

Supreme Court, U.S.

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No. 21-7860

In The Supreme Court Of The United States

ERICK RAHUMID HOBBS,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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ORIGINAL

QUESTIONS PRESENTED

1. Whether law enforcement's warrantless collection of real-time cell-site location information (CSLI) is reasonable under the "imminent harm" clause of the exigent circumstances exception to the Fourth Amendment based on conditional threats made during a past dispute?
  
2. Whether the collection of real-time CSLI by law enforcement is a search under the purview of the Fourth Amendment?

STATEMENT OF RELATED PROCEEDINGS

United States v. Erick Rahumid Hobbs, No. 1:18-cr-00322-DKC-1

U.S. District Court for the District of Maryland (order denying Motion to Suppress evidence) January 11, 2019.

United States v. Erick Rahumid Hobbs, No. 1:18-cr-00322-DKC-1

U.S. District Court for the District of Maryland (order denying Motion to Suppress evidence) February 11, 2019.

United States v. Erick Rahumid Hobbs, No. 19-4419

U.S. Court of Appeals for the Fourth Circuit (order affirming District Court's denial of Motion to Suppress evidence) February 1, 2022.

United States v. Erick Rahumid Hobbs, No. 19-4419

U.S. Court of Appeals for the Fourth Circuit (order denying petition for rehearing en banc) March 2, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Erick Rahumid Hobbs ("Hobbs") respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit opinion, which is published at 2022 U.S. App. LEXIS 2941, is reproduced in the Appendix at App.1.

The District Court opinions, which are oral and unpublished, are transcribed and reproduced in the Appendix at App.3.

JURISDICTION

The Fourth Circuit issued its opinion on February 1, 2022. The jurisdiction of this Court is invoked under U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

## UNITED STATES CONSTITUTION AMENDMENT IV

The right of 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.

INTRODUCTION

This case presents an important question in the evolving jurisprudence of exigent circumstances. Intended by this Court to be narrow and well-delineated, the Fourth Circuit decision below broadly expands the scope of the exigency exception to permit the warrantless access to real-time CSLI by police, under a disingenuous claim of imminent harm, based on alleged threats made during a past dispute. To best illustrate the far-reaching effects of the Fourth Circuit's decision, please consider this hypothetical scenario.

Rob Katz, a gambling addict, borrows \$5,000 from Pam Lee, a loan-shark with a record. Rob agrees to repay \$7,500 in two weeks. Two weeks later, Pam waits at her office for Rob to show up and satisfy his debt, but to no avail. For two weeks, Pam attempts to reach Rob on his cell phone but no luck. Eventually the cell phone is disconnected. A week later, Rob receives an unexpected knock at the door as he prepares to turn in for the evening. Upon opening the door, he recognizes Pam and attempts to shut the door but Pam forces her way inside. Immediately Pam removes a gun from her jacket pocket and demands payment in full but Rob does not have it. Undeterred, Pam notices an expensive gold watch on the table and grabs it, placing it inside of her jacket pocket and returning the gun back to the other. Before leaving, Pam warns Rob that if he does not have her \$7,500 in full, in a week, she will shoot him. Afraid, Rob calls 911 to report the incident. Police respond and Rob recounts the events. Rob is escorted to the precinct where he is interviewed. During the interview, Rob reveals Pam's name, her office address, and cell number. Police enter Pam's name in their databases and discover a recently expired driver's license, a vehicle registration address identical to the address listed on the driver's license, and a conviction for felony-assault five years ago. After a few hours of being at the precinct, a tired Rob goes home. An hour later, a detective

determines that based on Rob's statements, Pam Lee poses a threat of imminent harm and submits an exigent ping request to Pam's wireless provider for call-detail records and historical/real-time CSLI. Within an hour, Pam is apprehended at her office with a firearm.

Under this scenario, the decision below would permit police's warrantless use of Pam Lee's CSLI, based on the allegations of being armed, making a threat, a theft, and a criminal history. Factors such as there not being an actual imminent threat of harm, sufficient time to obtain a warrant, and no investigation of the police into possible locations associated with Ms. Lee, would weigh against a finding that police's actions were objectively reasonable. To be clear, in this hypothetical scenario, Pam Lee's actions constituted criminal offenses, but not at a level that constitutes an exigency. And although the alleged acts were egregious, they should not permit police warrantless access to CSLI. At the time police sought the exigent pings, there did not exist an imminent threat of harm. And assuming a threat was actually made, it would not be imminent until Pam returned to collect her money and only then, IF, Rob did not have it.

In this case, a window was damaged and property allegedly taken under threat of a gun. Jaquanna Foreman, the purported victim, stated that Hobbs was armed and threatened to harm her, her family, and police. According to Foreman, the threats were predicated upon her not returning a television, her contacting police, and police attempting to apprehend him. Ultimately, the television was returned. Hobbs left. The police were called. Hobbs was apprehended. And no one was harmed.

Based on those facts, Detective Michael Nesbitt of Baltimore County Police Department, determined, five hours after the alleged dispute ended, that a threat of imminent harm existed requiring the use of Hobbs' real-time CSLI without a warrant. As egregious as an alleged theft and assault may be, the decision below is about more than a damaged window and unfounded threats. It is about disregarding

the inconsistent and uncorroborated statements of a dishonest, scorned woman, the failure to challenge the disingenuous actions and testimony of Baltimore County police, and the severe eroding of the Fourth Amendment's protections for millions of individuals like Hobbs within the jurisdiction of the Fourth Circuit.

The Fourth Circuit decision below highlights an urgent need for this Court to provide instruction with regard to the interpretation of the imminent harm clause of the exigent circumstances exception as it applies to police's warrantless access to real-time CSLI. And as cases involving the warrantless use of real-time CSLI continue to grow throughout the Circuits, guidance from this Court is essential in safeguarding the privacy and security of individuals against arbitrary invasions of governmental officials.

