No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

BRANDON JOSHUA BAILEY,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to Florida's First District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government conducts a search under the Fourth Amendment when it accesses a vehicle's historical GPS location records, which provide a comprehensive chronicle of the driver's past movements.

2. Whether Bailey's Fourth and Fourteenth Amendment rights were violated where the detective misrepresented key facts and made conclusory, speculative assertions in the affidavit in support of the search warrant for Bailey's phone records.

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PETITION FOR WRIT OF CERTIORARI

Brandon Joshua Bailey petitions for a writ of certiorari to review the decision of Florida's First District Court of Appeal.

OPINIONS BELOW

The decision of Florida's First District Court of Appeal was rendered November 16, 2021. See Bailey v. State, 311 So. 3d 303 (Fla. 1st DCA 2020). A copy of the decision is attached as Appendix A. The First District affirmed Bailey's conviction. Rehearing was denied by the First District on February 8, 2018. A copy of the denial is attached as Appendix B. Bailey petitioned the Florida Supreme Court for review of the First District's decision seeking to invoke the Florida Supreme Court's discretionary review jurisdiction. A copy of the notice invoking the Florida Supreme Court's jurisdiction is attached as Appendix C. On June 14, 2021, the Florida Supreme Court declined to exercise jurisdiction and denied Bailey's petition for review. A copy of the denial is attached as Appendix D. A copy of the defense motion to suppress cell phone records, the affidavit in support of the search warrant, the search warrant, and the inventory receipt are attached as Appendix E. A copy of the defense motion to suppress GPS records is attached as Appendix F.

JURISDICTION

The First District Court of Appeal affirmed Bailey's conviction, and the Florida Supreme Court declined to exercise its discretionary jurisdiction to review the opinion of the First District. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States 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.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The State of Florida charged Bailey with one count of first-degree murder, one count of armed robbery, and one count of possession of a firearm by convicted felon. Bailey was tried by a jury and convicted as charged. He was sentenced to life in prison without parole. Florida's First District Court of Appeal affirmed Bailey's conviction. The Florida Supreme Court declined to review Bailey's case.

On the morning of February 17, 2016, the body of Dustin Howell was found in a park near Owen Avenue in Jacksonville, Florida. (II-327)[1] He had been working in the area and staying at the Extended Stay America hotel, where surveillance video showed he was last seen leaving there sometime after midnight. (II-354) The video also showed Bailey walking out of the hotel at the same time. Further investigation indicated that Bailey had been staying at the hotel with his girlfriend. He had taken her car that morning. Although she later testified that he generally had permission to use her car, she had called the police and her finance company on February 16 and 18, respectively, for help finding her vehicle. (II-365, 376) When Bailey returned to the hotel, Green had to let him in because he did not have a key. (II-366) She identified him in the video and said he had been wearing a red hat, blue tee shirt, and camouflage pants. (II-371)

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1 Reference to the record on appeal will be by use of the volume number in Roman numerals followed by the appropriate page number in parentheses.

On February 19, 2016, police went to the girlfriend's finance company and obtained GPS location records for her vehicle without a warrant. As a result, the defense later filed a motion to suppress that evidence and any evidence arising from those records. A hearing was held and the motion was denied. An additional suppression motion was filed for cell phone records, for which a warrant had been obtained, but that Bailey argued was based on a faulty affidavit.

At trial, the state put on a witness who explained how the vehicle GPS system worked. He testified that the system tracks movement, speed, stops and starts, and gives information as to how long a vehicle is stationery at a location. (II-395)

K. Anderson, mother of codefendant Desi Hall, lived at Iris Avenue, and she gave police access to surveillance video of her home on February 22, 2016. (II-414-17) She recognized the people in the videos and identified her son and Bailey. T. Anderson, Hall's brother, testified that he was not friends with Bailey, but that Bailey was at the house occasionally. He also reviewed the video and identified the people shown. He testified that on that morning when talking with Bailey he noticed blood on Bailey's boots and asked him about it. He testified that Bailey said he did something the night before to someone. Anderson did not yet know about the murder. He had seen Bailey with an AK style rifle and 9mm handgun at

some point, but not with a .32 revolver. Anderson said that everyone had access to the house, where .32 ammunition was later located. (II-439)

