No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FORREST COX, Petitioner,

vs.

STATE OF NEBRASKA, Respondent.

On Petition for Writ of Certiorari from

the Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

Thomas C. Riley
Counsel of Record
Public Defender for Douglas County, Nebraska

1819 Farnam Street
H05 Civic Center
Omaha, Nebraska 68183
(402) 444-7175

QUESTIONS PRESENTED:

I. IN A FIRST DEGREE FELONY MURDER CASE REQUIRING LIFE IMPRISONMENT, DID THE NEBRASKA SUPREME COURT ERROR IN APPLYING THE GOOD FAITH DOCTRINE TO A SEARCH WARRANT THAT WAS EXECUTED APPROXIMATELY HALF A YEAR AFTER BOTH THE FEDERAL STATUTE AND RELEVANT CASE LAW HAD BEEN OVERTURNED BY THIS COURT AS UNLAWFUL, CONTRARY TO THE FOURTH AMENDMENT?

II. WAS IT A DENIAL OF THE PETITIONER'S FOURTH AMENDMENT RIGHTS FOR THE NEBRASKA SUPREME COURT TO DECLINE TO ADDRESS THE TRIAL COURT'S *SUA SPONTE* APPLICATION OF THE INDEPENDENT SOURCE DOCTRINE TO IMMUTABLE EVIDENCE?

a. SHOULD THE INDEPENDENT SOURCE DOCTRINE BE MODIFIED TO ADDRESS THE UNIQUE NATURE OF IMMUTABLE EVIDENCE TO ENSURE PRESERVATION OF THE FOURTH AMENDMENT AND ITS PRINCIPLES?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Forrest Cox respectfully petitions for a writ of certiorari to the Nebraska Supreme Court in State v. Forrest Cox No. S-19-780.

OPINION BELOW

The opinion of the Nebraska Supreme Court is reported at 307 Neb. 762, ___ N.W. 2d _____(2020) and is attached at (App-A)

STATEMENT OF JURISDICTION

The Nebraska Supreme Court issued its opinion on November 13, 2020, (App. A). This Court's jurisdiction is invoked under 28 U.S.C. Section1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

I.

The Fourth Amendment states that "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."

II.

The Fourteenth Amendment states in pertinent part that "... nor shall any State deprive any person of life, liberty, or property, Without due process of law..."

STATEMENT OF THE CASE

The Petitioner, Mr. Forrest Cox, was convicted of First Degree Murder on solely a theory of felony murder, as well as Possession of a Firearm by a Prohibited

Person, and Use of a Firearm during the Commission of a Felony. While there were *no* eyewitnesses placing the Petitioner at the scene of the crime, nor was there ever a weapon recovered from the shooting, nor DNA results produced implicating the Petitioner, the State's theory of culpability relied heavily on the cellular site location information (hereinafter "CSLI") belonging to the cellular phone registered to the Petitioner.

Prior to this Court's opinion in *Carpenter v. United States*, 138 S.Ct. 2206 (2018), law enforcement applied for a court order pursuant to the Federal Stored Communications Act, 18 U.S.C. § 2701 to 2711 (hereinafter "FSCA"). (App-C). At the time of this initial search, the Petitioner was not under arrest for the aforementioned crimes. Approximately 20 months after applying for this court order and nearly half a year after *Carpenter* was published, law enforcement sought a search warrant for the same CSLI data at the direction of the prosecution, who in the same week, conceded to the unlawfulness of the initial search.

During this initial search and prior to applying for a search warrant, law enforcement made copies of the CSLI data and further, plotted said data to discover the cellular phone was in the area of the homicide in the moments surrounding the shooting. The trial court entered an order granting a motion to suppress for the CSLI data acquired during the initial search following the State's concession as to its unlawfulness. (App-B; App-D). The prosecution did not raise the good faith doctrine as to the initial search.

Thereafter, a subsequent motion to suppress CSLI data took place regarding the same substantive evidence, albeit the a new copy, this time sought pursuant to a search warrant and underlying affidavit that included nearly an entire page of new information for the issuing court to consider. (App-E; App-F). The trial court denied the motion to suppress, finding the good faith doctrine applicable to this subsequent search that occurred approximately six months post-*Carpenter* and *sua sponte* determining the independent source doctrine appropriate in this matter. (App-G).

The jury returned verdicts of guilt based upon the following facts:

On March 6, 2017, Mr. Laron Rogers (hereinafter "Mr. Rogers") was employed as a customer service representative at a Boost Mobile Store. (702:3-703:24). During his shift, Mr. Rogers asks another employee if he could borrow $100. (725:10-20; 728:9-21). Mr. Htoo did not provide Mr. Rogers with the money. (725:10-20).

Ms. Hope Hood visited her good friend, Mr. Rogers, during his shift. (733:9-735:4, 14-24; 758:1-3). Upon arrival, Ms. Hood met Mr. Rogers in his vehicle, where the two chatted and smoked marijuana. (740:1-11; 758:1-5). During this interaction, Ms. Hood observed her friend to be less talkative and he communicated that he was feeling stressed. (759:4-14).

Ms. Hood knew Mr. Rogers to be a marijuana dealer. (734:3-15; 749:15-18; 757:13-15). She informed law enforcement that Mr. Rogers reported to her, while in the Boost Mobile parking lot, that he owed his "plug" (drug supplier) money. (759:22-761:5; 902:5-9).

During this conversation, Ms. Hood observes a vehicle enter the parking lot with two men inside, one of which she recognizes as Petitioner. (741:3-742:4). According to Ms. Hood, the driver was a bald, stocky male, who did not approach the vehicle. (741:3-15). Instead, he stood in front of the vehicle, without saying a word. (749:1-8; 762:4-14).

Mr. Rogers greeted the taller male, Petitioner, as "cuz." (748:18-25; 763:4-12). To Ms. Hood, it seemed like Mr. Rogers had just seen an old friend. (749:1-11). The two men engaged in a conversation, wherein they exchanged phone numbers and had a back-and-forth over "two twos." (763:17-22; 764:14-24). Ms. Hood understood this as a conversation over ounces of marijuana. (763:13-26; 765:11-16).

While in Mr. Rogers' vehicle, Ms. Hood saw a white lidded container of marijuana that Mr. Rogers displayed in the vehicle. (763:23-764:13). Mr. Rogers displayed this white lidded container to Petitioner during their conversation over marijuana. (745:17-746:11; 763:23-764:13). This same white lidded container of marijuana was recovered by law enforcement, following the shooting, in the same condition as Ms. Hood observed in the parking lot. (763:23-764:13).