This case also presents an important question that was not before this Court when it decided Carpenter v. United States, 138 S.Ct. 2206 (2018). Whether the collection of real-time CSLI by police is a search under the Fourth Amendment? The decision in Carpenter was narrow and limited only to the question of historical CSLI. This Court rightly decided that an individual has a reasonable expectation of privacy "in the whole of his movements", id. at 2217, and that the collection of an individual's CSLI by law enforcement was a search requiring a warrant. However, as mentioned previously, the Carpenter Court declined to address the issue of real-time CSLI. id. at 2220.

The issue of real-time CSLI has caused division in the Circuits. And with the rapid advancement of cell phone technology, law enforcement are becoming increasingly aware of the precise and convenient method in which cell phone tracking allow them to surveil suspects. This Court has not endorsed warrantless use of a GPS tracker and should not endorse the warrantless conversion of an individual's cell phone into a tracking device by police. Therefore, as the growing number of cases

involving police's use of real-time CSLI continue to increase, guidance is needed to ensure fairness and uniformity.

In this case, Baltimore County police used Hobbs' real-time CSLI without a warrant. The Fourth Circuit found that exigent circumstances made the officers' use of the exigent ping request reasonable. However, the Fourth Circuit was silent on the issue of whether the real-time CSLI "pings" even required a warrant. If this Court were to find that exigent circumstances did not exist when Detective Nesbitt submitted the exigency request and remand this case back to the Fourth Circuit, the Court below may still affirm the District Court's ruling under a holding that real-time CSLI is not a search and that the officers were not required to obtain a warrant for its use. This case, therefore, provides a vehicle for this Court to firmly address the question of real-time CSLI and settle the issue that has divided the Circuits and left them without guidance.

#### STATEMENT OF THE CASE

1. Erick Hobbs and Jaquanna Foreman became acquaintances in October, 2017. On February 1, 2018, Hobbs ended his acquaintance with Foreman due to her continuous dishonesty. App.4, 60,63,65. Foreman did not want the relationship to end and tried unsuccessfully to persuade Hobbs to reconsider, App.4, 63-65, but Hobbs remained adamant. Hobbs asked Foreman to return a television he had loaned her a few weeks earlier but she refused. On the evening of February 3, 2018, Hobbs drove to Foreman's residence to demand his property. Upon arrival to Foreman's home, he noticed that Foreman's vehicle was gone and naturally assumed she was not home. Hobbs retrieved a hammer from the toolbelt located in his trunk and proceeded to Foreman's residence with the intent to break into Foreman's house, collect his

television, and leave. Hobbs used the hammer to break out a window pane in the kitchen window but before he could unlatch the lock, Foreman suddenly appeared at the window from inside of the residence. He and Foreman exchanged words briefly about the broken window, which she was clearly upset about, before she finally agreed to return his television.

Hobbs waited briefly at Foreman's front door until it opened slightly and he entered her residence. Inside, Hobbs watched Foreman struggle to drag the large television to where he stood by the door. As he quickly gathered the television, a frustrated Foreman fumed about him ending the relationship and about him damaging her window. Finally, Hobbs offered to pay for the window's repair before he left and went home. Unbeknownst to him, Foreman would call 911 a short time after leaving her residence, and completely misrepresent the entire situation between them. Foreman made several false allegations to the 911 dispatcher, including that Hobbs came to her home armed with a black handgun and rifle, and threatened to shoot her and her daughter if she did not give him the television. Foreman stated that Hobbs was mad because she did not want to see him the previous day and because she had ended their relationship. Foreman also stated that Hobbs alleged that he would shoot police because he was not going back to jail. Baltimore County police responded to Foreman's residence at 7:18 p.m. Foreman was promptly interviewed outside of her house by Officers Heather Flanary, Bryan Dixon and several other responding officers. App.5, 5., App.6, 27. Foreman made additional allegations that Hobbs was a terrorist, he had an AK-47 in his car and had several AK-47s at his house, that his mother was from Afghanistan, and that he had been threatening to kill her since the previous day. See, 911 audio. Foreman revealed Hobbs' Facebook page, possible dates of birth, identified his vehicle, and gave a partial license plate number. Foreman also revealed Hobbs' street name, partial street address, and the geographical location of his residence where she stated she had been multiple

times. See, Officer Flanary Body Worn Camera (BWC), App.7,11.

Foreman and her daughter were escorted to the police precinct where Officer Flanary conducted another interview. App.5,7. At the precinct, Foreman stated that Hobbs had served 15 years in prison and had family members in prison for terrorism. Officers confirmed that Hobbs had a criminal history. During the interview, Foreman revealed Hobbs' cell phone number and exact address, which she had saved in her cell phone's navigation log. See, Flanary BWC, App.5,8. At approximately 8 p.m., Detective Michael Nesbitt arrived at the precinct. App.6,49. He was immediately briefed by Officer Flanary, Officer Dixon, and the responding officers and made aware that Foreman was at the police station. App.6,27,49-50. Officer Flanary informed Detective Nesbitt of the details of Foreman's interviews and of the information she provided about Hobbs' criminal background, alleged access to assault rifles, his purported ties to terrorism, his alleged threats to her, her family, and to police as well as his cell phone number and home address. A check through Maryland's Motor Vehicle Administration revealed Hobbs' current driver's license, App.7,11, and confirmed his vehicle identification, license plate number, and registration associated with his wife whose listed address was identical to the address listed on his driver's license. App.9,1, App.6,51-52, App.7,9. Approximately 11 p.m., Detective Nesbitt interviewed Foreman. App.6,27. An hour later, Detective Nesbitt submitted an exigent request form to Hobbs' wireless provider, seeking amongst other things, real-time CSLI. App.6,33. On the exigent form, Detective Nesbitt stated that Hobbs had threatened girlfriend's life with a gun; was armed; and would not be taken alive. App.7,1. Within the hour, Detective Nesbitt began receiving his real-time CSLI. At Detective Nesbitt's request, Officer Dixon submitted an application for an arrest warrant at 1:11 a.m. on February 4, 2018. App.6,31, App.8,1. The arrest warrant was issued at 1:22 a.m. App8,2-4.