Tire impressions were taken at the scene of the murder. (II-481) Bullet casings and cigarette butts were also collected at the scene. (II-499) They did not locate the victim's pants or shoes, nor was his wallet recovered. On February 24, 2016, items of clothing were removed from the Iris Avenue house, including a blue tee shirt and camouflage pants. (II-638-40) Live rounds for a .22 and nine millimeter firearm were also collected from Iris Avenue. There was a stain on the camouflage pants that were swabbed for DNA testing. (II-648) The search of the New Kings Road location where Bailey was arrested yielded live rounds of ammunition in a green bag, among other items. (II-659, 678-80)

Cell phone call detail and text information were introduced into evidence based on the phone number identified as Bailey's. (II-667) Cell phone maps were created using the information from Bailey's and Hall's phones. The maps showed the towers in use at any given time that the phones were turned on. (II-693-4) The maps covered the time period from midnight to noon on February 17, 2016. (II-696)

Detective Santiago testified that the body was found at about 7:30 AM. He viewed the hotel surveillance video and saw the victim and Bailey go out the

door at the same time. (II-705-12) He contacted Bailey's girlfriend and obtained from her the name of her car finance company. (II-705-12) On February 19 he obtained the GPS location records from that company without a warrant. He contacted the girlfriend, who came to the station in her car and consented to a search of the vehicle. Santiago followed the GPS tracker map, beginning at the hotel and proceeding to Iris Avenue and later to the Owen Avenue park area, where the body had been located. (II-716-22) The GPS showed the car returned to the hotel area at 3:35 AM. Additional locations were also shown on the map. (II-722) The GPS information led him to Ms. Anderson on Iris Avenue and her surveillance video. (II-725) A search warrant was issued for that address, and clothing was recovered. (II-726) Bailey's girlfriend identified Bailey on the surveillance video. (II0-727) Santiago also requested cell phone mapping for Hall's and Bailey's phones. Both were later arrested. No firearms related to the murder were located. (II-739) Santiago constructed a timeline using all of the information: 12:49 AM car leaves hotel; 1:33 AM car arrives Iris Avenue; 1:43 AM car leaves Iris Avenue; 1:48 AM car near Owen Avenue; 1:57 AM car leaves Owen Avenue, returns to Iris Avenue and at 3:36 AM retuned to hotel. (II-740-3) The information also indicated the car drove in the area of Owen Avenue at 9:37 AM. By that time, police had arrived and roped off the crime scene. (II-747)

Analysis of the tire impressions made near the body and the actual tires from Bailey's girlfriend's car showed that the two rear tires were the same type as those that made the impressions, although the expert could not say the impressions were an exact match for the tires themselves. (II-762-4)

The firearms expert testified that six casings had all been fired from the same firearm. (II-785) He also testified that certain fragments corresponded with certain types of ammunition. (II-791) The live rounds he analyzed did not match the fragments, however. (II-796) He testified that one unfired round had been cycled through the same firearm as two spent casings. (II-802) Many fragments were of no value, but there were fragments found that had been fired from two different weapons.

Codefendant Hall pled guilty and testified at trial. (II-806) In essence, he testified that a white male arrived at his home with Bailey but did not get out of the vehicle. (II-812) He testified that Bailey stored firearms at Hall's home and later left his clothing at Hall's home. Hall testified that Bailey said he was going to rob the man, and that he did not agree to participate, but that he also did nothing to stop the offense from occurring. (II-820) He testified that the white male was wearing a silver chain and that Bailey later took the chain. He testified that Bailey drove to the park, got out of the car, opened the passenger side door, told the man to get out,

and pointed an AK rifle at him. Hall did not try to help and did not get out of the car, but instead turned up the volume on the radio. He testified that he did not hear what was said between the two. He heard shots and saw the victim fall. (II-824-30) He testified that he and Bailey returned to Iris Avenue. Hall identified Bailey with an AK rifle in one of the videos. (II-854) He testified that the times on the GPS map were accurate and that he later saw Bailey wearing the chain. (II-860) He testified that did not see any struggle. There was nothing in Hall's earlier sworn statement about a necklace. (II-885) He admitted lying numerous times when first arrested and for some twenty months thereafter until he entered into a plea deal. (II-899)

