

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD ANTHONY WILFORD,
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 WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

- I. Whether the warrantless seizure and search of Real-Time cell-phone location information disclosing the location and movements of the cell phone and its possessor continuously for many months is permitted by the Fourth Amendment.
- II. Whether a Franks Hearing and the exclusion of Real-Time cell-phone pinging evidence was required based on the actions of federal investigating agents in obtaining court orders.
- III. Whether the good-faith exception to the exclusionary rule apply to the Government's nonconsensual warrantless GPS attachment to private vehicles and use to monitor those vehicles in public and private areas over a prolonged period of time.
- IV. Whether Procedural Due-Process is violated thereby rendering the trial, conviction and judgment invalid when the Government arrest an individual based on an indictment for an infamous crime and hold the accused in prison for about 2 years and 3 months without providing an arraignment, bond hearing, nor an opportunity to plead to the charged indictment prior to jury trial.

PARTIES TO THE PROCEEDINGS

All parties to this proceeding are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Wilford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPENIONS BELOW

The opinion of the Fourth Circuit (Pet. App. 1a) is reported at 2017 U.S. App. LEXIS 8221 (unpublished). The district court opinions are published and are available at 961 F. supp. 2d 740 (June 7, 2013 and November 27, 2013); 2016 U.S. Dist. LEXIS 23699 (February 26, 2016).

JURISDICTION

The Fourth Circuit issued its opinion on May 20, 2017, and denied rehearing en banc on 5/20/17 (Pet. App. 12a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). (Extension was granted to 11/17/17-No. 17A 235).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the U.S. Constitution provides:

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

The Fifth Amendment to the U.S. Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property to be taken for public use, without just compensation.

Federal Pen Register And Trap And Trace statute provides in relevant part:

§3122(a) Application.

(1) An attorney for the Government may make application for an order or an extension of an order under section 3123 of this title [18 USCS §3123] authorizing or approving the installation and use of a pen register or a trap and trace device under this chapter [18 USCS §3121 et seq.], in writing under oath or equivalent affirmation, to a court of competent jurisdiction.

(b) Contents of application. An application under subsection (a) of this section shall include --

- (1) the identity of the attorney for the Government or the State law enforcement or investigative officer making the application and the identity of the law enforcement agency conducting the investigation; and
- (2) a certification by the applicant that the information likely to be obtained is relevant to an on going criminal investigation being conducted by that agency.

§3123. Issuance of an order for a pen register or a trap and trace device.

(a) In general:

(1)Attorney for the Government. Upon an application made under section 3122(a)(1) [18 USCS §3122(a)(1)], the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device anywhere within the United States, if the court finds that the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing investigation.

STATEMENT OF THE CASE

In August of 2010, the Drug Enforcement Administration (DEA) Task Force initiated an investigation in to the drug dealing activities of an associate of Petitioner Wilford, in the Baltimore City, Maryland area, which continued until the resulting May 5, 2011 single count Federal indictment charging Wilford and others with Conspiracy to Distribute and Possession With Intent to Distribute five kilograms or more of cocaine in the District of Maryland, in violation of 21 U.S.C. §§ 841(a)(1) & 846. Hr. Tr. 11/6/13 ECF-324 p.10.

During the course of the DEA Task Force investigation, the agents sought and obtained over twenty Maryland State authorizations for Pen-Register and Trap and Trace devices over Petitioner Wilford and other suspects cell-phones. Hr. Tr. 1/25/13 ECF-204 p. 63; Mot. to Sup. ECF-160 p. 22-23. The agents also attached warrantless GPS tracking devices to twelve vehicles believed to be used by Wilford and others to be utilized by the agents in tandem with the pinging of cell phones under the pen/trap orders. Hr. Tr. 1/25/13 ECF-204 p. 66, 87-90; Hr. Tr. 3/8/13 ECF- 218 p. 25-42.

Specifically, the agents obtained four pen/trap orders over a cell phone owned by Wilford, ending in the numbers 4365, and attached non-consensual warrantless GPS devices to two of his personal vehicles, a Honda Crosstour and Oldsmobile mini-van.

All pen/trap applications sought "Cellular Tracking Device" information in real-time pursuant to Maryland Courts and Judicial Proceeding "CJP" § 10-4B-01 et seq., were misleading, and were modified to circumvent constitutional privacy concerns by the inserted statement of probable cause. The accompanying template orders provided the articulation of probable cause merely that the "information likely to be obtained...is relevant to an ongoing criminal investigation." Pet. App. 110a. The Maryland pen/trap statute 10-4B-01 et seq. is virtually identical to its federal counterpart, 18 U.S.C. § 3121 et seq. See State V. Andrews, 134 A.3d 324, No. 1496 Slip Op. at 54-55 (Md. Ct. Spec. App. 2015).