At approximately 1:40 a.m., Baltimore County police located Hobbs driving his

vehicle in Baltimore City, as a result of the real-time CSLI and call-detail records. Police officers dressed in plain clothes and operating unmarked vehicles, attempted to recklessly stop him, but he quickly fled the scene and crashed into a parked vehicle shortly after. Hobbs exited his vehicle and was taken into custody. Officers recovered a black handgun from the ground between the driver's door and the curb. Hobbs' vehicle was towed to Baltimore County Police Headquarters. Detective Nesbitt applied for a warrant to search his vehicle at 3 a.m. on February 4, 2018. The warrant was promptly issued at 3:37 a.m. App.7, 2,4.

2. On February 5, 2018 at approximately 11 p.m. Baltimore County police executed a search warrant at a residence purported to belong to Hobbs. Three occupants were found inside, two of which were identified as his roommates. Evidence was recovered, including a prayer rug and a box of 9mm ammunition.

3. On June 12, 2018 a federal grand jury in Maryland returned a one-count indictment against Hobbs for Possession of a firearm and ammunition by a prohibited person. 18 U.S.C. § 922(g)(1).

4. On January 11, 2019 Judge Chasanow held a hearing on Hobbs' Motion to Suppress evidence obtained during arrest. He challenged Baltimore County police's warrantless collection and use of his real-time CSLI. Judge Chasanow denied his motion and ruled that officers' use of the real-time CSLI was excused under exigent circumstances. App.3,64. Judge Chasanow noted an issue with the amount of information Detective Nesbitt requested in the exigent request form and advised that a request for call-detail records with cell-sites for past 48 hours was overbroad and seemed to exceed the scope of addressing an exigency and cautioned that more discussion may be needed if any of those records were used. App.3,67. On February 11, 2019 a second hearing was held to discuss Baltimore County's use of the call-detail records to locate Hobbs. Ultimately, Judge Chasanow upheld the decision, holding that the officers' limited use of the call-detail records did

not alter her previous ruling. App.3,31.

5. On March 6, 2019 following a 3-day trial, Hobbs was found guilty by a jury of the single count indictment. On May 30, 2019 he was enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and sentenced to 198 months in the Bureau of Prisons and 5 years of supervised release. On June 10, 2019 Hobbs submitted a timely notice of appeal.

6. Under review in the Court of Appeals for the Fourth Circuit was the District Court's denial of Hobbs' Motion to Suppress evidence and the indictment's omission of an element charging him with having knowledge of his prohibited status pursuant to this Court's decision in Rehaif v. United States, 139 S.Ct. 2191(2019). On December 9, 2022 the two parties had oral argument before the Fourth Circuit panel below to address the issues fully briefed. On February 1, 2022 the decision below affirmed the District Court's denial of Hobbs' Motion to Suppress. App.1,1-13. On February 15, 2022 Hobbs requested a rehearing en banc with regard to the Fourth Circuit panel's exigency analysis which was denied in an order filed March 2, 2022. App.2,1.

#### REASONS FOR GRANTING CERTIORARI

This case presents two important issues for review. The first issue presented involves a question of exceptional importance in the jurisprudence of exigent circumstances under the Fourth Amendment. This Court has identified only a few emergency conditions justifying law enforcement's immediate action and circumvention of the warrant process. Such conditions include "the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence". Carpenter, id. at 2223. This case specifically

challenges the Fourth Circuit's interpretation and application of the imminent harm clause of the exigency doctrine and whether it was rightly applied to the officers' warrantless use of Hobbs' real-time CSLI based on alleged threats made during a domestic dispute that ended 5 hours before its collection.

The decision below ignores factors critical to an exigency analysis applied under the "totality of the circumstances" standard and conflicts with the holdings and opinions of all Fourth Amendment exigent circumstances cases known to Hobbs. Specifically, a majority of the Circuits have reasoned in their analyses that if there existed an unreasonable delay of action by police and time to obtain a warrant then officers' claim of exigent circumstances was defeated. The decision below is contrary and certiorari is warranted for these reasons: (1) The decision below endorses police's use of real-time CSLI based on an alleged threat of harm that falls below the recognized standard of any exigency analysis applied in the majority of Circuits; (2) The Fourth Circuit found exigency in the absence of a credible articulation of an imminent threat of harm; (3) It excused officers' candid failure to even attempt to identify and warn persons purported to be under a threat of imminent danger App.5,12, App.6,43-44; (4) There was no accountability for the officers' unexplained inaction for several hours in the face of a supposed exigency, where warrants could have easily been obtained, and actually were obtained App.8,4, App.7,4; and (5) No regard was given to the fact that officers failed to even investigate credible addresses associated with Hobbs that were in their possession hours before the exigent request form for Hobbs' real-time CSLI was submitted. Lastly, the decision below, now precedent in the Fourth Circuit, broadly expands the scope of the exigency exception for warrantless cell phone tracking to include any individual, allegedly armed, who may have spoken conditionally of acts of violence he or she may commit. App.8,2, App.4,43 This standard effectively abrogates any reasonable expectation of privacy in location information of any individual accused

of a crime, assuming that the right words are uttered.

The second issue relates to how the Lower Courts regard law enforcement's access to an individual's real-time CSLI. Some Circuits have held that it does not require a warrant based on probable cause, while other Circuits have ruled that requiring a wireless provider to reveal a person's real-time CSLI is a search that triggers the warrant requirement of the Fourth Amendment. Even worse is that some Circuits have remained silent on the issue in anticipation of guidance from this Court.