That evening, the Petitioner entered the Boost Mobile store, inquiring about a particular phone. (726:19-727:11). Petitioner left a blue post-it with an employee containing the writing "B", "Bubba" with the numbers "312-6473". (Exhibit 118).

Upon review of the surveillance video from Boost Mobile, Detective Ryan Hinsley (hereinafter "Detective Hinsley") identified the other male from the white Impala as Mr. Rufus Dennis (hereinafter "Mr. Dennis").

Law enforcement located this white Impala discovered a seemingly new steering wheel cover within the vehicle. (Exhibit 87; 787:11-21). Also within the vehicle, law enforcement collected a partially open ProElite box of license plate fasteners. (790:19-791:9; Exhibit 119). A receipt from Autozone collected from the inside of the vehicle dated 3/15/2017 with a plate number UEK 803. (Exhibit 101, 116; 795:19-796:18). A registration for the white Impala, belonging to Ms. Deanna Dennis, the mother of Mr. Rufus Dennis, was located within the vehicle as well. (Exhibit 104; 798:8-14; 835:14-836:3).

During the interrogation of Mr. Dennis a few weeks following the shooting, Mr. Dennis was shown a photo of Mr. Rogers. (835:14-836:10). Mr. Dennis denied that he had ever seen Mr. Rogers in his life. (835:14-836:10; 1116:8-22). Further, Mr. Dennis initially denied being at Boost Mobile on March 6, 2017, with Petitioner. (836:4-25). It was only *after* the detective showed Mr. Dennis photos and surveillance video from Boost Mobile did he admit that he was at Boost Mobile on March 6th. (836:4-25).

On March 6, 2017, LT Thomas's son, Mr. Rogers, returned home from his shift at Boost Mobile between 5:30 p.m. and 6:15 p.m. (693:19-24; 695:12-22). While at home, and before leaving the residence again, Mr. Rogers asked his father, Mr. Thomas, for "some change." In response to this request, before Mr. Rogers left the house, Mr. Thomas provided his son two $100 bills. (696:14-697:18).

During the course of the day, Mr. Rogers made two visits to his bank, SAC Federal Credit Union. (912:6-932:9, Exhibits 120-121). Mr. Rogers made two withdrawals on the day of the shooting, one for $120 cash and the other for $821.89.

(912:6-932:9; Exhibits 120-121). The first withdrawal was made at 1:49 p.m. (912:6-932:9; Exhibits 120-121). The second withdrawal was made by Mr. Rogers that evening, at 6:56 p.m. (912:6-932:9; Exhibits 120-121). In each instance, Mr. Rogers had a remaining balance in his accounts of nearly the minimum permitted by the bank, which is five dollars. (912:6-932:9; Exhibits 120-121).

Moments prior to the shooting, surveillance video of the dark, lower lot of the Ames Avenue convenience store seemed to depict a white sedan pulling into the parking lot with headlights illuminated. (Exhibit 135; 813:8-20; 814:5-10). This was based upon law enforcement's own observation. (813:8-20; 814:5-10; 841:25-842:12). It was not formed by anyone associated with manufacturing or design from the Chevrolet Corporation, nor was it the opinion of any individual associated with a local Chevrolet dealership. (841:25-842:12). Eyewitness accounts of this vehicle varied between a white vehicle and a small, dark vehicle that was reportedly not an Impala.

Gunshots were fired and immediately thereafter, patrons observed Mr. Rogers staggering up from the south lot, shouting, "call the police, call the police." (501:10-16; 508:10-18).

Upon paramedics' arrival to the convenience store parking lot, Mr. Rogers was in stable condition. (459:19-460:2). Mr. Rogers was able to communicate on scene that he had been shot. (456:3-23).

Law enforcement discovered three $2 bills on Mr. Rogers' person. (540:10-544:24). Further, inside of his front jeans pocket, law enforcement collected 2.27 grams of cocaine. (891:1-892:11; Exhibit 71).

Mr. Rogers' vehicle was processed by the Omaha Police Department on the evening of the shooting. (548:4-550:7; 850:15-852:15). The interior and exterior of Mr. Rogers' vehicle was swabbed for DNA. In addition, the vehicle was processed for fingerprints. (583:20-588:5).

Law enforcement located narcotics within Mr. Rogers' vehicle. (617:18-20; Exhibit 43). The narcotics were not visible from the outside of the vehicle. (617:18-618:4). The amount of marijuana recovered in Mr. Rogers' vehicle was beyond a mere user amount—it was an amount reflective of distribution. (618:22-619:8). The amount of marijuana recovered from Mr. Rogers' vehicle amounted to approximately four ounces. (624:19-22; 850-15-852:15).

Subsequent to the shooting, law enforcement discovered that a 2004 white Chevrolet Impala had been sold "quickly" at a local auto sales shop. (899:2-900:18). In fact, it was sold the day immediately following the shooting. (899:2-13). Law enforcement did little to no follow up with respect to where that vehicle had come from or who it had been sold to. (899:2-900:18; 910:3-13). Instead, all law enforcement could account for was that it was purchased by a female. (899:2-21).

Photographic "stills" were collected from the video surveillance camera at a local AutoZone approximately a week and a half after the shooting. (863:8-871:11). These stills depicted an adult, black male entering the store and then making a purchase of a steering wheel cover. (863:8-871:11; Exhibits 111-115). Detective Hinsley identified this adult, black male as Petitioner. (1104:18-1107:24).

Law enforcement interrogated the Petitioner nearly a year after the incident. (831:19-833:8-12; 1090:2-11). During the course of the interrogation, Petitioner reported to law enforcement that he did see Mr. Rogers on the day of the shooting at Boost Mobile. (1115:25-1116:7; E162). Petitioner explained that he was familiar with Mr. Rogers after having worked together in the past. (1116:3-4). Further, Petitioner recalled being at Boost Mobile with Mr. Dennis. (1117:7-10; E162). In his interrogation nearly a *year* after the shooting, Petitioner denied being anywhere near the area of 42nd and Ames Avenue on the evening in question. (E162). Petitioner reported to the detective that he believed he was with Ms. Lateah Carter-Thomas at her residence, where he stayed overnight. (E162). From a review of the phone records, the detective discovered that Petitioner had been in contact with a number of females that day, the detective could not find any contact with Ms. Carter-Thomas on March 6, 2017. (1102:2-25).