The camouflage pants matching those Bailey appeared to be wearing on the hotel video and later found at the Iris Avenue home were swabbed for blood. It was later determined that the victim's DNA was on the pants. (II-1010) Bailey's DNA was on a cigarette butt that had been collected at the scene. The medical examiner testified that there were some 17 wounds to the victim made by two different firearms. (II-952)

The State rested its case, and the defense moved for judgment of acquittal, which was denied. (II-1025) Bailey testified that he did not kill Howell. Bailey testified that they had socialized and that Howell wanted to obtain some pills, so he

called Hall to assist. They went to the park and the person with the pills came, but the person did not have enough, so that person called other people. (II-1047) Others arrived and an altercation ensued. One of the pill suppliers grabbed Howell, Howell pulled a knife, and another person pulled a gun and shot Howell. (II-1051) Hall and Bailey left the park. Bailey testified that when they left Howell he still had on pants and shoes. (II-1055) Bailey did not know the names of the others who arrived at the park. Bailey was smoking while at the park. Bailey testified that Hall was not guilty of the murder either. (II-1075)

In rebuttal, the State offered Hall, who testified that no one else had come to the park while they were there. (II-1084) He testified that Bailey did not ask him to help purchase pills.

Suppression Hearing - August 9, 2018:

The defense filed multiple suppression motions which were taken up at the hearing. The trial court's denial of the motion to suppress GPS location records and denial of the motion to suppress cell phone records were raised as issues on appeal in Florida's First District Court of Appeal.

There had been no search warrant for the vehicle GPS records. There had been a search warrant for Bailey's cell phone records, including his historical cell

site location information. The warrant was issued based upon an affidavit submitted by Detective Chapman.

The State argued that Bailey's girlfriend, the owner of the vehicle, had not given Bailey permission to drive her vehicle. However, at the suppression hearing, the girlfriend testified that Bailey did have permission to drive the vehicle. (I-3022) On cross-examination, she acknowledged that she had called her finance company (which maintained the GPS on her vehicle) on February 18, the day after the murder, to help locate her car, and that she had also called police on February 16, but further testified that Bailey had permission to drive it. (I-3023) Upon further questioning, she testified that Bailey could always use the car when he wanted it, with her knowledge, and that they have a child together. (I-3027-8) After the testimony at the hearing, and in response to a statement made by the prosecutor while arguing the motions, the trial court stated, "Well she says he had permission to use [the car] whenever he wanted to, is the way I understood her testimony." (I-3089)[2] There was also discussion during the hearing of a GPS-related waiver she

2 Regarding Bailey's authorization to use the car, the First District stated:

> The parties dispute the factual issue of Appellant's authorization to drive the Honda, with Appellant arguing that he had general permission from his girlfriend, and the State contending that she had withdrawn permission, making the car stolen while he used it during the

had signed when she purchased the car. The document itself is included in the record on appeal.

Jeffrey Buttner testified that the car dealership put GPS on all of the vehicles they financed (I-3031) He would be able to look up any vehicle and see the GPS location for it. (I-3033) Normally they are looking for the current location. (I-3034) Every consumer must sign a disclosure about the use of the GPS so they are aware it has been placed on the vehicle. (I-3036) Buttner testified that the girlfriend had asked for assistance to locate her vehicle at one point. (I-3037)

As to the suppression motion for the defendant's cell phone records, Detective Chapman testified at the hearing that he had signed the affidavit for the search warrant. He had noted in the affidavit that the GPS records showed the car had been "at" the location where the body was found when gunshots were heard. At the suppression hearing he testified that the GPS records showed that the car was

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> commission of the crime. It would be difficult to argue that one who has stolen a car has a reasonable expectation of privacy in the stolen property's location, or in his or her movements while operating a stolen car. That said, no specific finding was made by the trial court on this point, and the record is inconclusive. As the resolution of this dispute was not relevant to the trial court's ruling, it is likewise not reviewed here.