This case involves police's warrantless use of Hobbs' real-time CSLI. The Fourth Circuit has not yet addressed the issue of real-time CSLI and the decision below does not take up the question, finding instead that exigent circumstances justified its collection. However, if this Court were to decide that exigent circumstances were not present when officers used Hobbs' cell phone location data without a warrant, the Fourth Circuit could still affirm the Trial Court's decision in a ruling that real-time CSLI is not a search under the Fourth Amendment and that a warrant was not required for its collection. The use of real-time CSLI by law enforcement steadily increases as cell phone technology become more precise in its location capabilities. This case provides an opportunity for this Court to settle the division amongst the Circuits regarding real-time CSLI and to address an issue that was not before the Court in 2018 when it decided Carpenter. Now is the time. What is at stake is the abrogation of Fourth Amendment protection for millions. For all the reasons stated, this Court should grant certiorari.

I. The Fourth Circuit Did Not Consider Critical Factors In The Totality Of The Circumstances Standard Of Its Exigency Analysis When It Concluded That Exigent Circumstances Permitted Baltimore County Police's Search And Use Of Hobbs' CSLI Without A Warrant

A. There was no imminent threat of harm when Detective Nesbitt submitted exigent ping request for real-time CSLI

1. The Fourth Amendment of the U.S. Constitution protects individuals from unreasonable searches and seizures. A search may be unreasonable if it is conducted without a warrant. Because the ultimate touchstone of the Fourth Amendment is "reasonableness", this Court has articulated certain exceptions to the Fourth Amendment's warrant requirement. One such "reasonableness" exception is exigent circumstances. "Exigency" is defined as a "state of urgency; a situation requiring immediate action".(Black's Law Dictionary Tenth Edition) As the term suggests, such circumstances are not, alone, enough to establish exigency and thereby excuse the warrant requirement. Instead, when an officer undertakes to act as his own Magistrate, he ought to be in a position to justify it by "pointing to some real immediate and serious consequences if he postponed action to get a warrant".

Welsh v. Wisconsin, 466 U.S. 740,751 (1984)(quoting McDonald v. United States, 335 U.S. 451,460 (1948)). This Court has held that "the exigencies of the situation" may render "the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment". Mincey v. Arizona, 437 U.S. 385, 393-94 (1978).

2. But like all exceptions to the warrant requirement, the exigent circumstances exception is a "narrow" one that must be "well-delineated" in order to retain [its] constitutional character. United States v. Yengel, 711 F.3d 392,396 (4th Cir. 2013) (citing Flippo v. West Virginia, 528 U.S. 11,13 (1999)). Thus, while application of the exigency doctrine often depends on the "totality of the circumstances", See, •

Mitchell v. Wisconsin, 139 S.Ct. 2525, 2535, n.3 (2019) (plurality opinion) (quoting Missouri v. McNeely, 569 U.S. 141, 150 (2013)), this Court has identified only "a few ...emergency conditions" that rise to the level of exigent circumstances. Welsh, 466 U.S. at 749-50. They include: (1) the need to "pursue a fleeing suspect"; (2) the need to "protect individuals who are threatened with imminent harm"; and (3) the need to "prevent the imminent destruction of evidence". Carpenter, 138 S.Ct. at 2223 (citing Kentucky v. King, 563 U.S. 452, 460, 179 L. Ed.2d 865 & n.3 (2011)).

3. In the decision below, the Fourth Circuit noted the following facts in its analysis: Hobbs threatened Foreman and her daughter with a handgun to get a television back. After having obtained said television, he threatened that he might harm members of her family if she contacted police as well as harm law enforcement if they attempted to apprehend him. Then he left. The decision below notes that Foreman was trembling and distraught as she recounted Hobbs' actions to the police and that officers were "so concerned about Foreman's safety" that they escorted her to the police station, an extremely rare precaution according to Detective Nesbitt, and initiated "constant surveillance" of Foreman's residence while Hobbs was still at large. App.1,9. The decision below notes that Foreman's window was broken and that a theft and assault had taken place and that Hobbs had a criminal history. *id.* Under these circumstances, the Fourth Circuit held that officers reasonably concluded that Hobbs was armed and dangerous, that he posed an imminent threat to Foreman, to her family members, and to law enforcement, and that the exigent circumstances required them to seek the cell phone location information from T-Mobile without delay. App.1,10.

4. The Fourth Circuit got it wrong. Its interpretation of "imminent harm" is not congruent with a majority of the Circuit's understanding of this term. "Imminent" is defined as "threatening to occur immediately; dangerously impending or about to take place". (Black's Law Dictionary Eleventh Edition) "Imminent means

immediate- not past or future, but present." Thomas v. Leeke, 725 F.2d 246, 248 (4th Cir. 1984). The decision below does not note any articulation by Detective Nesbitt of a genuine, credible, and specific individual under threat of imminent harm at approximately 12 a.m. on February 4, 2018 when the exigent request form was submitted to T-Mobile. The decision below cites to the Second Circuit's analysis in United States v. Caraballo, 831 F.3d 95 (2d Cir. 2016) as instructive for these reasons: (1) good reason to believe defendant was armed (2) were aware that he was the primary suspect in a brutal murder, and (3) had "specific reasons to think" that he would act to kill undercover officers and other informants who had infiltrated his drug operation. App.1,8. These facts as compared to the facts in this case are not only extreme but readily distinguishable.