Detective Nick Herfordt (hereinafter "Detective Herfordt") was responsible for processing cellular phones in the criminal investigation. (942:11-23). During the course of the investigation, law enforcement reviewed the one text message between the phones attributed to Mr. Rogers and Petitioner. It was a text message from Mr. Rogers' phone to Petitioner's phone on March 6, 2017, sent at 6:37:38 p.m. that states, "This Ronno." (957:14-958:20; 993:12-996:1; Exhibits 138, 152, 153).

Moreover, there were four completed calls made between the phone number registered to Mr. Rogers and the phone number registered to Petitioner between 7:23 p.m. and 7:45 p.m. on March 6, 2017. (996:2-20). The call detail records of the phone

registered to Petitioner, as plotted by Detective Herfordt, provided CSLI of approximately 42nd and Ames Avenue during the phone calls at 7:36 p.m. and 7.45 p.m. Thereafter, at 7:57 p.m., the cellular tower used by the number registered to Petitioner was in use of the cellular tower near 72nd and Ames Avenue, with an estimated distance of 1.22 miles from where the Ames Avenue Convenience Store is located. (1036:2-24).

When a "transaction" occurs on a cellular phone, the phone will "communicate" with the tower that the device has the best relationship with. (971:17-23; 998:18-25). This is not necessarily the closest tower, as it could be affected by the volume of calls at the time, geography, or extreme surges of electricity. (971:14-23; 998:18-25; 999:1-21; 1048:3-25). In this event, the phone will register or communicate with another tower. (1049:3-12). Specifically, in Omaha, Nebraska, this would likely be within approximately a mile. (1049:3-12).

Detective Herfordt reviewed the cellular records for the phone number registered to Mr. Dennis around the time of the homicide. (1045:17-1046:20; 1052:3-1053:25). Despite his efforts, the detective was unable to retrieve any CSLI from said records as there was deplete of activity from 6:46 p.m. to 8:04 p.m. on March 6, 2017. (1123:2-16). This complete lack of records could have simply been attributable to nonuse of the phone. (1052:3-1053:25). However, it also could have been due to a user manually turning off the cellular phone or placing the phone in "airplane mode" during this timeframe surrounding the homicide. (1052:3-1054:12). In airplane mode, a cellular phone will not transmit or receive a signal. (1054:4-12). Nonetheless, it was

unusual for this particular number as there was regular activity from November 2, 2016, all the way through March 27, 2017. (1123:2-16).

Furthermore, Detective Herfordt analyzed the CSLI for the phone number registered to Mr. Laron Rogers in the hours leading up to the shooting. From this analysis, he was able to discern that the CSLI revealed the phone may have been in the general area of the residence of Mr. William McNeal (hereinafter "Mr. McNeal"), at 7:16 p.m. on the evening of the shooting. (1058:18-1060:17; Exhibit 169).

Mr. McNeal was Mr. Rogers' "plug." (1120:14-1121:17). In other words, Mr. McNeal supplied Mr. Rogers with the marijuana that he distributed. (1120:14-1121:17). Detective Hinsley's investigation revealed that on the day of the shooting, Mr. Rogers owed Mr. McNeal, his supplier, some money to a point where he seemed desperate. (1120:14-1121:17).

Ms. Carter-Thomas did not recall seeing Petitioner on March 6th or 7th of 2017. (1081:2-11). Albeit, there would be times in which Petitioner would spend the night at her residence. (1081:2-11). Furthermore, when Ms. Carter-Thomas was interviewed by Detective Hinsley approximately a *year* after the shooting, she reported she could not recall if she was with Petitioner on the evening of the shooting. (1084:-1086:8).

Dr. Michelle Elieff, a forensic pathologist, conducted the autopsy of Laron Rogers and concluded to a reasonable degree of medical certainty that the cause of death to Mr. Rogers was a gunshot wound of the lower torso. (663:11-18).

Following jury trial, the Petitioner was sentenced to life imprisonment for First Degree Murder under the sole theory of liability of felony murder, to be followed by 25 to 30 years' imprisonment, plus 40 to 45 years' imprisonment for the weapons offenses.

REASONS FOR GRANTING THE WRIT

I. IN A FIRST DEGREE FELONY MURDER CASE REQUIRING LIFE IMPRISONMENT, DID THE NEBRASKA SUPREME COURT ERROR IN APPLYING THE GOOD FAITH DOCTRINE TO A SEARCH WARRANT THAT WAS EXECUTED APPROXIMATELY HALF A YEAR AFTER BOTH THE FEDERAL STATUTE AND RELEVANT CASE LAW HAD BEEN OVERTURNED BY THIS COURT AS UNLAWFUL, CONTRARY TO THE FOURTH AMENDMENT?

The highest court in the State of Nebraska addressed the Petitioner's arguments regarding the search warrant for cellular records, specifically CSLI data, in *two and a half pages* for a first degree felony murder conviction, requiring life imprisonment. While it is unclear due to the brevity of the analysis, the Nebraska Supreme Court seemingly acknowledges that the search warrant (second search chronologically) was unsupported by probable cause. (App-A, pg. 769). In doing so, the Nebraska Supreme Court provided that this matter was akin to two cases of its own precedent, *State v. Jennings*, 942 N.W.2d 753 (Neb. 2020), and *State v. Brown*, 921 N.W.2d 804 (Neb. 2019). In simplest terms, the Nebraska case of *Jennings* relied upon *Illinois v. Krull*, 480 U.S. 340 (1987), and *Davis v. United States*, 564 U.S. 229 (2011). At the time the searches were executed in *Jennings*, *Carpenter* had not been

decided by this Court and thus the FSCA was controlling, as was a Nebraska state case, *State v. Jenkins*, 884 N.W.2d 429 (Neb. 2016).

