No. _____

In the

Supreme Court of United States

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Tobias O. Reed,

Petitioner

v.

Commonwealth of Virginia,

Respondent

PETITION FOR WRIT OF CERTIORARI

Supreme Court of Virginia Record No. 200074

Court of Appeals of Virginia No. 1305-15-4

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QUESTIONS PRESENTED

Today, prosecuting attorneys all too frequently are part of and lead the investigating team. They are not brought a case investigated and prepared by law enforcement to evaluate for prosecution.

In this case, a prosecutor's *ex parte* motion resulted in an order leading to electronically tracking Reed historically and in real time, 24 hours a day, 7 days a week, for months, using CSLI and GPS.. After Reed's case was vacated and remanded by this Court because of *Carpenter v. United States*, 585 U.S. ___ 16402, 138 S. Ct. 2206 (2019), the prosecution raised good faith as a defense to their unconstitutional action. Virginia's courts treated the prosecution as if dealing with a police officer acting in the moment on the street.

I. Are prosecuting attorneys who engage with a court in the course of conducting a criminal investigation, such as obtaining an *ex parte* order, entitled to the same good faith exemption from the exclusionary rule that this Court allowed for a police officer acting in the moment in *Illinois v. Krull*, 480 U.S. 340 (1987), under the same standard and analysis as police, or are lawyers different, requiring a different standard and analysis?

II. When a prosecutor who has used an unconstitutional method to obtain evidence in a criminal investigation raises the affirmative defense of good faith, like that raised by the police officer in *Illinois v. Krull, supra*, to exempt their action from

the exclusionary rule, should the court deciding their claim have a factual record about what the prosecution knew or was chargeable with knowing and what they did or did not do for its decision?

PARTIES TO THE PROCEEDINGS

All parties to these proceedings are noted in the caption of the case. Neither party is a corporation.

Neither the United States nor any federal department, office, agency, officer, or employee is a party.

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INTRODUCTION

Petitioner, Tobias O. Reed, who has requested to be allowed to proceed *in forma pauperis*, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Virginia Supreme Court, dated 21 May 2020.

OPINION BELOW

This Court's remand of this case to Virginia's Supreme Court on 28 June 2018 in *Reed v. Commonwealth*, Record No. 17-5402 is attached as Appendix A. The opinion of the Virginia Court of Appeals, issued on 12 November 2020 in *Reed v. Commonwealth*, 71 Va.App. 164 (2019), is attached as Appendix B. The Virginia Supreme Court's order in *Reed v. Commonwealth*, Record No. 200074, denying his petition for appeal on 21 May 2020, is attached as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a). The decision of the Virginia Court of Appeals was issued on 12 November 2019. The Virginia Supreme Court order denying Petitioner's timely petition for review of the Court of Appeals decision was issued on 21 May 2020. This petition is filed within 90 days of the Virginia Supreme Court's denial, on 21 May 2020, of discretionary review of Mr. Reed's case pursuant to Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

The origins of this case go back to 18 July 2012, when an undercover police officer arranged a small drug buy from one Fernando Payne in Alexandria, Virginia. They were to meet to obtain the drugs from Alan Farmer, the main target of the investigation. The undercover officer's truck broke down so they could not meet Farmer. Payne made a call and left his cell phone with the officer, telling him, "If Tobias calls, he is my man. Pick up and tell him I'm coming". Payne walked to a nearby parking lot where an officer, scrunched down and hiding in the back of an SUV, claimed to see him entering a vehicle allegedly driven by Reed and parked on the far side of a van. Payne returned to the undercover officer and sold him 1.9 grams of cocaine powder. No arrests were made that day.

Weeks later, on 3 August 2012, an Alexandria prosecuting attorney presented a motion, *ex parte,* asking for a court order under the Stored Communications Act directing an out of state cell phone carrier, Verizon, to produce a massive amount of

cell phone records concerning a cell phone number alleged to belong to Reed.[1] The information sought included Cell Site Location Information (CSLI) tracking, 24/7 for a five (5) month historical period, and real time GPS tracking going forward.[2] The Alexandria Circuit Court granted the motion. In its order, prepared by the prosecutor, the court found that the prosecutor had established "reasonable grounds" to believe the records sought were relevant and material to an ongoing criminal investigation.

On 17 August 2012, Reed was taken into federal custody and incarcerated in the Alexandria City Jail because of a federal supervised release violation. While he was in the local Alexandria jail, the Alexandria officers obtained an arrest warrant from a magistrate at the jail for the drug sale of 18 July 2012. They knew Reed was there at that time, but chose not to serve the warrant on him. The prosecution decided to withhold service of the warrant until Reed completed his two year sentence for his federal supervised release violation. The warrant's command that it be served "forthwith" was deliberately ignored.

When Reed was released from his federal sentence at FCI Butner in North Carolina in June 2014, the Alexandria police, who knew where he was after he had been transferred out of the Alexandria jail, were waiting. They snatched him up, bundled him into their Alexandria Police vehicle, and hauled him back to Alexandria, where they served the August 2012 warrant and put him in jail. They had no lawful

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[1] Virginia's Stored Communications Act - Va. Code §19.2-70.3 is the state's equivalent of 18 U.S.C.§2703.