According to Foreman's statements to police, all threats alleged to have been made by Hobbs were conditional, whereas in Caraballo, the suspect's threats were evident in actions already taken with a reasonable belief that more actions were imminent. Foreman alleged that Hobbs threatened to shoot her and her daughter "if" she did not give him the television. That he would kill her and her family "if" she contacted police; and that he would shoot police "if" they attempted to apprehend him. At oral argument, even the Honorable Judge King astutely referred to any threats against police as being "conditional" since they applied only "if" Hobbs was pursued. Foreman ultimately gave Hobbs the television so the alleged threat against her and her daughter in that regard no longer existed. The decision below does not indicate that Hobbs was aware that Foreman had contacted police. And the record shows that Baltimore County police did not attempt to even identify or warn any of Foreman's family members purported to be in such severe danger that the warrant requirement should be dispensed with, App.5,12, App.6,43-44, while noted in the decision was the fact that Detective Nesbitt initiated "constant surveillance" of Foreman's residence while Hobbs was still at large, App.1,9,

although at that time Foreman was safe at the police precinct. In light of such a serious threat, it defies logic that Detective Nesbitt would not also initiate "constant surveillance" of Foreman's family members as well, while simultaneously seeking to apprehend Hobbs, as if one act precluded him from conducting the other. Any purported imminent danger to law enforcement seems not to be cognizable under the exigency analysis since there perpetually exists a looming threat of harm when tasked with the duty of apprehending suspects. Nevertheless, officers had identified Hobbs' vehicle and license tag number, App.6,51-52, and could have easily warned the entire Baltimore County Police Department as well as the Baltimore City Police Department of any possible imminent threat Hobbs may have posed. However, the decision below is silent with regard to any additional actions police could have taken to alleviate any supposed danger to law enforcement while still earnestly attempting to apprehend Hobbs. In the absence of an articulated, specific and credible imminent threat at the time of the search and use of Hobbs' CSLI, Baltimore County police violated his Fourth Amendment right.

5. The totality of the circumstances standard is essential when Courts apply an exigency analysis to the facts of a case. *id. Mitchell*, at 2535. The standard is not only meant to consider the facts and actions of the suspect but of law enforcement as well. Surprisingly absent in the decision below is the behavior of the Baltimore County police. It credited, in its analysis, the fact that police were "so concerned about Foreman's safety" that they escorted her to the police station, but elected not to challenge the fact that Foreman herself may not have been kept at the precinct until Hobbs was apprehended. App.6,43. Nor was there any discussion on the fact that police made no attempt to warn or even identify any of Foreman's family that were allegedly threatened. The record reflects that Foreman had revealed Hobbs' address to Officer Flanary during interviews as well as his cell phone number. See, Officer Flanary BWC, App.5,8. Yet the decision below does not address

why Detective Nesbitt did not attempt to initiate surveillance at any of the addresses revealed, in an effort to locate and apprehend Hobbs, nor does it challenge Detective Nesbitt's decision to wait more than 4 hours to submit an exigent request form for Hobbs' real-time CSLI at midnight, App.6,33, when officers were given Hobbs' cell phone number as early as 8 p.m. that evening. App.5,8, App.6,49. However, the decision below did note that just as in Caraballo, 831 F.3d at 99,105, Hobbs' cell phone provider was known to be "notoriously slow" in responding to law enforcement search warrants App.1,10, and given the facts recounted by Foreman, they agreed that even a brief delay in apprehending Hobbs placed many individuals at a significant risk of harm. Amazingly, the Fourth Circuit was silent on the fact that Detective Nesbitt had allowed significant time to elapse between the incident at Foreman's residence and the exigent ping request. Perhaps the Fourth Circuit only considered Detective Nesbitt's response to the exigency to be "particularly slow" in comparison to T-Mobile.

B. Baltimore County's unreasonable delay belie any objectively reasonable belief that there was a "compelling need to act" and "no time to obtain a warrant"

1. The rationale underlying the exigent circumstances exception is a "compelling need for official action and no time to secure a warrant." McNeely, 569 U.S. at 149. The decision below cited to this very proposition as noted in footnote 5,

"...Detective Nesbitt testified that it was 'standard procedure' for the officers to use an 'exigent form' instead of obtaining a search warrant. He also stated that he could not obtain a warrant for the "pings" during the nighttime hours, although he admitted that he was able to secure a search warrant that night for Hobbs' car."

But as stated previously, nothing was made of the fact that significant time had elapsed (from around 7p.m. when the incident occurred to well after midnight) between the incident at Foreman's residence and the exigent ping request. See, e.g.

Jones v. United States, 168 A.3d 703,711 (D.C. 2017) ("The [trial] court noted significant time (around ten hours) had passed between the sexual assault and the arrest of Mr. Jones on October 11, during which time the detectives could have been getting a warrant.") (internal citations omitted). As time is a key element in an "urgent or immediate" response situation, the court's have determined that where exigent circumstances make "the needs of law enforcement so compelling that a warrantless search is objectively reasonable" officers must respond according to the situation. Mincey, 437 U.S. at 393-94. And in order to determine whether police impermissibly manufacture or create exigent circumstances, courts must look to the "reasonableness and 'propriety of their actions and investigative tactics' preceding the warrantless entry". United States v. Mowatt, 513 F.3d 395,399 (4th Cir. 2007) There must be a genuine need to forgo the warrant process; and in assessing that need, courts must focus not only on the moment that police made the decision to make the warrantless entry, but rather "appraise the agents' conduct during the entire period after they had a right to obtain a warrant" and not merely from the moment when they knocked at the front door. United States v. Patino, 830 F.2d 1413,1416 (7th Cir. 1987). Detective Nesbitt, on whom most, if not all possible bases for exigency depended, referred to the ultimate request for a warrant to track Hobbs as a "courtesy", and his method of submitting an exigent ping request without a warrant as "standard procedure". The decision below did note in footnote 5, that a "standard procedure" would not be sufficient justification for an exigency exception, however, the testimony of officers about their "standard procedure", App.6,<sup>47</sup>, reveals that the warrant requirement is being abused in Baltimore County. Given no significance, apparently, was the blatant misrepresentation by this same detective that he did not know how to get a warrant that night for cell phone tracking, while applying for and successfully obtaining a warrant to search Hobbs' vehicle later that night. App.7,1-4.