Thus, in applying these local cases and in turn *Krull* as well as *Davis*, the Nebraska Supreme Court lost sight of the critical temporal inquiry involved in the good faith analysis—that being *when* the search occurred. At the time of the subsequent search in this particular case, *Carpenter* had been published six months prior. (App-F). It is of monumental significance in this analysis to note that the first search of the CSLI is *not* before this Court in the Petition nor was it before the Nebraska Supreme Court on direct appeal as the prosecution conceded to its unlawfulness. (App-D). Consequently, at the time the subsequent, subject search was executed neither a *Krull* nor *Davis* analysis was appropriate as the FSCA and *Jenkins* had been overturned by *Carpenter*. Therefore, to dismissively and hastily apply the good faith doctrine was reversible error by the Nebraska Supreme Court, requiring this Court's intervention.

The Fourth Amendment of the United States Constitution provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...," and further guarantees "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."

The exclusionary rule "is a judicially prescribed remedial measure..." *Segura v. U.S.*, 468 U.S. 796, 804 (1984). This remedial measure accepts the premise that "the way to ensure such [constitutional and statutory] protections is to exclude

evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes." *Nix v. Williams*, 467 U.S. 431, 443 (1984).

According to the Court, "[w]hen police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' on the subsequently invalidated search warrant." *Herring v. U.S.*, 555 U.S. 135 (2009). This remedial measure of the Fourth Amendment "serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* at 145, 129 S.Ct. at 702.

The exclusionary rule is appropriate if (1) the judge or magistrate in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for a reckless disregard for the truth, (2) the issuing judge or magistrate wholly abandoned his or her detached and neutral role, (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence unreasonable, or (4) the warrant is so facially deficient that the officer executing the warrant cannot reasonably presume it is valid. *U.S. v. Leon*, 468 U.S. 897, 923 (1984). It is prosecution that has the burden to show that the good faith exception applies. *Id.* at 924.

The Ohio Supreme Court, in *State v. Castagnola*, refused to apply the good faith exception to the exclusionary rule. 46 N.E.3d 638, 659 (Ohio 2015). The Ohio Supreme Court determined it would be inappropriate to apply because, "[t]he affidavit was so lacking in indicia of probable cause and the warrant was so facially

deficient in failing to particularize the items to be searched for on Castagnola's computer that the detective could not have relied on it in objective good faith." *Id.* at 660. Further, the court explained, "[q]uite simply, the search-warrant affidavit was not based on evidentiary fact. It was based on layered inferences." *Id.* The court stressed that "[a] search cannot depend on mere suspicion."

Finally, the Ohio Supreme Court declared that this was a "difficult case," admitting that the evidence obtained implicating the defendant (child pornography) was "horrifically objectionable," but refused to apply the good faith exception nevertheless. *Id.* The court expounded, "[t]here is always a temptation in criminal cases to let the end justify the means, but as guardians of the Constitution, we must resist the temptation." *Id.*

In *United States v. Weaver*, the Sixth Circuit Court of Appeals reversed the defendant's firearm convictions, finding that the boilerplate language of the affidavit underlying the search warrant to be "bares bones," and thus holding the good faith doctrine to be inapplicable. 99 F.3d 1372, 1374-1381 (6th Cir. 1996). The affidavit contained boilerplate language with respect to the unlawful distribution of marijuana, generic information about the subject residence, as well as unconfirmed information from an unnamed confidential informant. *Id.* at 1375-1376. In addressing the boilerplate language of the affidavit, the court recognized that affidavits are often drafted "by nonlawyers in the midst and haste of a criminal investigation," yet refused to dismiss that affidavits must reflect the particular case at hand. *Id.* at 1378.

According to the Sixth Circuit, "[t]he use of generalized boilerplate recitations designed to meet all law enforcement needs for illustrating certain types of criminal conduct engenders the risk that insufficient 'particularized facts' about the case or the suspect will be presented for a magistrate to determine probable cause." *Id.* (citing *In re Young*, 716 F.2d 493, 500 (8th Cir. 1983)(holding unacceptable an FBI affidavit of 'broad, boilerplate statement describing in a general way' applications, reports, and records commonly kept in bail bond operation)).

The search warrant, as presented, contained boilerplate language along with minimal particularized information of an *incriminating* nature, along with *conclusory* statements of the affiant's belief as to probable cause of criminal activity. *Id.* at 1379. Law enforcement took no steps to corroborate the informant's claims with respect to criminal activity, but rather only confirmed *innocent* facts that was, according to the court, insignificant. *Id.* (citing *U.S. v. Gibson*, 928 F.2d 250, 252-253 (8th Cir. 1991)(insufficient showing of probable cause when officer only corroborated 'innocent details' of utility records for account name, revenue agency for physical description, and car titles, and '[t]here was neither surveillance nor observation of unusual civilian or vehicular traffic at the address, nor were there very short visits characteristic of drug trafficking.')). Thus, even assuming the information of the confidential informant was reliable, the court's review of the affidavit "reveals of a paucity of particularized facts indicating that a search of the...residence 'would uncover evidence of wrongdoing.'" *Id.*

The Sixth Circuit recognized the definition of a "bare bones" affidavit as one "...that states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge..." *Id.* at 1378. As the search warrant was merely supported by a "bare bones" affidavit, the court determined the evidence seized at the residence should be suppressed as a "...a reasonably prudent officer would have sought greater corroboration to show probable cause and therefore do not apply the *Leon* good faith exception on the facts of this case." *Id.* at 1381

The Third Circuit Court of Appeals in *United States v. Goldstein* determined it was appropriate to extend the good faith doctrine to the government's search warrant of the defendant's cell phone where the search warrant for CSLI data was executed *prior* to Court's decision in *Carpenter*. ___ F.3d ___, No. 15-4094, 2019 WL 273103, at *1 (3rd Cir. 2019). The defendant in *Goldstein* was arrested for his involvement in a kidnapping scheme. *Id.* at *1. In an effort to find further evidence of his involvement, the government acquired a court order pursuant to the FSCA, compelling the defendant's phone carrier to produce 57 days' worth of CSLI data. *Id.* This CSLI data placed the defendant in the vicinity of the scene of the kidnapping. *Id.* at *2. Ultimately, following a trial, the defendant was convicted.