[2] CSLI is cell site location information that allows 24/7 tracking back in time for past movement and locations, while GPS, global positioning sytems, allow such tracking in real time.

process or legal authority in North Carolina; they are the police, so they just kidnaped him and drove back to Alexandria.

Reed had not been given the statutorily required and court ordered notice of the court order regarding the CSLI and GPS 24/7 tracking using his cell phone, and only discovered it, by chance, when litigating a motion to quash a prosecution subpoena in 2015 in his Alexandria case.[3] The prosecutor had kept the order secret until it was inadvertently revealed in the subpoena litigation. Once he learned about the August 2012 *ex parte* order, Reed moved to suppress the evidence produced pursuant to that unconstitutional and unlawful order including both the 24/7 historic tracking using CSLI and real time GPS surveillance and any evidence obtained as a result. Reed's motion argued, *inter alia*, that a search warrant was required under the Fourth Amendment to obtain the cell phone records, and that an *ex parte* order under the Stored Communications Act (S.C.A.), Va. Code §19.2-70.3, was constitutionally insufficient. That motion was only heard on legal arguments. Good faith was not raised by the Commonwealth as a defense to Reed's claim that the order was unconstitutional. No facts about what the prosecutor did or did not do in regard to his motion and the order, or what he knew or was chargeable with knowing, were presented or addressed at that hearing.

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[3] He did not have the opportunity, as this Court suggested in Illinois v. Krull, supra, at 354 to litigate a civil suit to enjoin use of the Stored Communication's Act against him while in FCI Butner because the prosecutor did not let him know about the tracking order despite a court order specifically directing the prosecutor to provide him with the statutorily required notice.

At the time of the *ex parte* order, in August 2012, and the suppression hearing in 2015, there had been no decision by the Fourth Circuit Court of Appeals nor by any Virginia appellate court allowing 24/7 tracking of an individual by use of a cell phone's CSLI and GPS capabilities under either Virginia's or the federal government's Stored Communications Act (S.C.A.). The most recent and most relevant decision on 24/7 electronic tracking was the unanimous decision and five Justices' concurrence in *United States v. Jones*, 565 U.S. 400 (2014), which found that 24/7 GPS tracking was within the protections of the Fourth Amendment. The motion to suppress was denied based on Virginia's version of the S.C.A. - Va. Code §19.2-70.3.

Reed's case was tried without a jury. The CSLI records obtained from Verizon by the unconstitutional use of the Stored Communications Act were introduced as part of the prosecution's case in chief to help prove the claim that Reed's cell phone was nearby and, thus, he was involved in the 1.9 gram sale of 18 July 2012. Reed was convicted.

Mr. Reed had a prior record, and was sentenced to ten (10) years in prison for that one time sale of 1.9 grams of powder cocaine. Due to his indigence, undersigned counsel was appointed for his appeal by the trial court at his sentencing on 28 May 2015 pursuant to Va. Code §19.2-159. A notice of appeal was timely filed. His petition for appeal was granted by the Court of Appeals of Virginia. In that appeal, among the issues he raised was that a search warrant was required to obtain several months worth of historical (CSLI) and real time (GPS) surveillance. In its

opinion the Virginia Court of Appeals held that "any remedy appellant may have had as a result of such error was corrected by the fact that only historical cell phone records (CSLI) from the relevant time and date of the drug buy were admitted at trial". *Reed v. Commonwealth*, 16 VapUNP 1305154 (2016), slip op. at 13. In other words, since only a little bit of what was claimed to have been obtained in violation of the Fourth Amendment was actually used at trial, the court did not need to address the Fourth Amendment issue. The Supreme Court of Virginia sustained the Court of Appeals decision by denying Reed's timely petition for appeal. *Reed v. Commonwealth*, No. 161401 (Va. Apr. 26, 2017).

While Reed was preparing his petition for certiorari for this Court, certiorari was granted in *Carpenter v. United States*, No. 16-402, on 5 June 2017. The question was whether the warrantless seizure and search of a cell phone user's historical CSLI tracking records, revealing his location and movements 24 hours a day for 7 days a week over the course of a little more than four (4) months, was permitted under the Fourth Amendment pursuant to a Stored Communications Act order or whether a warrant supported by probable cause was required. That same issue was presented in Reed's petition to this Court and his case was held in abeyance pending a decision in *Carpenter*. When *Carpenter* was decided, Reed's petition was granted. The Supreme Court of Virginia decision was vacated and the case was remanded for further proceedings consistent with the decision in *Carpenter v. United States,* 138 S.Ct.2206 (2018), by this Court in its order of 28 June 2018. (Pet. App.1.)

The Supreme Court of Virginia, having only ratified the Court of Appeals of Virginia decision by denying review, remanded the case to that court. That court ordered simultaneous briefings. Reed's brief addressed the holding in *Carpenter* that 24/7 surveillance using CSLI required a search warrant. The Commonwealth's brief raised the claim, for the first time, that good faith exempted application of the exclusionary rule because the S.C.A. provision at issue had not been held to be unconstitutional at the time of the August 2012 motion for a court order for 24/7 tracking using the CSLI and GPS capabilities of Reed's cell phone.