Bailey at 318, n. 3.

actually within a range of a few blocks from the area the body was found. He had also written in the affidavit that tire tracks found near the body "matched" tire treads on the vehicle, but at the suppression hearing he testified that he did not have an expert opinion indicating a match. When asked by the prosecutor at the hearing whether it was a "match" or "similar," he testified it was "similar." (I-3045, 3050)

Detective Santiago testified that he had obtained Bailey's phone number from Bailey's girlfriend's mother. (I-3066) He met with the girlfriend on February 19, 2016, and confirmed the phone number was Bailey's. Santiago testified that the GPS records showed that the vehicle left the Iris Avenue address and traveled to the park area. The observation about the tire tracks was based on observation with the naked eye, not on expert analysis. (I-3071) Santiago further testified that the defendant did not live at the Iris Avenue address, where the blue tee shirt, camouflage pants, and hat were located. (I-3078) All of the locations were in the GPS records.

The trial court denied the motions to suppress. The trial court ruled that Bailey had no expectation of privacy as to the GPS records because the car was not his and law enforcement had no obligation to get a warrant to get the records from the third party dealer. (I-3095-96) The trial court ruled that the affidavit in support

of the application for the warrant for the cell phone records was prepared in good faith and provided sufficient probable cause. (I-3100)

The historical cell phone location records, the historical vehicle GPS records, and evidence discovered because of the GPS location records were admitted at trial, and Bailey was convicted. Bailey appealed his convictions to Florida's First District Court of Appeal, where he raised the two suppression issues regarding the car GPS records and his cell phone records. Bailey argued that the Fourth Amendment, and particularly Carpenter v. United States, 138 S.Ct. 2206 (2018), and United States v. Jones, 565 U.S. 400 (2012), required suppression of the GPS records and all evidence found because of the GPS records and that his convictions should be reversed. Bailey argued that the affidavit in support of the search warrant for the cell phone records was insufficient and that the Fourth Amendment required that the cell phone records be suppressed and that his convictions be reversed. The First District affirmed Bailey's convictions and held that under the Fourth Amendment Bailey did not have a reasonable expectation of privacy in the historical GPS location records of his public movements in the car. The First District distinguished Bailey's case from that of Carpenter and Jones and held that United States v. Knotts, 460 U.S. 276 (1983), controlled the outcome of the Fourth Amendment analysis. The First District noted that the issue of standing or of

Bailey's ability to contest the police conduct he believed violated a Katz v. United States, 389 U.S. 347, 351 (1967), privacy interest was not in question. Bailey at 318, n. 2. The First District rejected Bailey's argument regarding the denial of the motion to suppress the cellular phone records but did not elaborate beyond that. Bailey at 307.

REASONS FOR GRANTING THE PETITION

I. Florida violated Bailey's Fourth and Fourteenth Amendment rights when police acquired without a warrant the historical GPS location records for the vehicle he was driving and then used the GPS records and resulting evidence against him at trial

This case tests whether a person has a reasonable expectation of privacy in his historical location information reflected in the GPS tracking records of the vehicle he was driving.

The Court has recognized that "the Fourth Amendment protects people, not places" and has expanded its conception of the Amendment in order "to protect certain expectations of privacy as well." Carpenter at 2213, citing Katz v. United States, 389 U.S. 347, 351 (1967). When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, the Court has held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. Carpenter at 2213. The decision of Florida's First District Court of Appeal relied on Knotts to hold that a person does not have a reasonable expectation of privacy in the historical GPS records of a vehicle and, therefore, the warrantless acquisition of those records does not violate the Fourth Amendment. Bailey v. State, 311 So. 3d 303 (Fla. 1st DCA 2020). However, the First District acknowledged that this

Court's decision in Carpenter may indicate this Court's willingness to revisit Knotts in this context:

> We acknowledge that Carpenter's seemingly sweeping language, its discussion of the fundamental shifts of the technology revolution of the 21st century and discussion of an expansion of individual constitutional rights in this type of data. This may indicate the Supreme Court's willingness to revisit Knotts. (Citation omitted) The Supreme Court has not explicitly overruled Knotts and continues to apply its precedent in recent Fourth Amendment analysis… Knotts is more factually analogous than Carpenter and it controls this Court's holding.