Upon applying *Carpenter*, the Third Circuit Court of Appeals determined the CSLI data was acquired in contravention to the defendant's Fourth Amendment rights. *Id.* Nevertheless, the court determined the exclusionary rule was not applicable and rather the good faith doctrine should control as the government—*at*

the time of the search—was acting in objectively reasonable reliance on a statute as well as then-binding appellate precedent. *Id.* at *2-3. In reaching said holding, the Third Circuit relied on precedent of the Court—namely, *Krull* and *Davis*. *Id.*

In *Krull*, the Court determined that the good faith doctrine should apply where "a search is executed pursuant to a statute that was valid at the time of the time of the search but later declared unconstitutional." *Id.* at *3. In like manner, the Court in *Davis* held that the good faith doctrine also should apply "when a search is conducted based upon reasonable reliance on *then-binding* appellate precedent..." *Id.* (emphasis added). At the time of the government search in *Goldstein*, the FSCA was still valid and further Third Circuit precedent provided that an individual does not have a reasonable expectation of privacy in CSLI data under the Fourth Amendment. *Id.* The Court's opinion of *Carpenter* was published *after* the search was executed in *Goldstein*. *Id.*

Lastly, the court noted that it was "in good company," as several other sister circuit courts have also held that the good faith doctrine should be extended where the government search for CSLI data occurred *prior* to the Court's decision in *Carpenter*. *Id.* at *3; See *U.S. v. Zodhiates*, 901 F.3d 1378 (2nd Cir. 2018); *U.S. v. Christian*, 737 Fed.Appx. 165 (4th Cir. 2018); *U.S. v. Curtis*, 901 F.3d 846 (7th Cir. 2018); *U.S. v. Joyner*, 899 F.3d 1199 (11th Cir. 2018).

The Supreme Court of Florida applied the same analysis as the Third Circuit Court of Appeals in *State v. Ferrari*, ___ So.3d ____, No 4D14-464, 2018 WL 6132264 (Fla. 2018), wherein the court held the state could not meet the requirements off the

good faith exception to the Fourth Amendment exclusionary rule. In *Ferrari*, law enforcement acquired the cell phone records of the defendant by means of a subpoena in 2001. *Id.* at *6. At trial, an FBI agent testified about these cell records, specifically the defendant's historical CSLI data. *Id.*

According to the Florida Supreme Court, it was reversible error for the trial court to deny the defendant's motion to suppress as "[t]he 'good faith' exception avoids the exclusion of the results of a warrantless search where the police conduct an objectively reasonable search based upon binding decision as law, *see Davis v. United States,* 564 U.S. 229, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), or in reasonable reliance on an applicable statute, even if that statute is later held to be unconstitutional, *see Illinois v. Krull,* 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)." *Id.* at *7.

At the time the search was executed in 2001 in *Ferrari*, there was no binding precedent in existence "that CSLI data was not within Fourth Amendment protections and thus exempt from the warrant requirement." *Id.* The trial court improperly relied on precedent from 2009, which *predated* the motion to suppress hearing, yet post-dated the *search* by nearly a decade. *Id.*

The relevant inquiry with respect to application of the good faith doctrine is the time of the search, and thus the Florida Supreme Court determined it was error for the trial court to apply it. *Id.* Further, the detective did not cite any statute within the request for issuance of the subpoena, and even though a relevant statute existed at the time within the state, the government failed to comply with its terms. *Id.* Consequently, the Florida Supreme Court held "the good faith exception to the

exclusionary rule does not apply because the State was not relying on binding precedent or clearly applicable statutes in obtaining the data." *Id.* at *8.

The Nebraska Supreme Court, in its swift analysis on this matter, offered *State v. Jennings,* 942 N.W.2d 753 (Neb. 2020) and *State v. Brown*, 921 N.W.2d 804 (Neb. 2019), as support for its holding. (App-A). Yet, neither state case should be controlling due to the critical temporal differences that eliminate any reliance on *Krull* or *Davis.*

Most recently, the Nebraska Supreme Court in *Jennings* held the exclusionary rule was inappropriate for application as law enforcement acted in reasonable reliance on the FSCA. In *Jennings*, law enforcement obtained a court order for the defendant's CSLI pursuant to the FSCA . *Id.* These records were obtained 18 months *prior* to *Carpenter. Id.* Thus, the relevant case law at the time the search occurred consisted of *State v. Jenkins*, 884 N.W.2d 429 (Neb. 2016), wherein the Nebraska Supreme Court held that the FSCA did not violate the Fourth Amendment as there is no reasonable expectation of privacy in CSLI. *Id.* As a result, the good faith doctrine as set forth in both *Krull* and *Davis* was controlling in *Jennings. Id.*

Prior to *Jennings*, the highest state court published *Brown*, holding that the exclusionary rule was not appropriate where law enforcement acquired the accused's CSLI in reliance upon FSCA. Shortly after the search was conducted in *Brown*, the Nebraska Supreme Court decided *Jenkins*. Moreover, while the matter in *Brown* was on appeal, this Court published its opinion in *Carpenter*. *Brown,* 921 N.W.2d at 810. Consequently, the Nebraska Supreme Court in *Brown* determined that *Krull* was controlling because at the time the search was executed, officers' reliance on FSCA

was reasonable and did not require application of the exclusionary rule. *Id.* at 810-812.

At the trial level, the prosecution did not meet its burden in demonstrating the good faith doctrine applies in light of the obvious Fourth Amendment violations. The indiscriminate sweep of the language contained within the Affidavit and Search Warrant for the cellular phone records of 402-312-6473 is intolerable, and to hold otherwise, would be false to the terms, meaning, and history of the Fourth Amendment. There is no fair probability articulated within the warrant and supporting affidavit for the cellular phone that evidence of a crime will be found. Instead, the prosecution relied upon boilerplate language based upon the detective's training and experience to attempt to establish an evidentiary nexus between the subject cellular phone and the criminal investigation.

In this matter, law enforcement searched and seized the victim's cell phone prior to application for this search warrant. As a result, law enforcement was aware that Mr. Rogers' phone had seemingly been in contact with the phone law enforcement believed to belong to the Petitioner over an *hour* before the shooting. Certainly, had the contents of this *sole* text message revealed criminal activity of any nature, then the words of this text message certainly would have been included in the underlying affidavit. Yet, there was no mention *whatsoever* as to what the contents of this singular text message contained. (App-F). Not to mention, per the affidavit, the phone number that Mr. Cox self-reported to law enforcement in 2016 *differs* from the number provided to an employee at Boost Mobile and that was the subject of an

outgoing text message by Mr. Rogers. This distinction, in and of itself, should render this Search Warrant for 402-312-6473 invalid as it fails the Fourth Amendment in each particularity and probable cause.