Reed moved to strike that newly raised good faith argument after filing his simultaneous brief on what the holding in *Carpenter* meant for his case. The Virginia Court of Appeals, in a footnote to its decision sustaining the Commonwealth's claim of good faith, denied Reed's motion. *Reed v. Commonwealth*, 69 Va. App. 332, 338 n.3 (2018). That decision adopted the analytical framework of *United States v. Chavez*, 894 F.3d. 593 (4th Cir. 2018) that investigators who act in reasonable reliance on statutes not then invalidated are entitled to a good faith exemption from the exclusionary rule. *Chavez,* however, did not deny that the investigators in his case had acted in good faith, and the opinion focused only on investigators, not prosecutors, because the issue of a prosecutor's actions requiring different treatment than that of a police officer had not been raised. *Id*. at 608. *See*, *Reed v. Commmonwealth*, 69 Va. App. at 338, 339. *Reed* did not agree that there was good faith and focused on the prosecutor, not the police.

Reed petitioned for an appeal to the Supreme Court of Virginia which remanded the case to the Court of Appeals by an Order entered on 3 July 2019. After that remand, Reed filed his brief in the Court of Appeals on the Commonwealth's affirmative defense of good faith. Among his arguments was that the prosecuting attorney acted in disregard of this Court's decision in *United States v. Jones, supra.* It should have been brought to the attention of the court when the *ex parte* motion under the S.C.A. was presented for decision.[4] Reed also contended that this issue was a mixed question of law and fact. His case involved the actions of a prosecuting attorney's motion, not the police. Prosecutors are not the same as police.

The Virginia Court of Appeals on a cold record, on an issue never decided or even addressed in the trial court, allowed the prosecution's good faith argument and ruled that the prosecutor who presented the *ex parte* S.C.A. motion was entitled to the same good faith exemption in Reed's case as was allowed for the police officer in *Illinois v. Krull,* 480 U.S. 340 (1987). *Reed v. Commonwealth*, 71 Va.App. 164, 176 (2019). There was no analysis of the difference between a police officer acting in the moment and a lawyer presenting a motion to the court. According to the Virginia Court of Appeals decision, if a statute had not been declared to be unconstitutional at the time

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[4] Jones, supra, was a significant, unanimous decision addressing the use of modern electronic tracking 24/7. It was the first time this Court ruled on that kind of extensive, extended surveillance, though not the first time the Fourth Amendment's protections were applied to new technology. The opinion rested on a trespass violation, but five Justices, in two concurrences, made it clear that electronically tracking someone 24/7 is such an invasion of privacy that it comes within the protections of the Fourth Amendment. Id. at 415, 418, 431.

the prosecutor used it, that was all that was needed for good faith to apply to his conduct. *Commonwealth v. Reed,* 71 Va. App. at 173-176. There was no need for any facts about what the prosecutor knew, is charged with knowing, or did or did not do.

That opinion principally relied on federal circuit courts of appeal cases where the good faith conduct of police officers, not prosecuting attorneys, was at issue and, in those cases, their good faith had not been called into question. *See, United States v. Chavez, supra*, and *United States v. Chambers*, 751 Fed. Appx.44 (2nd Cir 2018), cited in *Reed v. Commonwealth,* 71 Va. App. at 175, 176. The lack of any dispute on the good faith of the officers in those cases is in contrast to Reed who did call the good faith claim by the prosecutor in his case into question.

The unpublished decision from the Second Circuit, *United States v. Chambers, supra,* was, like Reed's case, on remand from this Court because of the decision in *Carpenter v. United States, supra. United States v. Chambers, supra*, at 45, cited in *Reed v. Commonwealth*, 71 Va. App. at 176. In the *Chambers* decision, the Second Circuit addressed the impact of exclusion of evidence on "... an *officer* who has simply fulfilled his responsibility to enforce the statute as written". 741 Fed. App. at 47, citing to *Illinois v. Krull, supra*, at 350(emphasis added). *Chambers, supra*, like *Chavez, supra*, did not address the issue that prosecuting attorneys, because of their knowledge of the law and obligations as attorneys, should not have their claims of good faith assessed using the same analysis applied to the officer in *Krull*. That lawyers are not the same as police in what they know about the law and what they are obligated to do

when making a presentation to a court was not before the court in either *Chambers* or *Chavez* court and was not analyzed.

That Virginia Court of appeals decision also relied on *United States v. Goldstein*, 914 F.3d 200 (3rd Cir. 2019). *See, Reed v. Commonwealth, supra*, at 176. That federal case did hold that prosecutors are to be treated the same as police officers when conducting a good faith analysis, but conducted no analysis of the difference between police officers and lawyers. *Goldstein, supra,* at 205, 206.[5] In *Goldstein*, there had been no basis or support offered by the appellant for the distinction he claimed between lawyers and law enforcement officers in the context of a good faith analysis. *United States v. Goldstein, supra. Id.* at 206. No case was cited by the Court of Appeals of Virginia that conducted, nor did that court itself conduct, any analysis of the difference between police and lawyers. That difference exists and cannot be ignored in the context of a good faith analysis of whether they are exempt from the exclusionary rule because a statute they used was not yet declared invalid when used.

