

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANDREW HARGETT, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Whether the Fourth Amendment exclusionary rule required suppression of evidence obtained as a result of Mr. Hargett's arrest.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is Andrew Hargett, Jr.

Respondent, who was the Plaintiff-Appellee below, is the United States of America.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case by unpublished opinion issued 21 January 2020, in which it affirmed the judgment of the trial court. A copy of the Fourth Circuit's opinion is included in the Appendix to this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of an opinion affirming the denial of Mr. Hargett's pretrial motion to suppress evidence, and affirming his convictions, following a jury trial, of one count of possession with the intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841(a)(1) (Count 1); one count of possession with intent to distribute a quantity of cocaine and a quantity of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) (Count 2); one count of possession of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c) (Count 3); and one count of possession of a firearm having been previously convicted of a felony in violation of 18 U.S.C. §§ 922(g), 924 (Count 4). J.A. 18, 289-90. The petition is being filed within the time permitted by the Rules of this Court, as extended by the Court's Order entered 19 March 2020. *See* S. Ct. R. 13. This Court has jurisdiction to review the Fourth Circuit's opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

Investigation and arrest of Andrew Hargett, Jr.

In the fall of 2015, the Nash County Sheriff’s Office received information from a confidential source, later identified as Samuel Rose, that Andrew Hargett, Jr., of Raleigh, North Carolina, was supplying cocaine to Mr. Rose. J.A. 42-43. Mr. Rose told officers that he had traveled to Atlanta with Mr. Hargett twice over the last couple of weeks to pick up cocaine. J.A. 43. Mr. Rose provided a cell phone number he said he used to contact Mr. Hargett. J.A. 43-44.

Phillip Lewis of the Nash County Sheriff’s Office, also a DEA task force officer, applied for a pen register trap and trace order to obtain real-time cell site location information (“CSLI”) and call information for the cell phone number Mr. Rose provided. J.A. 42, 44; see J.A. 300-10. TFO Lewis used the CLSI to monitor the cell phone’s location. J.A. 44-45.

On 16 November 2015, Mr. Rose told TFO Lewis that Mr. Rose and Mr. Hargett were planning to travel to Atlanta over the upcoming weekend to pick up cocaine. J.A. 147. Around 11:00 p.m. on November 21, Mr. Rose told TFO Lewis

they were leaving for Atlanta. J.A. 147. Mr. Rose also sent TFO Lewis a photograph of what Mr. Rose said was Mr. Hargett's blue Nissan Maxima, which was left parked in the parking lot of a Harris Teeter grocery store in the North Hills development in Raleigh. J.A. 147, 151.

Investigators used the CSLI to monitor the trip to Atlanta. *See* J.A. 44-45, 147-50. During the trip, Mr. Rose kept in contact with TFO Lewis. *See* J.A. 43-45, 149-53. Mr. Rose sent TFO Lewis the name of the hotel where they were staying, and a photograph of a Marshall amplifier box, where Mr. Rose believed cocaine was hidden. J.A. 46, 152-53.

While Mr. Rose and Mr. Hargett, accompanied by a woman later identified as Yashica Miller, were away, officers from multiple agencies conducted surveillance in the North Hills area. J.A. 46. Officers located the blue Maxima in the Harris Teeter parking lot, and determined that it was registered to Zechariah Hargett, Andrew Hargett's brother. J.A. 148. Officers found a black Maxima, also identified by Mr. Rose, in a nearby North Hills parking lot. J.A. 148. The black Maxima was registered to Andrew Hargett. J.A. 148. At a nearby apartment building, where officers suspected Mr. Hargett lived, the officers set up surveillance units. J.A. 46.