Further, as in *Castagnola*, the good faith doctrine is not appropriate as the affidavit was not based on evidentiary fact, but rather layered inferences. These inferences, as in the Sixth Circuit case of *Weaver*, went unconfirmed and uncorroborated by law enforcement, aside from innocent details. Here, law enforcement learned from Mr. Rogers' parents, who had spoken to Mr. Rogers' boss, that Mr. Rogers had contact with two black males the afternoon of the shooting. This most certainly is layered information, as well as hearsay within hearsay. In an effort to corroborate this information, law enforcement responded to his place of employment and were able to review video surveillance. *However*, through this video surveillance at his place of employment, law enforcement simply corroborated the innocent fact that Petitioner was inside the Boost Mobile Store more than an hour before the shooting, which occurred at a different location.

The only potentially incriminating information relayed to law enforcement involved white Impala being present at Boost Mobile, which was only, in a basic sense, similar to the suspect vehicle in that it was seemingly a white sedan. Even so, this white Impala at Boost Mobile belonged to the Dennis family, not the Petitioner. None of this information provides the necessary nexus to the CSLI required by the Fourth Amendment.

The only information provided within the affidavit as to how cell phones are related to a criminal investigation is within the page of boilerplate language, none of which contains particularized facts about this particular investigation or this particular cell phone. Certainly, an officer with reasonable knowledge of what is prohibited by the law is more than aware of such differences in warrants. As a result, official belief of law enforcement in this particular search warrant for the cell phone is unreasonable. Admittedly, the Nebraska Supreme Court seemingly acknowledged that the warrant was lacking in probable cause by applying the good faith doctrine, however, as aforementioned, it is unclear due to the brevity of the analysis. (App-A).

Lastly, there is no basis provided in *Carpenter* to support the Nebraska Supreme Court's application of the good faith doctrine for this particular search warrant. As discussed above, a significant number of the federal circuit courts of appeals have determined that the good faith doctrine should be applied where the search occurred *prior* to the filing of *Carpenter*.

Unfortunately, none of the aforementioned arguments were addressed by the Nebraska Supreme Court in its two and a half pages on this issue in this case before the Court. In lieu of conducting an analysis pursuant to *Leon*, the Nebraska Supreme Court abruptly held that the good faith doctrine was applicable in these facts based upon its own precedent without discussion concerning probable cause. Namely, the Nebraska Supreme Court opined, "[s]imliar to *Brown* and *Jennings*, law enforcement's reliance on a court order issued under the Stored Communications Act, at a time when the act had not yet been found by the U.S. Supreme Court or by this

court to implicate the Fourth Amendment, was not objectively unreasonable." (App. A., pg. 770).

Factually, the Nebraska Supreme Court's rationale is inaccurate. This case is distinguishable from those state cases in a significant way—law enforcement did *not* conduct the search prior to *Carpenter*, but rather nearly six months after its publication. This is critical as the temporal inquiry of the good faith doctrine encompasses *when* the search at issued occurred. There were not multiple searches for the Nebraska Supreme Court to review as there was in *Jennings*. In this case, the first search of the cellular records—executed prior to *Carpenter*—was not before the Nebraska Supreme Court for its review as the prosecution conceded at the trial level as to its unlawfulness. (App-D, pgs. 13-14).

As the trial court noted in its order, the State failed to raise the good faith doctrine as to the initial search when it conceded as to the illegality. (App-D, p. 15). The prosecution applied for the cellular records pursuant to a search warrant nearly six months after *Carpenter* and approximately 20 months following the initial application to search the cellular records. (App-C; App-F). Therefore, unlike *Jennings*, neither *Krull* nor *Davis* is controlling in this particular case as at the time of the application and execution of the subsequent search warrant, *Carpenter* had been in effect for nearly half a year. The result of this opinion clarified that *Jenkins* was no longer binding precedent in the State of Nebraska and that law enforcement's reliance on the FSCA was contrary to the protections afforded by the Fourth Amendment.

Consequently, the Nebraska Supreme Court entirely omitted an analysis under *Leon*, instead applying *Krull* and *Davis* in such a way so as to render the Fourth Amendment ceremonial, at most. As a result, guidance from this Court is necessary to ensure the Fourth Amendment is not circumvented by allowing a search and seizure to be superficially labeled as conducted pursuant to the "good faith doctrine" without any meaningful examination. Should this Court not intervene, the Nebraska Supreme Court may continue to hastily reduce the Fourth Amendment to "a form of words."

II. WAS IT A DENIAL OF THE PETITIONER'S FOURTH AMENDMENT RIGHTS FOR THE NEBRASKA SUPREME COURT TO DECLINE TO ADDRESS THE TRIAL COURT'S *SUA SPONTE* APPLICATION OF THE INDEPENDENT SOURCE DOCTRINE TO IMMUTABLE EVIDENCE?

The burden to establish by a preponderance of the evidence that information inevitably independently was acquired by lawful means belongs to the prosecution. *Nix v. Williams*, 467 U.S. at 444; *Nardone v. U.S.*, 308 U.S. 338, 342 (1939). Thus, it was reversible error for the trial court in the case pending before to the Court to set forth an exception to the exclusionary rule, on its own accord, that the State had the burden to raise and prove by a preponderance of the evidence. *Id.*

As provided in the argument above, the facts set forth in the record are insufficient, even when viewed in totality, to support application of the independent source doctrine. The State failed to raise this exception to the exclusionary rule. Instead, the prosecution argued that the warrant (App-F) was supported by probable

cause and, alternatively, if it was not supported by probable cause, that Detective Hinsley executed the search warrant in good faith reliance on *Carpenter*.

Nonetheless, the trial court, in its order denying the motion to suppress, determined on its own that the independent source doctrine was applicable. (App-G; App-H). As in *Murray*, there was no factual finding in the trial court's order as to Detective Hinsley's motivation in procuring the search warrant (App-F) for the cellular records. There was no mention in the order as to how Detective Hinsley, in fact, was affected or prompted by what was discovered during the course of the initial unlawful search of the cellar records—an illegality that the State conceded in the court below. Thus, as the trial court improperly applied an exception to the exclusionary rule on its own accord, and the Nebraska Supreme Court omitted any analysis on this issue in its opinion, the Petitioner respectfully requests this Court reverse this case and remand the matter for new trial.