Bailey at 315.

Knotts was decided nearly forty years ago in a case involving the use of a beeper, a device that, at best, provides only immediate, real-time location data and not comprehensive historical location data. As such, an immediate and profound distinction is clear between Knotts and the present case, as has been pointed out in several significant rulings since that time, including Carpenter. The Carpenter Court itself noted that, "This sort of digital data— personal location information maintained by a third party— does not fit easily under existing precedents." Carpenter at 2214. The Court further stated that the beeper in Knotts offered no more than "augmented visual surveillance." Id. at 2215. "The Court in Knotts, however, was careful to distinguish between the rudimentary tracking facilitated by

the beeper and more sweeping modes of surveillance. . . [s]ignificantly, the Court reserved the question of whether 'different constitutional principles may be applicable' if 'twenty-four hour surveillance of any citizen of this country [were] possible.'" Carpenter at 2215.

The Carpenter Court stated that when the Court considered GPS tracking in Jones it was looking at "more sophisticated surveillance [than] the sort envisioned in Knotts." Id. The Carpenter Court also recognized that in the Jones concurring opinions "five Justices agreed that related privacy concerns would be raised by, for example, 'surreptitiously activating a stolen vehicle detection system' in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone." Id. "Since GPS monitoring of a vehicle tracks 'every movement' a person makes in that vehicle, the concurring Justices concluded that 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." Id. "[W]hen confronted with more pervasive tracking, five Justices [in Jones] agreed that longer term GPS monitoring of even a vehicle traveling on public streets constitutes a search." Id. at 2220.

The Court drew a direct line from cell-site location information (CSLI) to GPS monitoring:

> [CSLI] partakes of many of the qualities of the GPS monitoring we considered in Jones. Much like GPS

> tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.

Id. at 2216. "As with GPS information, the time-stamped [CSLI] provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" Id. at 2217. The Court noted that "the accuracy of CSLI is rapidly approaching GPS-level precision." Id. at 2219.

The underlying principle of Knotts was that, "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Knotts at 281. The present case involves an entirely different situation. It is not about the "augmented visual surveillance" of an automobile as it travels on public roads and highways. "Beepers are merely a more effective means of observing what is already public." Id. at 284. The Court in Jones and in Carpenter recognized that the issues involved in those two cases went far beyond the visual observation and beeper at issue in Knotts. The present case is about obtaining, without a warrant, historical personal location information from a vehicle GPS that would not otherwise be available to law enforcement by visual or other traditional means. The "retrospective quality of the data here gives police access to a category of information otherwise unknowable." Carpenter at 2218. Historical GPS records, like historical CSLI records, allow the State to "travel back

in time to retrace a person's whereabouts." Id. Historical GPS records, like historical CSLI records, do not even require the police "to know in advance whether they want to follow a particular individual, or when." Id. As with historical CSLI, "[w]hoever the suspect turns out to be, he has effectively been tailed" for the entire period covered in the historical GPS records. Id. The present case is therefore more analogous to Carpenter and Jones than Knotts. In recognition of that, the concurring opinion in Bailey observed, "In view of Carpenter's elaboration on Jones, its retreat from applying Knotts and the third-party disclosure doctrine in continuous digital tracking-oriented cases. . . I cannot see affirming this case under Knotts, or with a holding that drivers lack a reasonable expectation of privacy in the GPS records of their vehicle's movements." Bailey at 317 (J. Osterhaus, concurring in result).

In a factually similar situation to the instant case, the United States District Court for the Northern District of Illinois held that law enforcement's warrantless acquisition of a person's historical vehicle GPS records was a search that violated the Fourth Amendment. See United States v. Diggs, 385 F. Supp. 3d 648 (N.D. Ill. 2019). In Diggs, as in the instant case, the defendant was not the owner of the car, but was an authorized driver who used the car regularly. In Diggs, as in the instant case, the registered owner of the vehicle signed a contract with the finance company

that held the loan note on the car acknowledging the presence of a GPS tracker in the car that could be used to locate the car in the event of default. In Diggs, as in the instant case, police accessed the historical GPS records of the car through the financing company without a warrant. In Diggs, as in the instant case, police used the historical GPS records to place the car in the vicinity of the scene of the crime on the date the crime occurred and to discover other witnesses and evidence later used at trial against the defendant. The Diggs court held that the historical GPS data fit "squarely within the scope of the reasonable expectation of privacy identified by the Jones concurrences and reaffirmed in Carpenter." Diggs at 652. In so holding, the Diggs court quoted Carpenter, noting the retrospective quality of the data that gave police access to a category of information otherwise unknowable and allowed the police to travel back in time to retrace the defendant's whereabouts.

