or, in the alternative, the district court should have denied the motion to suppress because the 2018 search warrant was supported by probable cause.

C.

Finally, the government argues that the district court erred in suppressing ***Beverly***'s toll records and subscriber information obtained under the *§ 2703(d)* order. To the extent that the district court intended to suppress this evidence, it erred.[10]

[*239] The parties agree that *Carpenter*'s holding only applies **[**22]** to evidence that can reveal a person's physical movements over time. *See 138 S. Ct. at 2217* (holding that a person "maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI"). ***Beverly*** contends that because the government "doubtless" will attempt to use his toll records and subscriber information to track his location over time, the toll records and subscriber information are equivalent to CSLI under *Carpenter*'s reasoning. We disagree. ***Beverly*** fails to articulate any credible grounds for accepting the first premise of his argument: namely, that toll records and subscriber records will be—or even can be—used to track someone's physical location over time. With no showing of that, ***Beverly***'s attempt to force this evidence into *Carpenter*'s holding is a nonstarter. In any event, *Carpenter* cautioned that it was a "narrow" decision that did not address, among other things, "other business records that might incidentally reveal location." *Id. at 2220*. We therefore decline to expand *Carpenter* in the way ***Beverly*** urges.

* * *

For the forgoing reasons, we hold that the district court erred in granting ***Beverly***'s motion to suppress.

REVERSED.

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[10] It is not clear whether the district court intended to suppress ***Beverly***'s toll records and subscriber information. The suppression opinion repeatedly mentions "cell-site location data" and never expressly refers to subscriber information or toll records. Still, the suppression order does specify that the "warrant and the order are void," and since both the warrant and the order extend to subscriber information and toll records, it is at least plausible that the district court intended to suppress this evidence along with the CSLI.

18 U.S.C. 2703

(a)Contents of Wire or Electronic Communications in Electronic Storage.—

A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President) by a court of competent jurisdiction. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b)Contents of Wire or Electronic Communications in a Remote Computing Service.—

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

(A)without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President) by a court of competent jurisdiction; or

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

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

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

except that delayed notice may be given pursuant to section 2705 of this title.

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

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

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

(c)Records Concerning Electronic Communication Service or Remote Computing Service.—

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

(A)obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President) by a court of competent jurisdiction;

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

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

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

(E)seeks information under paragraph (2).

(2)A provider of electronic communication service or remote computing service shall disclose to a governmental entity the—

(A)name;

(B)address;

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

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

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

(F)means and source of payment for such service (including any credit card or bank account number),

of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1).

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

(d)Requirements for Court Order.—

A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing

criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

(e)No Cause of Action Against a Provider Disclosing Information Under This Chapter.—

No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.

(f)Requirement To Preserve Evidence.—

(1)In general.—

A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.

(2)Period of retention.—

Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g)Presence of Officer Not Required.—

Notwithstanding section 3105 of this title, the presence of an officer shall not be required for service or execution of a search warrant issued in accordance with this chapter requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

(h)Comity Analysis and Disclosure of Information Regarding Legal Process Seeking Contents of Wire or Electronic Communication.—

(1)Definitions.—In this subsection—

(A)the term "qualifying foreign government" means a foreign government—

(i)with which the United States has an executive agreement that has entered into force under section 2523; and

(ii)the laws of which provide to electronic communication service providers and remote computing service providers substantive and procedural opportunities similar to those provided under paragraphs (2) and (5); and

(B)the term "United States person" has the meaning given the term in section 2523.

(2)Motions to quash or modify.—

(A)A provider of electronic communication service to the public or remote computing service, including a foreign electronic communication service or remote computing service, that is being required to disclose pursuant to legal process issued under this section the contents of a wire or electronic communication of a subscriber or customer, may file a motion to modify or quash the legal process where the provider reasonably believes—

(i)that the customer or subscriber is not a United States person and does not reside in the United States; and

(ii)that the required disclosure would create a material risk that the provider would violate the laws of a qualifying foreign government.

Such a motion shall be filed not later than 14 days after the date on which the provider was served with the legal process, absent agreement with the government or permission from the court to extend the deadline based on an application made within the 14 days. The right to move to quash is without prejudice to any other grounds to move to quash or defenses thereto, but it shall be the sole basis for moving to quash on the grounds of a conflict of law related to a qualifying foreign government.