The vitality of the independent source doctrine is called into question by the prevailing use of immutable evidence in criminal prosecutions. In particular, relevant immutable evidence includes DNA, cellular-site location information, and cellular phone data. The nature of said evidence provides that law enforcement may repeatedly apply for a search warrant for the *same* substantive evidence without having to physically maintain possession of the initial evidence acquired pursuant to an unlawful search and seizure. For example, should law enforcement obtain CSLI data by a court order unlawfully, there is no manner to forbid application for a search warrant of the identical CSLI data to a cellular provider. Moreover, nor is there any

method to prevent a third search for this evidence should the trial court find both the first and second search unlawful. Due to the unique nature of immutable evidence, without any specified limitations, there are infinite opportunities for the prosecution to use said evidence without consequence. The result of such a practice will be to render the Fourth Amendment, by its words, meaning, and purpose, a mere formality.

While the independent source doctrine should not provide the effect of "immunity from prosecution," its use should be explicitly addressed as to immutable evidence. As set forth in Wayne LaFave's "Search and Seizure: A Treatise on the Fourth Amendment,"

> The 'independent source' exception was initiated only to protect the government where its source is developed through honest police efforts and not where its evidence is developed through a mixture of good and bad police work... It is a matter of deterrence. If the police know that their initial illegality can be covered up later by legal police work, *what is there to stop them from committing the initial illegality*?

§11.4(a) Extent of the taint: "but for"; "attenuated connection"; "independent source"; and "inevitable discovery" (September 2020 update)(emphasis added).

A number of courts have been presented with arguments regarding the application of the independent source doctrine to immutable evidence. *State v. Betancourth*, 413 P.3d 566 (Wash. 2018)(applying the traditional independent source doctrine where the subsequent search warrant for cellular records was sought to remedy a jurisdictional matter); *Commonwealth v. Wilson*, 158 N.W.3d 343 (Mass.

2020)(applying the independent source doctrine to CSLI data sought approximately four years after the initial search); *Commonwealth v. Henderson*, 47 A.3d 797 (Pa. 2012)(affirmed lower court in refusing to apply the independent source doctrine to second search warrant for DNA sample where law enforcement did not exploit fruit of the unlawful search); *People v. Dominguez-Castor*, 469 P.3d 514 (Colo. App. 2020)(affirming trial court's application of the independent source doctrine to subsequent search of cellular phone records even where law enforcement gained knowledge of phone contents prior to second search warrant application); *U.S. v. Baires-Reyes*, No. 16-10545, 750 Fed.Appx. 548 (2018), at *550-551 (9th Cir. September 25, 2018)(on plain error review rejected application of independent source doctrine to DNA swab of the accused, amongst other evidence acquired, following unlawful entry into the home as said doctrine only allows admission of evidence "*actually* acquired through a separate and lawful means"). Yet, there is a lack of guidance provided on how the purpose and application of the independent source doctrine is challenged by immutable evidence.

The New Jersey Supreme Court made an effort to address this very difficulty in *State v. Camey*, 217 A.3d 106 (N. J. 2019). In *Camey*, the New Jersey Supreme Court established a new variety of the independent source doctrine. *Id.* at 122-123. As support for rendering this new test, the court offered,

> ...DNA is not an item like guns, drugs, or documents. DNA is different in that immutable evidence lives on. Always. And the breadth of it extends beyond the swab. A new DNA sample might provide the same

information as the original sample, but each sample is evidence in its own right—and the exclusionary rule bars the use of the same evidence that was illegally obtained or 'poisoned fruit' evidence that would not have been discovered but for the initial, illegally obtained evidence.

Id. at 121.

To fully understand why immutable evidence presents unparalleled complications to the independent source doctrine, a review of the precedent from which it originated provides insight. The Court in *Segura v. United States* held "...the evidence discovered during the subsequent search of the apartment the following day pursuant to the valid search warrant issued *wholly* on information known to the officers before the entry into the apartment need not have been suppressed as "fruit" of the illegal entry because the warrant and the information on which it was based were *unrelated* to the entry and therefore constituted an independent source for the evidence..." 468 U.S. 796, 799 (1984)(emphasis added). It was undisputed in *Segura* the law enforcement conducted an illegal, warrantless entry into Segura's apartment whereupon items indicative of drug trafficking were observed in plain view. *Id.* at 804.

At the time of the illegal entry in *Segura*, law enforcement was already in the process of acquiring a search warrant for the residence. *Id.* at 797-798. The reason for the delay was solely due to the "lateness of the hour." *Id.* at 800. Thus, due to "administrative delay," the search warrant was not presented to the magistrate until the following day. *Id.* at 801.

The Court, in its opinion, reasoned that the drugs and other items were not "fruit" of the illegality because, the facts did not support that "but for" the illegality, law enforcement would not have searched and seized the evidence at issue. *Id.* at 811, 815. Specifically, the Court provided, "...the initial entry—legal or not—does not affect reasonableness of the seizure. Under either method—entry and securing from within or a perimeter stakeout—agents control the apartment pending arrival of the warrant; both an internal securing and a perimeter stakeout interfere to the same extent with the possessory interests of the owners." *Id.* at 811.

Nonetheless, even where the facts did not support the first prong of "but for" causation of the exclusionary rule, the Court proceeded in its analysis. *Id.* at 813-814. The drugs and other items were not "fruit" as none of the information within the search warrant "was derived from or *related* in any way to the initial entry into petitioners' apartment; the information came from sources *wholly unconnected* with the entry and was known to the agents well before the entry." *Id.* at 814 (emphasis added). As a result, suppression was not justified. *Id.* at 815.

At the time the Court decided *Segura*, the complexities of searches involving the application of the independent source doctrine to immutable evidence were not foreseeable. Technology has advanced in such a way that a search of a cellular phone "...would typically expose the government to far *more* than the most exhaustive search of a house..." *Riley v. California*, 573 U.S. 373, 396-397 (2014). While in *Segura* it may not have been consequential to the Court if the initial entry was "legal or not," it undoubtedly should alter the analysis of this Fourth Amendment doctrine with

immutable evidence. This case before the Court presents an example of the problem. In particular, should law enforcement be permitted to remedy an unlawful seizure of CSLI data, there will be no incentive to abide by the Fourth Amendment at the outset. Instead, law enforcement will repeatedly engage in the same conduct as was done here—once the evidence has been copied and thoroughly examined in the haste of an investigation, it will take then make efforts to abide by the Amendment, as the evidence will remain in the same condition as months or even years before.