2. The decision below deviates from a majority of Circuits that have determined

that in cases involving an imminent threat of danger to life and limb, time delay and law enforcement's actions throughout the entire period, were key factors in its objectively reasonable analysis. See, Carlson v. Fewins, 801 F.3d 668,674-75 (6th Cir. 2015) reasoning that "when police initiate action after a long delay with no new provocation, the delay itself may suggest an unreasonable evasion of the Fourth Amendment rather than a reasonable response to a dynamic threat". See, also Sutterfield v. City of Milwaukee, 751 F.3d 542 (7th Cir. 2012) (finding that 9 hours passed before illegal search was conducted); United States v. Gooch, 6 F.3d 673 (9th Cir. 1993)(finding that several hours passed between the alleged discharge of firearm and fight and the actual arrest, officers could not have reasonably believed that there was a present danger to occupants of the tent and campground.) and see also, Fisher v. City of San Jose, 509 F.3d 952,961 (9th Cir. 2007)(holding exigent circumstances did not justify entry into a home in spite of police confronting an armed suspect who seemed intoxicated and had already threatened a civilian and may have presented a threat to police) and O'Kelley v. Craig, 781 F. App'x 888,896 (11th Cir. 2019)(overruling lower court finding exigency in holding that when police confronted armed suspect and in spite of earlier threats to civilians with firearms "no reasonable officer would believe... an imminent risk of serious injury to the Deputies or others existed" because "[b]y the time the officers arrived on the scene the events that gave rise to the 911 call... were complete.")

3. As Justice Douglas warned in his dissent in Terry v. Ohio, 392 U.S.1,36-39 (1968), federal and state courts have steadily moved to a jurisprudence relying entirely on reasonable articulation of facts by police. Law enforcement's whims and perceptions, in other words, might be sufficient provided they are properly articulated, even ad hoc, during a suppression hearing and found to be credible. Such a dangerously broad discretion would permit the proverbial (reasonable) officer's belief to fluctuate between being objective and subjective, and effectively abrogate

the purpose of the Fourth Amendment which is to safeguard the privacy and security of individuals against arbitrary invasions of governmental officials.

In the decision below, every objective measure of whether police testimony (about their belief in the danger) at the suppression hearing ought to be credible, points away from such a finding, while their perceptions, so easily changed or repurposed as needed during legal proceedings, in order to provide all the support needed for finding an emergency. Objectively, Hobbs obtained the television without physically harming anyone. Police took no measures to ensure anyone's safety (not even fellow officers), aside from apprehending Hobbs, such as learning names and locations of supposedly at risk people. App.6,43-44. Police had Hobbs' address but made no attempt to apprehend him there, deciding to implicate his Fourth Amendment right to privacy instead. Police took Foreman to the precinct, but had no recollection of whether she was kept there until Hobbs was apprehended. id. at App.6,43. Warrants were not sought because that was the "policy" of the Baltimore County Police Department. Subjectively, and ad hoc, Foreman was taken to the station, supposedly to protect her but also to obtain a recorded statement. Foreman seemed upset. Police believed there was an imminent threat. This component of the exigency analysis, the need to act without a warrant, does not appear in the jurisprudence by accident and was cited to in the decision below. What is difficult to understand is how no amount of actions or inactions belying the supposed emergency or the credibility of the police were addressed in the same Opinion below that cites to the factor. Hobbs cannot help but be reminded of the Honorable Judge Wynn's concurrence in Curry, though referring to a quite different scenario, which warns against "factors conjured by the government to bolster its analysis." United States v. Curry, 965 F.3d 313,337 (4th Cir. 2020), as amended (July 16, 2020). Simply put, the decision below relies too much on articulation of certain facts, ignoring of others and strays too far from accountability from law enforcement, by permitting the repurpos-

ing of their actions to fit with their need for a finding of exigency when the time came. It is especially troubling for the Fourth Circuit to break new boundaries based upon the articulation of facts by less-than-candid officers, learning most or all of their actionable information from a dishonest civilian.<sup>1</sup>

The decision below involves a fact pattern where police were perfectly candid that they ignored the warrant requirement because that is what they normally do. (Standard Procedure) While the Fourth Circuit found exigency to exist, no weight was given to these serious contradictions between these reasonably articulable dangers, as expressed by police, and their conduct accordingly. How can it be as Detective Nesbitt testified, both exigency and standard procedure? By definition that is impossible.

This case left unaltered , will likely come to stand for the proposition that the reasonable articulation of facts supporting an exigent search by reasonably objective officers, or as would be viewed by a reasonable officer, can be discredited neither by material misrepresentations of fact under oath nor by behavior completely at odds with the supposed emergency.

4. If under the totality of the circumstances standard, the factors ignored by the Fourth Circuit are applied to its exigency analysis, the decision below would have reversed the ruling of the Trial Court. Viewed from the perspective of a reasonable officer, the facts available at the time would not warrant the submission of the exigent ping request. Foreman and her daughter had been safely escorted to the precinct where they remained for several hours until they were allowed to leave. No credible threats made against any of Foreman's other family members.

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<sup>1</sup> During trial, Foreman testified inconsistent with earlier testimony and prior-statements made about "seeing" Hobbs with AK-47s, "in his car", App.4,56, compare with, App.4,69; "at his house", App.4,56-57, compare with, App.5,11, App.6,29; about Hobbs being a "terrorist", App.4,57; about "ending their relationship", App.4,59, compare with, App.4,60-61; about "seeing" Hobbs "break the kitchen window with gun", App.8,2, App.4,43, compare with, App.4,53-54; and about Hobbs "making threats prior to February 3, 2018", App.4,52,59-60, compare with, App.4,1.