Because Mr. Goldstein offered no support for his claim that prosecuting attorneys are not the same as police officers when it comes to using statutes not yet expressly declared invalid, the court in *Goldstein* did not consider or address the fact

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[5] Another reason Goldstein did not prevail was that, prior to Mr. Goldstein's original case, the Third Circuit had held that it was lawful to obtain the kind of cell phone data at issue in his case under the S.C.A. Id. at 202, 203, citing In Re Application, 620 F.3d.309 (3rd Cir. 2010). Under this Court's decision in Davis v. United States, 564 U.S. 229 (2011), prior binding precedent of an appeals court such as the Third Circuit's decision of In Re Application controlled. Goldstein, supra, at 205. An Eleventh Circuit case on which Mr. Goldstein relied was of no moment because of the binding precedent of In Re Application. Ibid.

that attorneys, unlike police, have a duty of continuing their legal education as a requirement to be licensed and attend continuing legal education seminars to keep up with developments and changes in the law. Most are required by their Bar Associations to take a certain number of mandatory continuing legal education (MCLE) credit hours each year.[6] In Virginia, for example, the license requirement is a mandatory 12 hours per year. Prosecutors' knowledge of the law and their obligations as lawyers are not the same as those of a police officer. Neither the decision in *Goldstein* nor by the Virginia Court of Appeals in this case addressed that significant difference between police and lawyers in the context of a good faith claim of exemption from the exclusionary rule. Respectfully, this Court should. It is important to give guidance to the lower courts on how they should address the issue as the role of prosecuting attorneys continues to more frequently include the role of investigator.

Reed did not prevail in his argument that the prosecuting attorney in his case knew and was chargeable with knowing that a mere court order under the S.C.A. for 24/7 tracking of Reed violated the Fourth Amendment because of the landmark decision in *United States v. Jones, supra,* (decided on 28 January 2012; about half a year before the prosecutor presented his S.C.A. motion in this case).

The appellate court in Virginia, through its own research, crafted an analysis to hold that the decisions in *Jones* did not prevent it from finding, on a cold record, that

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[6] All of the states require continuing legal education credits to maintain a law license, except Massachusetts, Maryland, Minnesota, and South Dakota. See, American Bar Association at www.americanbar.org/events-cle/mcle/.

this prosecutor had acted in good faith. *Reed v. Commonwealth, supra*, at 176. They decided they did not need to know what he knew or whether he complied with the statute.[7]

Essentially, the Virginia Court of Appeals decided that, if a statute has not specifically been held to be unconstitutional there is an irrebuttable presumption of good faith for anyone who uses it. That decision found, without a factual record, that the police (not the prosecutor) had "...complied with the provision of the S.C.A. and Va. Code §19.2-70.3(B). *Reed v. Commonwealth, supra*, at 174. As for the prosecutor's actions, the opinion did not agree that prosecuting attorneys are any different from police in the context of good faith and adopted the decision in *Goldstein, supra. Reed* at 176.

After Reed was unsuccessful in the Virginia Court of Appeals, he petitioned for appeal to the Supreme Court of Virginia which refused to hear his case by a final order of 21 May 2020. Pet. App. C.

This Petition seeks to have this Court address whether the good faith exemption applied in *Krull* to a police officer applies just the same to prosecuting attorneys using the same standard and analysis as was used for police officers acting in the street.

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[7] This is in sharp contrast to Illinois v. Krull, supra, where the Illinois Court of Appeals remanded the case to the trial court for a fully developed factual record because "recent developments in the law" made it apparent to that appellate court that good faith would be an issue. Illinois v. Krull, supra, at 344. To decide a claim of good faith requires a factual record so that appellate court ordered that one be developed. It was, and, in Krull, this Court relied on it. Id. at 342-344.

Should there be, as there was in *Krull*, a factual record about what the person who acted (a prosecutor here) did or did not do in compliance with the statute at issue and knew or was chargeable with knowing when deciding a claim of good faith which is contested and those facts have never been presented to nor addressed in the trial court.

REASONS FOR GRANTING THE WRIT

This case presents a significant matter of constitutional importance. Does this Court's exemption to the exclusionary rule for a police officer, shown to be acting in the moment and in good faith reliance on as well as in full compliance with a statute not yet specifically declared unconstitutional also apply equally and using exactly the same analysis and standard to a prosecuting attorney preparing and presenting a motion in an *ex parte* hearing in a trial court or are prosecuting attorneys different?

When prosecutors claim they are entitled to an exemption from the exclusionary rule because they acted in good faith, are they to be assessed differently than police officers because, as lawyers, their knowledge, chargeable knowledge, and obligations are not the same as a police officer? Should there be a factual record about what a prosecutor did or did not do and what he or she knew or is chargeable with knowing when deciding whether to allow a claim of good faith?

ARGUMENT

Lawyers, including their knowledge of the law, are not the same as police officers acting in the moment in the street. This Court's holding in *Krull* cannot be applied the same to lawyers preparing and presenting a motion to a trial court as it was to a police officer acting in the moment in the street.