Just as the Knotts decision seems to have diminished impact in this technological age, post-Jones and post-Carpenter, so too does the third-party doctrine. The third-party doctrine largely traces its roots to United States v. Miller, 425 U.S. 435 (1976). Carpenter at 2216. The third-party doctrine stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. Id. at 2219. But, this Court has declined to extend the third-party doctrine to CSLI historical location records:

> We decline to extend [Smith v. Maryland, 442 U.S. 735 (1979)] and Miller to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in Jones or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.

Carpenter at 2217. The application of the third-party doctrine to CSLI historical location records "fails to contend with the seismic shifts in digital technology that made possible" the tracking of a person's location over significant lengths of time. Id. at 2219. The Court has noted that "cell phone location information is not truly 'shared' as one normally understands the term":

> In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. (Citation omitted). Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume[ ] the risk" of turning over a comprehensive dossier of his physical movements. (Citation omitted).

Carpenter at 2220.

GPS location information from a person's car is also "not truly shared" for privacy purposes. Automobiles are also "a pervasive and insistent part of daily life" and use of an automobile is often "indispensable to participation in modern society." Id. "[L]ike carrying a cellular telephone, driving is an indispensable part of modern life." Commonwealth v. McCarthy, 142 N.E. 3d 1090, 1105 (Mass. Sup. Ct. 2020). Millions of Americans must use their automobiles to travel to and from their places of employment, their places of worship, medical appointments, the homes of friends, loved ones, and romantic partners, grocery stores, banking institutions, political gatherings, schools, and the places where they enjoy their leisure time. In some large cities, public transportation may be able to stand in for personal use of an automobile, but for many who live where public transportation is not available, use of an automobile is vital to their day-to-day lives. Vehicles with GPS devices installed on them by the vehicle lien-holders need no affirmative act by the user of the vehicle to "share" his or her location information. The GPS device continuously sends out the vehicle's location information to the lien-holder. In no meaningful sense does the user of an automobile voluntarily assume the risk that the lien-holder will turn over a comprehensive dossier of the user's historical location and travels. The only way for a vehicle user to avoid the GPS location

information being sent to the lien-holder is to not have a GPS device on the vehicle in the first place, but that is not an option for many Americans. The only way many Americans are able to afford the use of a vehicle is by leasing it or financing the purchase of it. Application of the third-party doctrine to allow the government to acquire historical vehicle GPS location records without a warrant would be "a significant extension of [the third-party doctrine] to a distinct category of information." Carpenter at 2219.

Through the historical GPS location information obtained on February 19, 2016, detectives learned that the vehicle had been near the park where the body was found at particular times, but they also learned it had stopped at the Iris Avenue and New Kings Road addresses, where additional evidence used at trial was obtained, such as video surveillance from Iris Avenue, the identity of the alleged co-defendant who lived at that address, clothing worn by the defendant and later tested for DNA, and ammunition which could have corresponded to the types of injuries sustained by the victim. The co-defendant later testified against Bailey at trial.

Pursuant to Carpenter, the warrantless search of the historical GPS records and the subsequent use at trial of those GPS records and other evidence found because of those GPS records violated Bailey's Fourth and Fourteenth Amendment

rights. This case presents the Court the opportunity to clarify the scope of Carpenter and revisit the viability of Knotts where the government is able to acquire comprehensive historical GPS records of a person's public movements without a warrant.

II. Florida violated Bailey's Fourth and Fourteenth Amendment rights when police searched his cellular phone records based on an invalid warrant.

This case calls upon the Court to decide whether the search warrant for Bailey's cellular phone records was supported by sufficient probable cause, and if not, whether the police could lawfully rely on it so as to prevent imposition of the exclusionary rule.