On November 22, Mr. Rose reported to TFO Lewis that he, Mr. Hargett, and Ms. Miller were on their way back to Raleigh. J.A. 47. Mr. Rose drove a car the group had rented in Atlanta, while Mr. Hargett drove Mr. Rose's car. J.A. 153. They dropped off the rental car at the airport in Raleigh, and returned to North Hills in Mr. Rose's car. J.A. 153-54. Late at night on November 22, or in the early

morning hours of November 23, officers saw Mr. Rose, Mr. Hargett, and Ms. Miller arrive at the Harris Teeter parking lot and load luggage and other items into the blue Maxima. J.A. 47, 154, 203, 222. Mr. Rose left the area, while Mr. Hargett got into the blue Maxima with Ms. Miller and drove to a nearby apartment building, 201 Park at North Hills Street. J.A. 47, 154-55. Mr. Hargett circled the apartment building once, and then pulled into the parking deck. J.A. 155. As Mr. Hargett drove into the parking deck, officers blocked him in and conducted a traffic stop. J.A. 48, 155-57.

After being removed from the blue Maxima, Mr. Hargett was handcuffed and placed in the front passenger seat of Agent Kevin McLaughlin's car. J.A. 156-57, 207. TFO Lewis read Mr. Hargett his Miranda rights and encouraged him to cooperate with law enforcement. J.A. 157. Mr. Hargett did not speak at first. J.A. 157. TFO Lewis then asked whether Mr. Hargett had a firearm; Mr. Hargett replied that he did not have a firearm "on me." J.A. 157. TFO Lewis then asked whether Mr. Hargett had a firearm in the blue Maxima, and Mr. Hargett admitted that he did. J.A. 157. Mr. Hargett denied living in the apartment building, and said he was there to visit a friend. J.A. 160. TFO Lewis continued, unsuccessfully, to attempt to elicit information from Mr. Hargett, until Mr. Hargett said he did not want to cooperate. J.A. 157-58.

While TFO Lewis questioned Mr. Hargett, other officers interviewed Ms. Miller. J.A. 160, 211. Ms. Miller told the officers she believed that Mr. Hargett lived in the apartment building, but she did not know which apartment number.

J.A. 160, 211.

Officers on the scene called a K-9 unit to conduct a dog sniff of the blue Maxima. J.A. 160, 204, 228-29. K-9 Lucy of the Raleigh Police Department alerted at the trunk of the blue Maxima. J.A. 160, 228-30. Officers opened the trunk and removed a Marshall amplifier box. J.A. 160-61, 230. K-9 Lucy sniffed the amplifier box and alerted again. J.A. 161, 204-05, 231. Officers inspected the amplifier box, which appeared to have been taken apart. J.A. 161. TFO Lewis removed the cover and found 2.5 kilograms of white powder, later confirmed to be cocaine, inside the amplifier box. J.A. 161.

After finding the suspected cocaine, officers continued to search the blue Maxima. J.A. 49, 162. They found a Glock .45 caliber pistol in the glovebox. J.A. 49, 162-63; *see* J.A. 205. In the center console of the blue Maxima, officers found a document with Mr. Hargett's name, a North Hills address, and an apartment number. J.A. 163, 165-67. Officers also found a key chain, including a key fob. J.A. 163-64.

In the parking deck, TFO Lewis told Mr. Hargett they would be seizing a black Maxima registered to Mr. Hargett based on the North Carolina substance abuse tax. J.A. 171, 173. The black Maxima was parked in the same parking deck where Mr. Hargett was stopped, near the entrance to the apartment building. J.A. 172. TFO Lewis asked Mr. Hargett what to do with any property found in the black Maxima, and Mr. Hargett told him to move the property into the blue Maxima. J.A. 171. While unloading the black Maxima, TFO Lewis found a paper bag of cash, and

another Marshall amplifier stuffed with cash, totaling about \$35,000. J.A. 50, 171-72.

Agent McLaughlin served a subpoena on the apartment building manager, and confirmed that Apartment 256 was rented to Zechariah Hargett. J.A. 168. The manager said that Andrew Hargett also lived in the apartment. J.A. 168.

With Mr. Hargett in custody, officers used the key fob to enter the apartment building. J.A. 168-69. They knocked on the door of Apartment 256, but no one answered. J.A. 168-69. Officers used a key found in the blue Maxima to enter and conduct a sweep of the apartment. J.A. 169. In a bedroom, TFO Lewis found a bag of white powder, which he suspected was cocaine. J.A. 169.