I. The Good Faith Analysis in *Krull* Was About a Police Officer, Not a Lawyer.

In *Illinois v. Krull, supra*, a state trial court in Cook County suppressed evidence obtained during an administrative search by the police because the day after the search a federal court had ruled that the administrative search statute was unconstitutional. *Id.* at 344. When the case was appealed to the Appellate Court of Illinois, it vacated the trial court's ruling and sent the case back to that court for further proceedings about what the officer did because it had determined that, due to recent developments in the law, good faith reliance on the state statute might be relevant in assessing the admissibility of the evidence. It was the trial court which should make a factual determination regarding exactly what had happened and what the officer did or did not do and knew or did not know in the context of good faith before the matter was considered on appeal.[8] *Ibid.* Ultimately the Illinois Supreme Court

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[8] If the police department's lawyers had, for example, issued a directive to the department, after a review of the then pending federal case, that the administrative search statute was no longer to be used because it had constitutional defects, or if that officer had not followed the statute's requirements or procedures, that set of facts could disallow good faith. Similarly, in Arizona v. Evans, 514 U.S. 1(1995) it was also necessary to develop the facts about the police claim of good faith in order to make an accurate decision. An arrest

concluded that the statute violated the Fourth Amendment and sustained the suppression of the evidence. This Court granted certiorari to consider the application of the good faith exception to the Fourth Amendment exclusionary rule for police officers acting in reliance on a statute declared unconstitutional after the officers had acted in reliance on it. *Id*. at 346.

In its analysis, this Court focused on its prior decision in *United States v. Leon*, 486 US 897 (1984). The Court observed that the exclusionary rule is `to deter police misconduct rather than punish the errors of judges and magistrates because the judicial branch is not an"...adjunct[s] to the law enforcement team ..."; rather, judges are "... neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." *Illinois v. Krull, supra*. at 348, citing to *Leon, supra* at 917. The Court also observed that legislators,"...like judicial officers, are not the focus of the rule..." *Krull, supra,* at 350. The legislative branch, like the judiciary, is not a branch which is an "...adjunct[s] to the law enforcement team." *Id*. at 350, 351. Legislators, this Court noted, enact laws to establish and perpetuate the legal system. *Ibid*. They are different from police who are engaged in the "...hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" *Ibid*. Citing to *Johnson v. United States,* 333 US 10, 14 (1948). Legislators, unlike

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on a withdrawn warrant was allowed in that case because the evidence at a hearing on the matter established that a departmental error did not show the warrant had been withdrawn in the computer system used by the arresting officer. Hearings in the trial court about what happened were necessary since there were no irrebuttable presumptions in those cases.

police, enact statutes for "broad, programmatic purposes, not for the purpose of procuring evidence in particular criminal investigations." *Id.* at 353. In other words, the exclusionary rule is not applicable to the legislative branch nor to the judicial branch of government because they are not focused on nor invested in a particular outcome in a prosecution as are police and the prosecutors who make up the investigative and prosecution team.

The exclusionary rule does apply to those who are engaged in investigating and bringing criminal cases, i.e. the executive branch. While the rule is most often applied to the police, prosecutors, who, these days, are more than a mere adjunct to the police and often play a larger role in the collection of evidence and the overall investigation than they did in the past, are and ought to be within the purview of the Rule. Prosecuting attorneys are not neutral arbiters; they are advocates and, when they are part of the law enforcement investigation they are not entitled to be exempt from the exclusionary rule. When they claim good faith they are not to be treated the same as would be a police officer. Their profession makes them different but does not give them a free pass when, as here, they claim the good faith exemption for themselves. As Supreme Court Justice Robert Jackson said when he was the United States Attorney General, in a speech which he gave in 1941, prosecutors wield a great deal of power and we must be mindful of their actions. He was aware of and candidly warned of the dangers of abuse by a prosecutor who has broad and often unscrutinized use of power, and said that, "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. ...While the prosecutor is

at his best one of the beneficient forces in our society, when he acts from malice or other base motives he is one of the worst." *Robert H. Jackson, the Federal Prosecutor*, 31 J.Crim.L.&Criminology Volume 3, 3 (1940).

Prosecutors are more than an "adjunct to the law enforcement team". They can be and often are, as recent history shows, the team leader. They are not neutral and detached members of the judiciary who have no stake in the outcome of a given case nor are they legislators who are enacting laws for policy and programmatic purposes. They are advocates and, when involved in an investigation, they are a major part of the investigative team and, like police, they become vested in the investigation and its outcome. Their knowledge of the law and their duty to know the law and where it is and its status at the time they use it and their obligation of candor to the tribunal, however, make them different than police officers. Police, unlike lawyers, "...cannot be expected to question the judgment of the legislature that passed the law...". *Id.* at 350. They are expected to "...simply fulfill his [their] responsibility to enforce the statute as written." *Ibid*. Lawyers are different. Prosecutors are different still. As this Court said in *United States v. Agurs*, 427 US 97, 111 (1976), holding prosecutors to a higher standard is necessary, lest the "special significance to the prosecutor's obligation to serve the cause of justice" be lost.

Prosecuting lawyers who appear before a court in an *ex parte* hearing have a different body of knowledge about the law and a different duty toward the court than is expected of a police officer acting in the moment on the street. More is expected of lawyers and rightfully so. They are not exempt and ought not to be from scrutiny.