Officers had Hobbs' home address and cell phone number as early as 8 p.m., less than an hour after the incident at Foreman's residence. Officers discovered Hobbs' current Maryland driver's license which confirmed an additional address. Detective Nesbitt made no attempt to warn fellow police officers of an alleged impending danger or to issue an All Points Bulletin (APB) or Be On Look Out (BOLO) alert for Hobbs' vehicle. In all, the record is completely silent on the actions of Baltimore County police officers for several hours, in the face of a supposed emergency situation, until finally a decision was made by Detective Nesbitt to submit a warrantless exigent ping request to T-Mobile sometime after midnight. And lastly, the record reflects that it was Detective Nesbitt who delegated Officer Dixon to secure an arrest warrant, App.6,31, which was applied for at 1:11 a.m. on February 4, 2018 and promptly issued at 1:22 a.m. App.8,4.<sup>2</sup> In short, if there was time to apply for an arrest warrant, there was time to apply for a search warrant as well.

The conduct of Baltimore County police and the unreasonable delay of actions during a claimed emergency totally belie any objectively reasonable belief that exigent circumstances justified the warrantless use of Hobbs' CSLI. The Fourth Circuit below erred.

C. Decision below broadly expands the exigent circumstances exception

1. But like all exceptions to the warrant requirement, the exigent circumstances exception is a "narrow" one that must be "well-delineated" in order to retain [its] constitutional character. Yengel, *id.* at 396(citing Flippo, 528 U.S. at 13.) The decision below has created ramifications of the greatest importance to

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<sup>2</sup> A study of Officer Dixon's affidavit, App.8,1-4, will blatantly contradict Detective Nesbitt's testimony that Baltimore County officers did not discover Hobbs' exact address from Foreman that evening. (4534 Parkton Street, Baltimore, Maryland 21229)

exigent circumstances jurisprudence in two ways. First, the level of danger required to circumvent the warrant requirement for exigent phone tracking will, going forward, include any allegedly armed individual who has spoken conditionally of acts violence he or she may commit. Second, no amount of disregard for the Fourth Amendment by police at a suppression hearing will avail those challenging a warrantless search, provided a reasonable officer might have articulated a reasonable justification, however ad hoc such rationales appear.

From Caraballo to this case, the precedential decision below now directs that any individual, allegedly armed and allegedly dangerous based on uncorroborated statements from a civilian, even made in the conditional and regardless of whether actual violence has occurred, will justify exigent phone tracking. The standard implied in the decision below, namely, any civilian claiming threats were made, (provided the police took them seriously), cannot be the standard. Otherwise, every allegedly armed individual is susceptible to this sort of analysis if they utter the right words. Such a standard essentially broadens the exigent circumstances exception, severely weakens the protections guaranteed by the Fourth Amendment and will potentially effect millions of individuals subject to the abuse of law enforcement by dishonest civilians, within the jurisdiction of the Fourth Circuit and beyond.

2. Nothing like this has ever been sanctioned by any Circuit or by this Court, as the vast majority of other reported opinions from any Circuit involves either destruction of evidence, a hostage or barricade situation or, most relevant here, a situation where actual violence has occurred with good reason to believe more might be imminent. Effectively, any reasonable expectation of privacy in location information is abrogated, provided only that a civilian claims someone is armed and made threats, even in the conditional. Not every case in history upholding an exigent search based on a threat of imminent harm has included violence. Nor does Hobbs urge that as a threshold. Yet Hobbs is not aware of a decision by any Circuit or

this Court, upholding warrantless tracking to chase a suspect based on a verbal threat without more.

To allow law enforcement warrantless access to an individual's real-time CSLI based on such a low standard opens the door to precisely what this Court continued to urge guarding against in Carpenter, "... that the 'progress of science' does not erode Fourth Amendment protections". 138 S.Ct. at 2223(citing Olmstead v. United States, 277 U.S. 438, 473-74 (1928)(J. Brandeis dissenting)). Even more alarming, the decision below stands to support the notion that the word of any civilian, even a dishonest one, might remove an individual's Fourth Amendment protections.

3. This Court has noted that Lower Courts have approved of warrantless searches related to bomb threats, active shootings, and child abductions. Carpenter, 138 S.Ct. at 2223. The decision below permits warrantless collection of real-time CSLI where a scorned and rejected woman can make inconsistent and unsubstantiated allegations about a former acquaintance as long as there exists a criminal background, property damage, and a general alleged threat. This Court should not endorse such an expansion. This case falls way below the type of urgent, fact-specific threats associated with the category of cases cited in Carpenter. At best, this case involved the destruction of property, an alleged theft of Hobbs' own television, and an alleged verbal assault, which "in the mine-run criminal investigation" requires police to get a warrant when collecting CSLI. *id.*

4. The decision below endorse Baltimore County officers' subjective belief that Hobbs' twenty year old criminal history, a broken window, uncorroborated threats, and an alleged access to firearms, constituted an emergency that made the officers' warrantless collection of CSLI objectively reasonable. Even worse was Detective Nesbitt's insistence that this was "standard procedure", App.6,47, and the "number one way to locate people nowadays". App.6,31. To lower the bar this far as regards the level of danger justifying exigency in a case where police found

themselves unable to be candid about their ability to obtain a warrant, behaving throughout as though no one was truly in danger, and based on information from a civilian that was not only found to be untrue but was at the time, (prima facie), objectively unbelieveable, is a new precedent at odds with every exigent circumstances case on record.

If the decision below is allowed to stand, this expansion of the exigency doctrine will incentivize law enforcement officials to claim exigency in every case whose suspect has a criminal background, has allegedly made threats, and allegedly has access to a firearm, regardless of corroboration or the credibility of the claimant. Such a premise has the greatest potential for abuse, and would significantly reduce, if not, completely erode the fundamental protections of the Fourth Amendment afforded all citizens, even those accused of a crime. Therefore, this Court should grant certiorari.