While Mr. Hargett remained in custody at the apartment building, TFO Scott Young applied for a warrant to search Apartment 256. J.A. 50, 170; *see* J.A. 173-75. TFO Lewis informed TFO Young of the suspected cocaine, and TFO Young included the information in the warrant affidavit. J.A. 170. The warrant was issued at 6:45 a.m. on 23 November 2015. J.A. 126. Shortly thereafter, officers executed the warrant and seized powder and crack cocaine, digital scales, bank documents, cash, .45 caliber ammunition, an identification card for Mr. Hargett, business cards for Mr. Hargett's barbershop business, and a business card for a storage facility on Poole Road in Raleigh. J.A. 176-78.

Investigators interviewed the manager at a storage facility on Poole Road, and confirmed that Mr. Hargett rented two units the facility and had accessed them as recently as November 19. J.A. 185; *see* J.A. 95. Later in the day on November

23, TFO Young applied for and received a warrant to search both units. J.A. 132-36, 183. Officers executed the warrant and seized a total of approximately \$80,000 in cash, along with other property. J.A. 186-87. While officers were searching the units, Zechariah Hargett arrived at the storage facility with bolt cutters and padlocks. J.A. 187-88. He spoke to the officers and said his brother had been arrested and that he was there to pick up a television from the storage units. J.A. 188.

Also on 23 November 2015, Mr. Hargett was charged by criminal complaint with conspiracy to possess with the intent to distribute 500 grams or more of cocaine and possession of a firearm in furtherance of a drug trafficking crime. J.A. 4, 5. After a preliminary hearing, the Court found probable cause to believe Mr. Hargett committed the offenses charged. J.A. 5-6. Mr. Hargett was later charged by an indictment. J.A. 6.

Mr. Hargett's motion to suppress evidence

Mr. Hargett moved, pursuant to the Fourth and Fifth Amendments, to suppress evidence obtained as a result of the events of 23 November 2015. J.A. 58-95. Mr. Hargett argued that the warrantless search of the blue Maxima was unreasonable and in violation of the Fourth Amendment because police did not have probable cause to believe that there was contraband in any part of the vehicle except the trunk, where K-9 Lucy alerted, and officers found a Marshall amplifier box. J.A. 65. Therefore, Mr. Hargett argued that all evidence seized from the blue Maxima should be suppressed. J.A. 66-67.

Further, Mr. Hargett argued that the warrantless search of his apartment and seizure of evidence in plain view violated the Fourth Amendment, because the search could not be justified as a limited protective sweep. J.A. 67. Mr. Hargett sought to suppress all evidence obtained from the search of his apartment. J.A. 70-71. Mr. Hargett also argued that the search of his storage units violated the Fourth Amendment, because the search warrant was not supported by probable cause, and sought to suppress the evidence found in the units. J.A. 80-82.

Finally, Mr. Hargett argued that his post-arrest statements to TFO Lewis, in particular his statement that there was a firearm in the blue Maxima, should be suppressed. J.A. 66. Citing TFO Lewis's testimony at the preliminary hearing that Mr. Hargett was "in shock" at the time TFO Lewis advised him of his Miranda rights, *see* J.A. 49, Mr. Hargett argued that he did not knowingly waive his Miranda rights before making the statements. J.A. 74-77. Therefore, Mr. Hargett sought to suppress his statements. J.A. 78.

The Government responded in opposition to the motion to suppress. J.A. 96-136. First, the Government argued that Mr. Hargett validly waived his *Miranda* rights by making a self-incriminating statement after being advised of his rights, and without any police coercion. J.A. 107-113. The Government argued that Mr. Hargett was alert and lucid, and explained that when TFO Lewis testified that Mr. Hargett was "in shock," TFO Lewis meant that Mr. Hargett appeared upset and surprised at being arrested. J.A. 110. Therefore, the Government argued that Mr. Hargett's post-arrest statements should not be suppressed. J.A. 112-13.