That is part of our system of checks and balances. The judiciary has a duty to act as a check on the executive branch. Whether they acted in good faith is a matter for the judiciary to decide but it cannot be assessed the same as the actions and knowledge of a police officer. Their difference must be acknowledged and addressed when prosecuting attorneys, as here, claim they acted in good faith. If, as in *Krull*, the knowledge or chargeable knowledge of a police officer is relevant to good faith, then the same, at the very least, applies to a lawyer. *See Krull, supra*, at 1348. It cannot be decided without knowing what the prosecution actually did or did not do and what the prosecutor knew or was chargeable with knowing. This is a subject which needs guidance from this Court, especially as prosecutors have become more involved in investigations.

II. Lawyers Are Not the Same As the Police Officer On The Beat.

Virginia's appellate courts applied the good faith holding in *Krull* to a prosecuting attorney the same as if he were a police officer without giving any consideration to the differences between the two.[9] They held that the good faith

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[9] The Virginia Court of Appeals misapplied Krull even if lawyers could be assessed the same as policemen. In Krull, the Illinois Court of Appeals remanded the case to the trial court to determine what the officer did and what he knew or should have known. Krull at 344. This Court, in its decision, recognized that what the officer did and his knowledge or chargeable knowledge is a factor to be considered in assessing the police officer's good faith. Id. at 348. The same assessment should be made for lawyers claiming a good faith exemption, although their knowledge and chargeable knowledge is different. What they did or did not do and what they knew or are chargeable with knowing is important for the decision. A decision cannot be properly made on a cold record devoid of those facts.

exemption available to a police officer acting in the moment in the street applies equally to a prosecuting attorney when preparing and presenting a motion to a trial court in an *ex parte* motions hearing. *Reed v. Commonwealth, supra*, at 176. They cited no case which had analyzed the difference between lawyers and police officers that is to be taken into account when considering a prosecutor's claim that they acted in good faith. They did cite to *United States v. Goldstein, supra,* but that case conducted no analysis of and did not address the difference between police officers and lawyers. That question, not addressed in *Illinois v. Krull,* is especially important now given the current frequency of prosecutors involvement in investigations prior to the bringing of charges or any arrest. Prosecutors have become so often actively involved in investigations that the American Bar Association, in 2013, published a volume entitled *Prosecutorial Investigations* as part of its *Standards for Criminal Justice.* Because of their role as investigators, this specialized *Standard* was needed to provide guidance to prosecutors who, as in this case, are actively engaged in criminal investigations.

Prosecutors, as attorneys, are duty bound to keep updated on the law. A lawyer's knowledge of the law is not the same as that of a police officer acting in the moment in the street. Police officers are not attorneys with years of legal education and do not have the duty, the same as a lawyer, to know and be aware of changes in the law. Their training period at the police academy is not the same as nor intended to be the same as a three year law school education. They do not have mandatory attendance for several hours per year at continuing legal education seminars (MCLEs)

as do most lawyers.[10] They are not required to know and keep abreast of changes in the law as is expected of a practicing attorney.

Lawyers also have an obligation of candor toward the tribunal which generally requires providing counterveiling authority to the court. *See*, eg., Rule 3:3 of the American Bar Association's *Model Rules of Professional Conduct*. This obligation of informing a court of opposing authority is, of course, more pronounced in an *ex parte* proceeding than in an adversarial one where opposing counsel is participating. Courts, informed of counterveiling authority in an *ex parte* proceeding, are better able to reach a fair result. In Virginia, an attorney certifies, when he or she signs a motion in a civil case, that they have conducted a reasonable inquiry into the matter and that, to the best of their knowledge, information, and belief their position is well founded. Va. Code §8.01 - 271.1. This obligation is a corollary to Rule 3:3 of the American Bar Association's (ABA) *Model Rules of Professional Conduct* regarding candor to the tribunal and is also consistent with Comment 4 to Rule 3.3 of the *Virginia Rules of Professional Conduct* which applies to all lawyers, including prosecutors, and notes that lawyers are to present "pertinent" law to the tribunal and are expected to recognize the existence of *pertinent* legal authorities. In that context, the ABA's *Standard of Criminal Justice for Prosecutorial Investigations* 26-2.10(c) and (d) regarding Technical Surveillance should also be noted. In the Commentary to Subdivision (c) the ABA cautions prosecutors to give consideration to the legal and

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[10] See MCLE requirement from all but four of the 50 States in FN 5 on page 12.

privacy considerations of the subject. The Commentary to (d) focuses on the legal requirements of surveillance and has the admonition that prosecutors should routinely review changing legal requirements in the area of technological surveillance because the law in that field changes and the change can be significant. *United States v. Jones, supra,* is a prime example of significant change.