The Court in *Murray v. United States* vacated the judgment and remanded the matter to the trial court where the record did not support a factual finding as to whether law enforcement's decision to seek the search warrant was prompted or affected by the drugs observed in the warehouse during the initial unlawful entry. 487 U.S. 533, 542-544 (1988). In *Murray*, law enforcement conducted a warrantless entry into a warehouse where the officers observed numerous burlap-wrapped bales of marijuana. *Id.* at 535, 108 S.Ct. at 2532. Thereafter, law enforcement applied for a search warrant without including any information as to its unlawful entry or what had been observed during the unlawful entry and without making mention of said observations to the Magistrate. *Id.* at 535-536, 108 S.Ct. at 2532. Upon issuance of the search warrant, law enforcement reentered the warehouse and seized 270 bales of marijuana as well as records listing customers for whom the bales of marijuana were destined. *Id.*

The Court, in its opinion, made clear that there is not a sound rationale for a distinction in application of the independent source doctrine between tangible and

intangible evidence. *Id.* at 541-542, 108 S.Ct. at 2535. In support of this premises, the Court explained:

> The independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. So long as a later, lawful seizure is genuinely independent of an earlier, tainted (*which may well be difficult to establish where the seized goods are kept in the police's possession*) there is no reason why the independent source doctrine should not apply.

Id. at 542, 108 S.Ct. at 2535 (emphasis added).

Moreover, the Court clarified that the independent source doctrine involves an inquiry into whether the search pursuant to the warrant was "in fact a genuinely independent source" of the evidence at issue. *Id.* at 542. According to the Court, this would not be the case "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry or in information obtained during the entry was presented to the Magistrate and affected his decision to issue the warrant." *Id.*

In the case before this Court, the record is demonstrative of the difficulties presented in applying the traditional independent source doctrine to immutable evidence. By its nature, immutable evidence does not require that law enforcement ever maintain the unlawfully seized evidence in their possession, as was

contemplated in *Murray*. Thus, the prosecution may circumvent the Fourth Amendment by asserting the independent source doctrine so long as officers request a new copy of the evidence sought, whether it be CSLI data, a DNA sample, or call detail records.

While two such searches satisfied the trial court in this case, the possibilities are endless for application. Without guidance from this Court as to the parameters of the doctrine in at the current technological age, a "cat and mouse" game may ensue pending trial with repeated attempts at searches until the trial court is satisfied the terms of the Fourth Amendment, on its face, have been abide by. This could not possibly be what the Framers intended in creating the Fourth Amendment. As stated by this Court long ago, "[t]o hold otherwise would be false to the terms of the Amendment, false to its meaning, and false to its history." *Stanford v. State of Texas*, 379 U.S. 476, 486 (1965).

The Nebraska Supreme Court failed to address the trial court's application of the independent source doctrine on its own accord as its analysis on the search and seizure of the CSLI was simply two and a half pages in length as to all assignments of error raised by the Petitioner on direct appeal. (App-A; App-I). Aside from the difficulties presented by immutable evidence to the traditional independent source doctrine, the Nebraska Supreme Court did not at all address how the trial court's order is devoid of factual determinations as to law enforcement's motives as required by *Segura* and *Murray*. There was no discussion whether the officer's decision to seek the warrant was prompted or affected by what he had learned from the initial search

or if information obtained during the initial search was presented to the issuing judge. Consequently, this Court should reverse Petitioner's conviction and, at the very least, remand the matter for further factual findings as was done in *Murray*.

Although the record is devoid of the requisite factual determinations, it is imperative for this Court to consider that record available suggests the independent source doctrine must not even apply in a traditional application. Namely, during the suppression hearing held on October 9, 2018, Detective Hinsley testified that as a result of the initial search wherein the evidence was copied, booked into property, and plotted, law enforcement discovered through the cellular records at issue that the phone was in the area of a homicide during the shooting, thereby gaining an advantage from the unlawful search. (App-H). It is difficult to conceptualize, therefore, how it could be possible that Detective Hinsley's decision to seek the subsequent warrant was not *at all* prompted by the discovery of this cellular site location information, especially in light of the fact that the Petitioner had *not* been arrested for the subject crimes at the time of the initial, unlawful search. (App-H, 45:1-4).

Consequently, the record available to this Court reveals that law enforcement's decision to seek the search warrant was prompted and connected to the initial illegality. The limited facts presented on this topic suggest that unlike *Segura*, law enforcement was *not* in the process of acquiring a search warrant for the cellular records when the initial illegality occurred. Instead, the only available facts

provide that the subsequent search occurred approximately 20 months after the initial search was executed.

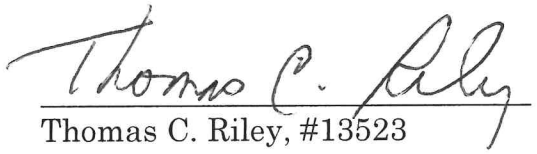
After all, in drafting and applying for the cellular records again at the direction of the prosecution, Detective Hinsley did not simply leave the affidavit and application in a similar fashion with the exception of a few minor changes (such as "order" to "warrant" and/or removing language regarding the FSCA). Rather than leaving the affidavit largely the same, he added an *entire page* to the affidavit in an effort to ensure its approval. (App-C; App-F; App-H). This entire page containing a thorough explanation as to the importance of cellular records in criminal investigations is consequential in light of the fact that the affidavit (App-F) is simply six pages—the final page being signatures from the approving judge.

In addition, the timing is imperative for this Court's consideration. The State did *not* seek a search warrant for the cellular records immediately upon or near in time to the release of *Carpenter*. In fact, the initial suppression hearing in this case took place in the interim. Instead, nearly a *month* after the suppression hearing, a full five months after *Carpenter* was published by the Court, and in the same week as the prosecution's concession to the motion to suppress the cellular records, did the State finally apply for a search warrant. Thus, from the available record, there is not sufficient support to make a finding that law enforcement's decision to seek the second search warrant was not prompted or affected by what was discovered during the initial unlawful search.

CONCLUSION

For each and all of the aforementioned reasons, the Petitioner respectfully requests the Court grant this Writ of Certiorari as it is imperative for purposes of preservation of the Fourth Amendment.

RESPECTFULLY SUBMITTED:



Thomas C. Riley, #13523
Douglas County Public Defender
Attorney for Petitioner