Turning to Mr. Hargett's Fourth Amendment arguments, the Government argued that there was probable cause to search the blue Maxima, and that because there was probable cause, it was proper for the officers to search every part of the vehicle and its contents that may conceal the object of the search. J.A. 113. The Government contended that the information about Mr. Hargett's trip to Atlanta to pick up cocaine, the officers' observation of Mr. Hargett loading items from Mr. Rose's car into the blue Maxima after returning from the trip, and Mr. Hargett's post-arrest admission that there was a firearm in the car furnished probable cause to search the car for cocaine and the firearm. J.A. 113-14. In the alternative, the Government argued that agents properly searched the blue Maxima incident to Mr. Hargett's arrest, because it was reasonable to believe evidence relevant to the crimes of arrest might be found in the car. J.A. 116.

The Government conceded that the warrantless search of Mr. Hargett's apartment was unjustified. J.A. 117-18. However, the Government argued that the independent source rule applied. J.A. 118. According to the Government, the agents sought a search warrant for the apartment based on the evidence obtained from the search of the blue Maxima, not the suspected cocaine seized during the warrantless search of the apartment. J.A. 118-19. An agent was already in the process of drafting the search warrant affidavit when the warrantless search occurred, and although the affidavit included information from the warrantless search, the Government argued that even without that information, the affidavit showed probable cause. J.A. 118-21. The Government also defended the searches of

the two storage units, arguing that both searches were supported by valid search warrants, and even if the search warrants were not valid, the good faith exception to the exclusionary rule applied. J.A. 121-24.

The district court held a hearing on the motion to suppress on 20 March 2017. J.A. 14. The Government called TFO Lewis, TFO Wade Butler of the Rocky Mount Police Department and the DEA, and K-9 Officer David Greene of the Raleigh Police Department. J.A. 141-239.

TFO Lewis testified about his involvement in the investigation of Mr. Rose and later Mr. Hargett. J.A. 141-43. TFO Lewis recounted his conversations with Mr. Rose, who described his trips to Atlanta with Mr. Hargett. J.A. 143-45. TFO Lewis testified that he obtained a trap and trace order on a phone number he believed was associated with Mr. Hargett, and used CSLI to track what he understood were Mr. Hargett's movements. J.A. 145-50. He testified about his contact with Mr. Rose leading up to Mr. Hargett's arrest on 23 November 2015, and how he corroborated what Mr. Rose told him by referring to the CSLI. J.A. 148. TFO Lewis described the officers' actions on November 22 and 23, including the stop of Mr. Hargett and Ms. Miller, Mr. Hargett's post-arrest statements, the search of the blue Maxima and the black Maxima, the warrantless search of Apartment 256 followed by a search pursuant to a search warrant, and the search of Mr. Hargett's storage units. J.A. 147-219. TFO Lewis recalled reading Mr. Hargett his Miranda rights, and described Mr. Hargett's demeanor after being read his rights. J.A. 158. TFO Lewis testified that Mr. Hargett seemed "completely aware" of what

was going on, but was in “some type of shock as in disbelief that this had occurred to him.” J.A. 158.

TFO Butler testified that he conducted surveillance in North Hills on November 22 and 23. J.A. 220. He recounted seeing Mr. Hargett and Ms. Miller unload items from Mr. Rose’s car into the blue Maxima. J.A. 222.

Finally, K-9 Officer Greene testified that he and K-9 Lucy responded to the scene to conduct a dog sniff of the blue Maxima. J.A. 227-30. Officer Greene testified about K-9 Lucy’s training and her behavior while sniffing the blue Maxima on November 23. J.A. 230-31.

Mr. Hargett briefly recalled TFO Lewis. J.A. 235-39. Mr. Hargett did not present any other evidence. J.A. 239.

The district court heard argument from both parties before announcing its ruling from the bench. J.A. 239-61, 264. The district court denied the motion to suppress in its entirety. J.A. 286-87.