## II. Certiorari Is Warranted To Settle A Division In The Circuits As To Whether Law Enforcement's Collection Of Real-Time CSLI Is A Search Under The Fourth Amendment

1. Prior to this Court's Carpenter decision, there was uncertainty amongst the Circuits with regard to law enforcement's collection of CSLI. Some Circuits viewed historical CSLI as records voluntarily shared with the wireless provider and not subject to a reasonable expectation of privacy. Others determined that cell phone tracking through inspection of CSLI invades that reasonable expectation of privacy. This Court's Carpenter holding established that historical CSLI was subject to a reasonable expectation of privacy and that an individual maintains a "legitimate expectation of privacy in the record of his physical movements as captured through

CSLI" and "in the whole of their physical movements". *id.* at 2217. However, the Court noted that the decision was a "narrow one" and declined to "express a view" on matters not before it. *id.* at 2220.

Following the Carpenter decision, there still remained a divide amongst the Circuits with regard to real-time CSLI. The question of whether law enforcement's collection of real-time CSLI was a search under the Fourth Amendment remained unanswered. And given the unsettled nature of the question, a few Circuits have declined to even answer it. See, e.g., United States v. Banks, 884 F.3d 998, 1011 n.3 (10th Cir. 2018); See also, United States v. Wallace, 885 F.3d 806, 810 (5th Cir. 2018). Circuits that previously held that real-time CSLI was not a search prior to the Carpenter decision maintained that holding. The Sixth Circuit held in United States v. Riley, 858 F.3d 1012, 1013 (6th Cir. 2017) that tracking a phone for seven hours in real-time via GPS data does not amount to a search under the Fourth Amendment because a person has no reasonable expectation of privacy against such tracking. On the other-hand, in Jones *Supra*, the District of Columbia Court of Appeals held that law enforcement's use of a cell-site simulator to determine the current location of a person's phone constitutes a search under the Fourth Amendment. *id.* 168 A.3d at 707.

More recently, in United States v. Hammond, 996 F.3d 374, 389-92 (7th Cir. 2021), that Court noted that the Carpenter decision was a narrow one focusing only on historical CSLI and finding defendant had no reasonable expectation of privacy in 6 hours of real-time CSLI, while in United States v. Baker, 2021 U.S. Dist. LEXIS 182519 (M.D. Pa), the Court held that a ping of defendant's cell phone constitutes a Fourth Amendment search.

2. The collection of real-time CSLI, like historical CSLI, triggers "even greater privacy concerns" than this Court found in United States v. Jones, 565 U.S. 400 (2012). Carpenter, 138 S.Ct. at 2218. Unlike historical CSLI, real-time CSLI provides law enforcement access to a continuous record of an individual's movements.

in real-time or close to it. And as this Court correctly noted in Carpenter, the advances of cell phone technology has actually increased the accuracy of CSLI to a degree "rapidly approaching GPS-level precision", *id.* at 2219. The government regarded police's warrantless collection of Hobbs' real-time CSLI as the least invasive search and urged the Trial Court not to view it as intrusive. Ultimately the position of the government was affirmed in the decision below. This rationale should not be allowed to stand. Detective Nesbitt ultimately requested that T-Mobile initiate a signal to Hobbs' cell phone to prompt its reconnection with the nearest cell phone tower, in order to reveal its current location. In addition, Detective Nesbitt asked that the signal's results, known as a "ping", be forwarded to a Baltimore County police email address, continuously, every 15 minutes for 48 hours, *App.7,1*, and for as long as 30 days. *App.7,1-2.*

3. In comparing the collection of historical CSLI with the GPS tracking used in Jones, this Court reasoned that historical CSLI presented even greater privacy concerns than in the GPS monitoring of a vehicle, for one simple and obvious reason: "individuals regularly leave their vehicles". *id.* at 2218. To be sure, real-time CSLI present the same privacy concerns that this Court noted in Carpenter, the only difference being the moments in time. However, with certainty, all real-time CSLI quickly become historical CSLI with the passage of time. Like historical CSLI, law enforcement's access to real-time CSLI, greatly exceeds the surveillance of a GPS tracker in a vehicle, the difference being that with no real physical effort, an individual's cell phone is unknowingly converted into a tracking device to be conveniently monitored in real-time. As the Carpenter Court noted, a cell phone is ubiquitous in that its owner "compulsively" carry their cell phone "with them all the time", allowing the cell phone to track "nearly exactly the movements of its owner." *id.* Such tracking will certainly allow governmental officials to follow an individual inside of a private residence, into a hospital exam room or doctor's

appointment, inside of a funeral service or even inside of a sacred place of worship. Entrance into such places absent judicial authorization will certainly invade a citizen's legitimate expectation of privacy. In that regard, this Court has cautioned that when an individual "seeks to preserve something as private", and his expectation of privacy is "one that society is prepared to recognize as reasonable", official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. *id.* at 2213 (citing Smith v. Maryland, 442 U.S. 735, 740 (1979)). Real-time CSLI is subject to a reasonable expectation of privacy and this Court should establish this right firmly.

4. This case provides a vehicle for this Court to settle the division in the Circuits on the issue of real-time CSLI. In addition, if this Court were to decide that, on the first question presented, exigent circumstances were not present when Baltimore County police searched and used Hobbs' real-time CSLI without a warrant, the Fourth Circuit panel below could still affirm the Trial Court's denial of his Motion to Suppress evidence, under a holding that real-time CSLI is not subject to a reasonable expectation of privacy and therefore Baltimore County police were not required to obtain a warrant for its use.

For all the reasons articulated in this petition, this Honorable Court should grant Hobbs a writ of certiorari.

CONCLUSION

For the reasons set forth, the petition for a writ of certiorari should be  
GRANTED.

Respectfully submitted,

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