(B)Upon receipt of a motion filed pursuant to subparagraph (A), the court shall afford the governmental entity that applied for or issued the legal process under this section the opportunity to respond. The court may modify or quash the legal process, as appropriate, only if the court finds that—

(i)the required disclosure would cause the provider to violate the laws of a qualifying foreign government;

(ii)based on the totality of the circumstances, the interests of justice dictate that the legal process should be modified or quashed; and

(iii)the customer or subscriber is not a United States person and does not reside in the United States.

(3)Comity analysis.—For purposes of making a determination under paragraph (2)(B)(ii), the court shall take into account, as appropriate—

(A)the interests of the United States, including the investigative interests of the governmental entity seeking to require the disclosure;

(B)the interests of the qualifying foreign government in preventing any prohibited disclosure;

(C)the likelihood, extent, and nature of penalties to the provider or any employees of the provider as a result of inconsistent legal requirements imposed on the provider;

(D)the location and nationality of the subscriber or customer whose communications are being sought, if known, and the nature and extent of the subscriber or customer's connection to the United States, or if the legal process has been sought on behalf of a foreign authority pursuant to section 3512, the nature and extent of the subscriber or customer's connection to the foreign authority's country;

(E)the nature and extent of the provider's ties to and presence in the United States;

(F)the importance to the investigation of the information required to be disclosed;

(G)the likelihood of timely and effective access to the information required to be disclosed through means that would cause less serious negative consequences; and

(H)if the legal process has been sought on behalf of a foreign authority pursuant to section 3512, the investigative interests of the foreign authority making the request for assistance.

(4)Disclosure obligations during pendency of challenge.—

A service provider shall preserve, but not be obligated to produce, information sought during the pendency of a motion brought under this subsection, unless the court finds that immediate production is necessary to prevent an adverse result identified in section 2705(a)(2).

(5)Disclosure to qualifying foreign government.—

(A)It shall not constitute a violation of a protective order issued under section 2705 for a provider of electronic communication service to the public or remote computing service to disclose to the entity within a qualifying foreign government, designated in an executive agreement under section 2523, the fact of the existence of legal process issued under this section seeking the contents of a wire or electronic communication of a customer or subscriber who is a national or resident of the qualifying foreign government.

(B)Nothing in this paragraph shall be construed to modify or otherwise affect any other authority to make a motion to modify or quash a protective order issued under section 2705.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1861; amended Pub. L. 100–690, title VII, §§ 7038, 7039, Nov. 18, 1988, 102 Stat. 4399; Pub. L. 103–322, title XXXIII, § 330003(b), Sept. 13, 1994, 108 Stat. 2140; Pub. L. 103–414, title II, § 207(a), Oct. 25, 1994, 108 Stat. 4292; Pub. L. 104–132, title VIII, § 804, Apr. 24, 1996, 110 Stat. 1305; Pub. L. 104–293, title VI, § 601(b), Oct. 11, 1996, 110 Stat. 3469; Pub. L. 104–294, title VI, § 605(f), Oct. 11, 1996, 110 Stat. 3510; Pub. L. 105–184, § 8, June 23, 1998, 112 Stat. 522; Pub. L. 107–56, title II, §§ 209(2), 210, 212(b)(1), 220(a)(1), (b), Oct. 26, 2001, 115 Stat. 283, 285, 291, 292; Pub. L. 107–273, div. B, title IV, § 4005(a)(2), div. C, title I, § 11010, Nov. 2, 2002, 116 Stat. 1812, 1822; Pub. L. 107–296, title XXII, § 2207(h)(1), formerly title II, § 225(h)(1), Nov. 25, 2002, 116 Stat. 2158, renumbered § 2207(h)(1), Pub. L. 115–278, § 2(g)(2)(I), Nov. 16, 2018, 132 Stat. 4178; Pub. L. 109–162, title XI, § 1171(a)(1), Jan. 5, 2006, 119 Stat. 3123; Pub. L. 111–79, § 2(1), Oct. 19, 2009, 123 Stat. 2086; Pub. L. 114–328, div. E, title LVII, § 5228(b)(1), Dec. 23, 2016, 130 Stat. 2912; Pub. L. 115–141, div. V, § 103(b), Mar. 23, 2018, 132 Stat. 1214.)