The district court found that the officers had probable cause to stop Mr. Hargett while he was driving the blue Maxima on 23 November 2015, based on probable cause to believe the car contained cocaine. J.A. 268-69. The district court found that TFO Lewis advised Mr. Hargett of his Miranda rights, and then asked Mr. Hargett whether he had a firearm, and whether he had a firearm in the blue Maxima; Mr. Hargett responded that he did have a firearm in the car. J.A. 269. The district court credited TFO Lewis’s testimony that Mr. Hargett spoke clearly and appeared alert and lucid at the time he received Miranda warnings, and did

nothing to suggest he did not understand his Miranda rights. J.A. 269-70. The district court found that Mr. Hargett validly waived his right to remain silent, and denied the motion to suppress to the extent it was based on the Fifth Amendment. *See* J.A. 276-80. The district also ruled that the doctrine of inevitable discovery applied to the firearm and other items found in the blue Maxima. J.A. 280. The district court concluded that, because the officers had probable cause to arrest Mr. Hargett, they could have lawfully searched the blue Maxima as a search incident to the arrest, and would have found the firearm and other evidence. J.A. 280, 282-83. Finally, the district court found that there was probable cause to search the blue Maxima, and no warrant was required. *See* J.A. 280-83. On these bases, the district court denied the motion to suppress evidence obtained from the search of the blue Maxima.

Regarding the search of the black Maxima, the district court noted that the issue was not developed in briefing, and declined to discuss it further. J.A. 273. The district court declined to suppress evidence of the cash found in the black Maxima. J.A. 273.

Turning to the search of Mr. Hargett's apartment, the district court declined to address whether the warrantless entry into the apartment was a lawful protective sweep. J.A. 283. The district court did not reach that issue because it concluded that the independent source doctrine applied, based on the officers' later search of the apartment pursuant to a search warrant. J.A. 283-84. The district court found that officers had already decided to seek a search warrant before they

entered the apartment. J.A. 284. In his warrant affidavit, TFO Young referred to a bag of white powder the officers found during the warrantless search of the apartment; however, the district court concluded that this information did not affect the magistrate's decision to issue a search warrant for the apartment. J.A. 284-85. Therefore, the district court denied the motion to suppress evidence obtained from the search of Mr. Hargett's apartment. J.A. 285.

Finally, the district court found that the search warrant for Mr. Hargett's storage units was supported by probable cause. J.A. 285. In the alternative, to the extent the warrant was not supported by probable cause, the district court ruled that the good faith exception applied. J.A. 286.

Superseding indictments and § 851 information

After the denial of the suppression motion, Mr. Hargett filed a pro se motion to vacate the district court's ruling. J.A. 17. On 21 August 2017, Mr. Hargett pleaded not guilty to both counts of the indictment, and the district court denied the pro se motion to vacate. J.A. 17.

Prior to trial, the Government filed a superseding indictment and then a second superseding indictment. J.A. 18. In the second superseding indictment, Mr. Hargett was charged with one count of possession with the intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841(a)(1) (Count 1); one count of possession with intent to distribute a quantity of cocaine and a quantity of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) (Count 2); one count of possession of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c)

(Count 3); and one count of possession of a firearm having been previously convicted of a felony in violation of 18 U.S.C. §§ 922(g), 924 (Count 4). J.A. 289-90. The Government also filed a notice of intent to seek an enhanced penalty pursuant to 21 U.S.C. § 851, on the basis of a prior felony drug offense within the meaning of 21 U.S.C. § 802(44). J.A. 20.

Mr. Hargett's second motion to suppress evidence

Prior to arraignment on the second superseding indictment, Mr. Hargett filed a second motion to suppress evidence on the basis of the Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). J.A. 17, 294-310. Under *Carpenter*, Mr. Hargett argued that the police unlawfully obtained CSLI, because obtaining such information was a search for Fourth Amendment purposes, and the police acted without a warrant. J.A. 297. Instead, the police relied on an order issued by a Superior Court judge under section 15A-260 of the North Carolina General Statutes and the federal Stored Communications Act, which allowed collection of CSLI upon a showing of reasonable suspicion to believe that a crime is being committed, and reasonable grounds to believe that the defendant is committing the crime and the CSLI is relevant and material to the ongoing investigation. J.A. 300-04; *see* J.A. 296. Mr. Hargett argued that without the CSLI, there would have been no reasonable suspicion to justify the stop of the blue Maxima on 23 November 2015, and no probable cause to arrest him, because the police would have relied only on the uncorroborated tips of an unproven informant, Mr. Rose. J.A. 295-98.