It is established law that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. Franks v. Delaware, 438 U.S.154, 165 (1978). When assessing whether a search warrant is supported by probable cause, it must be determined whether the issuing judge had a "substantial basis" for concluding that "a search would uncover evidence of wrongdoing." Illinois v. Gates, 462 U.S. 213, 236 (1983). Although "great deference" is paid to the judge's initial determination of probable cause, a warrant application cannot

rely merely on "conclusory statement[s]." Id. If a warrant is later found to be invalid, application of the exclusionary rule to the evidence recovered is not a given. Evidence seized in reasonable, good-faith reliance on a search warrant need not be excluded, even if the warrant turns out to have been unsupported by probable cause. United States v. Leon, 468 U.S. 897, 905 (1984). However, there are four exceptions to this good-faith reliance doctrine: (1) in cases where "the magistrate or judge ... was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;" (2) "in cases where the issuing magistrate wholly abandoned his judicial role" by acting as "an adjunct law enforcement officer" or mere "rubber stamp" for the police; (3) in cases where "an affidavit [is] so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" and (4) in cases where the warrant is "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." Id. at 914-23.

In the instant case the detective's affidavit in support of the application for the search warrant for Bailey's phone records contained material misstatements of fact, relied in part on the unlawfully obtained vehicle GPS records discussed in Issue I, and made conclusory and speculative claims regarding evidence that would

be found within Bailey's phone records. The affidavit in support of the search warrant application asserted that the GPS records "confirmed that the vehicle was at location where the victim's body was located at the same time as the gunshots were reported by witnesses," (I-2005) However, the detective later testified at the suppression hearing that the GPS records did not put the car "at [the] location" but instead within a several block range of the location. (I-3045) The affidavit also contained the statement that, "An examination of the vehicle's tire tread revealed that it matches the tire prints found near the victim's body." (I-2005) But, the detective testified at the suppression hearing that when he used the word "matched" he meant "[j]ust a glance[d] at it, it appeared to be somewhat." (I-3045) When asked if he had an expert opinion that said the tires matched the tracks before he wrote the affidavit he answered, "Absolutely not, sir." (I-3045). When asked by the prosecutor if the tires "matched" or "looked similar," he answered, "Similar." (I-3050) Finally, the affidavit contained the statement that, "The phone number and accompanying information being sought belongs to Branden Bailey and was possibly used on the day of the murder to coordinate the crime. The cell site information and call records will collaborate (sic) the information obtained from the vehicle tracking device." (I-2005) There was no allegation in the affidavit that the phone belonged to Bailey on the day of the crime, that he carried it with him on the

day of the crime or at any time between February 15, 2016, and February 22, 2016, that he used it on the day of the crime or between February 15, 2016, and February 22, 2016, to send a text, make a call, receive a call, take a photo, or take a video, that he usually carried that cell phone, that it was the only cellphone he owned, or that he had used it at some time close to the crime.

The affidavit lacked sufficient probable cause to support the search warrant for the phone records, and the warrant should have been declared invalid. United States v. Griffin, 867 F.3d 1265 (D.C. Cir. 2017). Further, the exclusionary rule should have applied because the detective's misstatements of fact in the affidavit were significant and clearly evidenced a reckless disregard for the truth. Whether the GPS records showed that the car was "at" the location where the body was found at the time gunshots were heard or whether they showed that the car was within several blocks of the location where the body was found is a major difference that the issuing magistrate should have been made aware of. Likewise, whether the tire tracks found at the park "matched" the tires on the car or whether they were "similar" to the tires on the car is another important difference that changes the probable cause calculus. Both misstatements of fact would have misled the issuing magistrate. As a result of the detective's factual misrepresentations regarding the car's location and the tire marks and his speculative assertions

regarding Bailey's phone, the affidavit completely lacked the requisite indicia of probable cause. Any official belief in its existence was entirely unreasonable. The cell phone records, including Bailey's historical cell site location information, should have been suppressed from evidence.

CONCLUSION

Bailey respectfully requests that the Court grant a writ of certiorari to review the judgment of Florida's First District Court of Appeal.

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