Had the prosecutor in this case made the required reasonable inquiry, and had he kept abreast of the law and changes in the law, then he would have known, and because of that obligation, was chargeable with knowing, that the 24/7 CSLI and GPS surveillance of Reed his motion requested for five or more months required more than a mere finding of reason to believe there was relevance and materiality to an investigation under the S.C.A., Va. Code §19.2-70.3. This Court's unanimous decision in *Jones* handed down over six months before his motion was a landmark. It addressed, for the first time, the extensive and extended invasion of privacy allowed by remote electronic tracking of someone everywhere they go, 24 hours a day, 7 days a week, for months on end. Former United States Solicitor General Walter Dellinger, a lawyer for Mr. Jones, was quoted as saying, when the decision was handed down, that "Law enforcement is now on notice that almost any GPS electronic surveillance of a citizen's movements will be legally questionable unless a warrant is obtained." Adam Liptak, *Justices Say GPS Tracker Violated Privacy Rights,* New York Times, 23 January 2012. See also, Robert Barnes, *Supreme Court Limits Police Use of GPS Tracking*, The Washington Post, 23 January 2012. The *Jones* decision was a major change. It did not go unnoticed in the news media nor in legal circles. Lawyers

engaged in criminal law would be hard pressed to claim ignorance of *Jones,* what it held, and what it meant.

In this case the prosecutor presented his *ex parte* motion to the court asking for an order under the S.C.A. to obtain five months of 24/7 electronic tracking using Reed's cell phone capabilities and told the court that it could be based on mere reason to believe it was relevant and material to an investigation. The prosecutor knew or should have known, at that time, August 2012, that a search warrant, supported by probable cause, was required for such an extensive invasion of privacy. The 28 January 2012 landmark decision by this Court in *Jones* was clear. That decision constituted "pertinent law" and "pertinent legal authority" at the very least.

A majority of five Justices in *United States v. Jones*, 565 U.S. 400 (2012) left no doubt that extended 24/7 electronic surveillance comes within the protection of the Fourth Amendment. Their concurrent opinions were not a vacuous undertaking. Justice Sotomayor's statement of agreement with Justice Alito's concurrence that "... longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy" was significant. *Jones, supra* at 415. Justice Alito, after acknowledging the massive invasion of privacy available through such devices as the ubiquitous modern cell phone, concluded that lengthy GPS monitoring, as occurred in *Jones* - and as was sought and granted six months later by the S.C.A. order in Reed, "... constituted a search under the Fourth Amendment." *Id.* at 431. Justices Ginsburg, Breyer, and Kagan joined Justice Alito's concurrence. *Id.* at 418. There could be no doubt from the concurring opinions of five Justices in *Jones* that 24/7 electronic

tracking, via a modern cell phone's capabilities, of a person everywhere they go for months was a Fourth Amendment search. In fact, when determining that the 24/7 tracking in *Jones* implicated Fourth Amendment areas of every day life that people reasonably expected to be private, it was also recognized that, in this digital age, people reveal so much of themselves in mundane tasks using cell phones, that *Smith v. Maryland*, 442 U.S. 735 (1979) and *United States v. Miller,* 425 U.S. 435 (1976), are ill suited to the digital age and would likely need to be revisited. *See,* Justice Sotomayor's concurrence in *Jones* at 417. Ultimately, it was decided in *Carpenter, supra*, that, in this digital age, *Smith* and *Miller* did not actually involve the *voluntary* surrender to a third party of the expansive information revealed in cell phone use today which allows 24/7 tracking using a cell phone's CSLI and GPS. *See, Carpenter v. United States, supra*, slip op. at 10, 11. A decision of the magnitude of *Jones* does not go unnoticed by lawyers in the field of criminal law - including prosecuting attorneys.

That warrantless Fourth Amendment searches, not based on such well-recognized and limited exceptions as, by way of example only, consent or an immediate exigency, which are surreptitious, pervasive, and long term were held not to be permissible on a finding of mere relevance and materiality to a criminal investigation is consistent with the long term, historic application of the Fourth Amendment. That an invasive intrusion by 24/7 electronic surveillance into the whole of one's private life is a Fourth Amendment matter, as found by five Justices in *Jones,* is consistent with the long history of the Fourth Amendment's protection of the right of the people to privacy from unreasonable invasion by the government. Indeed, when the Amendment

was adopted, its inspiration included General Warrants and the invasive Writs of Assistance of King George authorizing wholesale searches in the colonies without any specificity. See, *Boyd v. United States*, 116 U.S. 616, 622-623 (1986). As technology has advanced, so too has the application of the Fourth Amendment's protections. *See* e.g. *Kyllo v. United States*, 533 U.S. 27 (2001) prohibiting the use of thermal imaging technology to search a home from the outside.

The right of privacy protected by the Fourth Amendment has a long and venerated history in our Constitution. As this Court said in *Weeks v. United States*, 232 U.S. 383 (1914):

> "the Fourth Amendment ... put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints [and] ... and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." *Id.* at 391-392.

In *Weeks,* the Court went on to note that :

> "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." *Id*. at 393.

At the time of the prosecutor's *ex parte* motion in Reed's case a majority of this Court had already declared that people have a reasonable expectation of privacy in the whole of their movements. *Jones, supra*, at 430, 431. Justice Scalia's opinion also reflected acknowledgment that electronic surveillance implicated the Fourth Amendment. He wrote that "situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis". (Referring to the

holding in *Katz v. United States*, 384 U.S. 347, 351 (1952) that the Fourth Amendment protects people, not places.) *United States v. Jones, supra*, at 413.