Based on his second motion to suppress, Mr. Hargett asked the Court to vacate its order denying his first motion to suppress, and reconsider its decision. J.A. 294-95.

The Government opposed the second motion to suppress evidence. *See* J.A. 311-26. Although the Government did not dispute that *Carpenter* applied and the collection of CSLI was a search under the Fourth Amendment, the Government argued that the Superior Court's order allowing the collection of CSLI was the functional equivalent of a search warrant. J.A. 316-18. The order was issued by a neutral judicial officer, and particularly described the things to be seized and location to be searched. *See* J.A. 316-18. Although the law in place at the time did not require a showing of probable cause, in the order, the Superior Court stated that it found probable cause to believe that Mr. Hargett had committed drug offenses in violation of state law, and probable cause to believe that he used the cell phone number at issue to further and facilitate those offenses. J.A. 300-01; *see* J.A. 317. In the alternative, the Government argued that if the order did not meet the requirements for a search warrant, the motion to suppress should be denied on the basis of the good faith exception to the exclusionary rule established in *United States v. Leon*, 468 U.S. 897 (1984). *See* J.A. 318-24. The Government argued that officers reasonably relied on the order, and could not be charged with knowledge that the search was in violation of the Fourth Amendment, given that the law at the time did not require a search warrant to obtain CSLI. J.A. 319-22.

In reply, Mr. Hargett argued that the recitation of "probable cause" in the

order did not make the order the functional equivalent of a search warrant, because the order was not supported by a showing of probable cause. J.A. 327-28. Mr. Hargett contended that the application for the CSLI order failed to establish the reliability of the confidential source, and contained no corroboration. J.A. 328-29. Mr. Hargett also argued that the good faith exception did not apply. J.A. 330-32.

At a pretrial motions hearing, the district court heard argument on the second motion to suppress. J.A. 414-30. The district court denied the motion. *See* J.A. 430-37. The district court assumed without deciding that obtaining real-time CSLI constituted a Fourth Amendment search under *Carpenter*. J.A. 433. The district court agreed with the Government that the order allowing the collection of CSLI met the technical requirements of a search warrant and was supported by a showing of probable cause. J.A. 433-36. In the alternative, the district court ruled that the good faith exception applied. J.A. 436-37.

Arraignment and trial

Mr. Hargett pleaded not guilty to all four counts of the second superseding indictment and proceeded to trial. J.A. 22, 456.

The case was tried to a jury in the United States District Court for the Eastern District of North Carolina, before then-Chief United States District Judge James C. Dever III, on 20 and 21 August 2018. J.A. 22-23. The jury found Mr. Hargett guilty on all four counts of the superseding indictment. J.A. 886-88; *see* J.A. 896-98.

Sentencing and judgment

The district court imposed a sentence of 180 months' imprisonment on Count 1, 2, and 4, to be served concurrently, and a sentence of 60 months' imprisonment on Count 2, to be served consecutively, producing a total sentence of 240 months' imprisonment. J.A. 919-20. The district court entered judgment accordingly. J.A. 928-35.

Mr. Hargett timely filed a notice of appeal on 20 November 2018. J.A. 926-27.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question presented was argued and reviewed below because Mr. Hargett argued on appeal, subject to a harmless error standard, that the district court erred by denying his motions to suppress evidence. The Fourth Circuit concluded that there was no error, reasoning that the good faith exception to the exclusionary rule applied. App. 2-4.

REASONS FOR GRANTING THE WRIT

Mr. Hargett contends that there is a compelling reason for granting his petition for writ of certiorari, because the failure to apply the exclusionary rule improperly sanctions violations of the Fourth Amendment. Mr. Hargett respectfully requests that the Court exercise its discretion to grant the writ of certiorari to redress the violation of his Fourth Amendment rights. *See* S. Ct. R. 10.

DISCUSSION

THE DISTRICT COURT'S REFUSAL TO APPLY THE EXCLUSIONARY RULE EFFECTIVELY DENIED MR. HARGETT HIS FOURTH AMENDMENT RIGHTS.

The investigation of Mr. Hargett was based on information provided by Mr. Rose, an admitted drug dealer who felt that he had to set Mr. Hargett up to avoid going to prison himself. *See* J.A. 778. Mr. Rose had not acted as an informant before, and in recognition of his lack of a track record, officers sought to corroborate Mr. Rose's information by seeking an order to allow the collection of CSLI for a number Mr. Rose attributed to Mr. Hargett. *See* J.A. 189, 300-10, 661. As shown below, the CSLI was illegally obtained in violation of Mr. Hargett's Fourth

Amendment rights. Police arrested Mr. Hargett on the basis of Mr. Rose's statements and the CSLI. Without the CSLI, Mr. Hargett respectfully contends that the police would not have had probable cause to arrest him, and therefore would not have searched the blue Maxima, or obtained a search warrant for Apartment 256 or the storage units.

A. The CSLI Was Obtained In Violation Of The Fourth Amendment.

In *United States v. Carpenter*, this Court held that collecting historical CSLI constituted a Fourth Amendment search. 138 S. Ct. at 2217 & n.3. While the Court did not address real-time CSLI, the same reasoning extends to real-time data. *See, e.g., United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) (discussing intrusion of privacy that occurs with ongoing GPS surveillance); *see also* J.A. 316 (United States did not dispute that CSLI collection in Mr. Hargett's case constituted Fourth Amendment search). Therefore, officers could only collect the CSLI pursuant to a warrant issued upon a showing of probable cause. *See United States v. Carpenter*, 138 S. Ct. at 2221.

Police did not obtain a warrant for Mr. Hargett's CSLI. *See* J.A. 300-04. Instead, they obtained an order pursuant to North Carolina state law and the Stored Communications Act. J.A. 300-04, 310. Although the district court concluded that the order was the functional equivalent of a search warrant, *see* J.A. 435-36, Mr. Hargett respectfully contends that the order was not supported by probable cause.

In the application for the trap and trace order, the applicant relied entirely

on a confidential source's claim that Mr. Hargett was a drug dealer. The applicant recited that a confidential source—later identified as Mr. Rose—said Mr. Hargett was a cocaine supplier and provided a cell phone number for Mr. Hargett. J.A. 306. The applicant also recited that the confidential informant turned over cocaine the informant claimed to have bought from Mr. Hargett, and that the informant said he had been on two trips to Atlanta with Mr. Hargett and would be going on another trip to pick up cocaine in two weeks. J.A. 306-07. The applicant offered no information to corroborate Mr. Rose's statements about Mr. Hargett. *See* J.A. 306-07. He did not identify Mr. Rose by name and provided no information to establish Mr. Rose's trustworthiness. *See* J.A. 306-07.

These facts are insufficient to support a finding of probable cause. To find probable cause, a judicial officer must be presented with sufficient information to determine that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The accusations of an unnamed and unproven informant do not establish probable cause. *See, e.g., United States v. Wilhelm*, 80 F.3d 116, 120 (4th Cir. 1996) (affidavit reciting information from unnamed informant lacked indicia of informant's credibility and failed to establish probable cause). According to the trap and trace order application, the only fact Mr. Rose offered about Mr. Hargett was that he was a barber. *See* J.A. 306. That information was observable by any member of the public and does not suggest any knowledge of Mr. Hargett's activities. *See United States v. Wilhelm*, 80 F.3d at 121 (fact that informant gave

directions to defendant's house did not suggest she knew anything about what went on inside house); *cf. United States v. Lalor*, 996 F.2d 1578, 1581 (4th Cir. 1993) (informant's report that she purchased cocaine from defendant on multiple occasions was sufficiently reliable because warrant affidavit also showed that (1) informant knew defendant's alias, address, area of operation, and description of defendant's car; (2) second informant and police investigation corroborated details provided by first informant; and (3) defendant had recently been arrested for cocaine possession).