The tracking allowed in this case allowed electronic GPS surveillance 24/7 for months, not just four weeks, as occurred in *Jones, supra*. The prosecutor won his *ex parte* motion for 24/7 CSLI and GPS tracking of Reed using modern cell phone capabilities for months. The prosecutor's actual knowledge and his expected or chargeable knowledge of the decision in *Jones* regarding the application of the Fourth Amendment for four weeks of 24/7 electronic signal tracking, when he sought an even more invasive several months of surveillance 24/7 by a mere court finding of relevance and materiality under the Stored Communications Act, affects his right to claim good faith reliance on that Act. He is not a police officer. He is a lawyer. The cold record on which the Court of Appeals of Virginia relied does not show what he did or what he knew. He could not have escaped notice of the decision in *Jones*. He is, presumably, knowledgeable of pertinent authority such as that.

Four Justices in a unanimous decision joining in one concurrence, acknowledged as valid by another Justice in a separate concurrence is not all that common. A concurrence by a Justice who voted with the majority was termed a *pivotal concurrence* in the article, *Divide & Concur: Separate Opinions and Legal Change*, Cornell Law Review, Volume 103, 4 May 2018. In a statistical analysis of concurrences in this Court from 1946 through 2012, the authors determined that *pivotal concurrences* are cited (relied on) by lower courts nearly as often as plurality concurrences in constitutionally significant cases. *Id*. at 872. This five Justice majority in *Jones* on the

Application of the Fourth Amendment to a protected area of privacy was significant, it was a matter not to be ignored by lawyers who practice in the field of criminal law - prosecutors and defense lawyers alike. It was another case like *Kyllo v. United States, supra*, where advances in technology were not allowed to diminish reasonable expectations of privacy from government intrusion. Those who practice in the area of criminal law know and are expected to know that the Fourth Amendment's protection of the right of privacy is not and cannot be static as technology advances. That knowledge does and should inform their positions in their cases. In an *ex parte* proceeding, especially, they cannot feign ignorance of cases like *Jones*. Lawyers should not automatically be given a good faith pass on a motion relying on an unconstitutional statutory provision when they knew or should have known of the unconstitutional nature of their request. They also should be required to have faithfully complied with the statutory requirements and related court orders when claiming they are entitled to a good faith exemption from the exclusionary role. The Third Circuit in *Goldstein*, *supra*, applied *Krull* to a prosecutor without giving any reasoning concerning the difference between police and lawyers. The Virginia Court in Reed's case did the same. Prosecutors just are not the same as a police officer when it comes to whether they are entitled to a good faith exemption to the exclusionary rule. This Court would serve the criminal law system well by taking this case and giving guidance to lower courts on how they should address claims of good faith raised by prosecutors to defend their use of unconstitutional means to obtain evidence.

III. A Factual Record In the Context of a Good Faith Analysis Is As Important As It Is In Other Contexts.

In this Court's decision in *Illinois v. Krull, supra,* this Court paid attention to the facts the court of appeals had directed the trial court to develop what the officer actually did and what he knew. *Krull, supra*, at 344. What a prosecuting attorney has done is no less important in this context. What was known and what is the chargeable knowledge as well as what was or was not actually done ought to be know when making the important decision of whether the exclusionary rule applies to unconstitutional action by a prosecutor.

Prosecutors, in other contexts involving the constitutionality of their conduct, have the facts of what they did known before a decision is made. In *Batson v. Kentucky*, 476 U.S. 79 (1986) the use of peremptory strikes in jury selection to deny a black defendant the right to have members of his race on his jury was plainly renounced and prohibited. When a prosecutor strikes a black juror using a peremptory strike, the defense can challenge it. Before the court makes its decision on the challenged strike, it needs to know the facts about what the prosecutor knew and did. Was the strike race based or was it made in good faith based on the prospective juror's relationship to the accused or another valid reason? Facts first, decision after.

When a case is to be retried, after a successful appeal or habeas corpus petition, and additional new changes with more severe penalties are brought, are they brought in good faith based on newly available information or are they vindictive? Under *Blackledge v. Perry*, 417 U.S. 21 (1974), that question, good faith and proper or not,

based on what the prosecutors knew and did, must be answered before deciding a motion to dismiss for vindictive prosecution.

Another context in which the facts of a prosecutor's actions need to be determined when assessing whether a prosecutor acted in good faith is a motion under Rule 48(a) of the Federal Rules of Criminal Procedure. That rule permits a prosecutor to move to dismiss an indictment or information. It may be granted only with leave of court. When deciding such a motion, the court decides whether granting it "...would be clearly contrary to manifest public interest..." *Rice v. Rivera*, 617 F. 3d. 802, 811 (4th Cir. 2010). Making that decision "... should be decided by determining whether the prosecutor acted in good faith at the time he moved for dismissal." *United States v. Smith*, 55 F. 3d. 158, 159 (4th Cir. 1995). If the prosecutor's action is based on "... acceptance of a bribe, personal dislike of the victim, and dissatisfaction with the jury impaneled," then that would establish bad faith and the motion could be denied. *Ibid*. The prosecutor's actions and knowledge must be known so good faith can be assessed.

In the decision making process regarding a prosecutor's actions, it is important to know what actually was or was not done and what was known or should have been known when the action was taken. Guidance from this Court on this important principle in the context of this case would advance the perception and reality of justice in our criminal law system.

CONCLUSION

This Court is respectfully requested to grant this Petition for Certiorari.

Respectfully Submitted,

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