Mr. Hargett acknowledges the Fourth Circuit's decision in *United States v. Chavez*, 894 F.3d 593, 608 (4th Cir. 2018), that despite *Carpenter*, the exclusionary rule did not apply where officers acted pursuant to a court order issued under Virginia state law and the Stored Communications Act, because the officers acted with an objectively reasonable good faith belief that their conduct was lawful. Mr. Hargett also acknowledges that at the time officers obtained an order and collected CSLI from his phone, there was not law in effect that required a search warrant. However, Mr. Hargett respectfully contends that the existing law does not adequately redress the violation of his constitutional rights. *See generally Poe v. Ullman*, 367 U.S. 497, 549 (1961) (recognizing that Fourth Amendment protection of privacy is essential to "ordered liberty"). Mr. Hargett asks this Court to overrule *Chavez*, and hold that the good faith exception to the exclusionary rule inappropriately sanctions Fourth Amendment violations.

B. Without The Illegally Obtained CSLI, Officers Did Not Have A Basis To Stop And Arrest Mr. Hargett.

Throughout the investigation leading to Mr. Hargett's arrest, officers relied on tips provided by Mr. Rose. *See supra* pp. 6-7. Mr. Rose's tips included a photograph of what he said was Mr. Hargett's car, a photograph of an amplifier, and information about the alleged whereabouts of Mr. Rose, Mr. Hargett, and Ms. Miller. J.A. 46, 147-49, 151. None of this information was incriminating without the additional details Mr. Rose supplied—his claims that Mr. Hargett was a cocaine dealer and was in Atlanta to purchase cocaine. *See* J.A. 147. TFO Lewis had no history with Mr. Rose and no reason to believe he was telling the truth about Mr. Hargett absent some corroboration. *See* J.A. 189, 661. Therefore, TFO Lewis relied repeatedly on the CSLI to confirm Mr. Rose's reports about where Mr. Hargett was supposedly traveling. J.A. 44, 47, 143, 148.

Without the CSLI, officers could not corroborate the information about the trip to Atlanta. *See* J.A. 149 ("The only monitoring in Atlanta was through the GPS fixings."). They knew only that Mr. Rose dropped Mr. Hargett off in the Harris Teeter parking lot where Mr. Rose said Mr. Hargett left his car. *See* J.A. 154. They had no other information to corroborate Mr. Rose's claims, and no information to confirm that Mr. Hargett was engaged in any kind of illegal activity.

Mr. Hargett respectfully contends that, without the CSLI, officers would not have had probable cause to stop him and arrest him. Had officers not stopped and arrested him, they would not have searched the blue Maxima. *See* J.A. 280, 282-83

(ruling that officers could search blue Maxima incident to arrest). Without the search of the blue Maxima, officers would not have had a basis to obtain a search warrant for Apartment 256, and in turn, would not have had a basis to obtain a search warrant for the storage units. *See* J.A. 81-95. For these reasons, Mr. Hargett contends that the district court erred by denying his motions to suppress evidence.

CONCLUSION

For the foregoing reasons, Petitioner Andrew Hargett, Jr., respectfully requests that the Court grant his petition for writ of certiorari, reverse the decision of the Fourth Circuit, vacate his convictions on all counts, and remand for entry of an order granting his motions to suppress evidence.

This the 31st day of July, 2020.

/s/ Kelly Margolis Dagger

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition for Writ of Certiorari was served on the Respondent herein by depositing a copy thereof in the United States mail, postage prepaid, first class, addressed as follows:

Jennifer P. May Parker, Esq.
Assistant United States Attorney
150 Fayetteville Street, Suite 2100
Raleigh, North Carolina 27601

This the 31st day of July, 2020.

/s/ Kelly Margolis Dagger
Kelly Margolis Dagger