The applications, as modified, were intended to act as quasi warrants (10-4B-05(a)) for the acquisition of information beyond the scope of traditional pen/trap authority for sixty (60) days, including real-time location data which would reveal the physical location of the phone and its possessor whenever it was powered on. id. The applications request authority to:

...employ surreptitious or duplication of facilities, technical devices or equipment to accomplish the installation and use of a Pen Register And Trap And Trace and Cellular Tracking Device,..., and shall initiate a signal to determine the location of the subject's mobile device on the service provider's network or with such other reference points as may be reasonably available, Global Positioning System Tracing and Tracking, Mobile Locator Tools, R.T.T. (Real-Time Tracking Tool), Precision Location and any and all locations....)

Pet. App. 103a.

The initial application over Wilford's cell-phone 4365 was submitted by DEA agent Mara Hewitt on November 18, 2010, and contain several material false statements including that CS-1 identified Wilford as "a cocaine source of supply operating in Baltimore", and that CS-2 "provided Wilford's phone number as 410-984-4229," because that number was in contact

with the DEA's primary target. Pet.App. 52a. These material falsehoods were affirmed by the agents to be completely false, along with other information in the application. id. at 52a ; Hr. Tr. 1/25/13 p. 151-53 Agent Lester, and p. 181-91 agent Hewitt ECF-204.FN:1 The Government obtained subsequent authorizations to extend or renew the order on January 19, 2011; March 14, 2011; and April 29, 2011; while also simultaneously obtaining a State of Maryland wiretap order over the same 4365 (D-LINE). Pet. App.117a-155; ECF- 426 Ex. 8 .FN:2

The first non-consensual warrantless GPS tracking device was attached to Wilford's Honda Crosstour by the agents on November 17, 2010, while it was parked on a public street in Baltimore, City. On December 8, 2010, the agents removed the GPS for fear of detection and replaced it on December 12, 2010, where it remained until about April 16, 2011 producing over 4,200 location data points. The agents attached a GPS tracking device to Wilford's Oldsmobile mini-van, without his consent or a warrant, on January 18, 2011 while it was parked on a public street in Baltimore, where it stayed until the agents remove it on about May 16, 2011 producing over 7,300 locational data points. The extensive use of the GPS devices allowed the government to catalog and monitor the locations and movements of those vehicles 24/7 over a pro-longed time, including while those vehicles were parked inside of Wilford's private garage connected to his residence. Pet. App. 65a; ECF-204 1/25/13 Hr. Tr. p. 54-61, 86; ECF-304 p.

The extensive warrantless GPS tracking was purposefully hidden from the various judges whom authorized the many court orders and warrants because the agents "did not want

FN¹ . The affirmative misrepresentations presented in the Nov. 18, 2010 application was also presented in a prior application over 410-984-4229 (falsely attributed to Wilford), and continued over in the Jan. 19, 2010 application on 4365.

FN² . Congress did not intend for overlap between titles of the ECPA. See *Steve Jackson Games, Inc. V. U.S.*, 36 F.3d 457, 464 (5th Cir. 1994); Also see, *A Lot More Than A Pen-Register, And Less Than A Wiretap*: Stephanie K. Pell & Christopher Soghoian, 16 *Yale J.L. & Tech*, 134 (3013).

to hinder future investigations utilizing slap-on trackers." Hr. Tr. 1/25/13 ECF-204 p. 91. The agents also failed to disclose the specific devices used to conduct the cell-phone "pinging." Pet. App.-28a .

Government disclosure of the pervasive GPS tracking of Wilford's two vehicles shows the chain of monitoring of the vehicles to, at, and from Wilford's Elkton, Maryland home garage including Wilford's daily travels around Baltimore, inside of Washington, D.C., and elsewhere. Hr.Tr. 11/6/13 ECF-324 p. 112-13.FN3 The GPS tracking of the vehicles were conducted in tandem with the pinging of Wilford's cell-phone which was use by the government to learn private and personal information such as: his friday morning visits to the barber shop; his frequent trips to the airport for travel to California FN4; the location and times of his visits to his paramour's home at 3530 Seapines cir.; his visits and transactions at Staples Office Store; when he would be at 1500 Cliftview ave.; his purchases at Wal-Mart; his meetings with associates; and whenever he was on his way to, located at, or leaving his Elkton, Maryland home and whether he was traveling in the Honda or Oldsmobile vehicles. Hr. Tr. 3/8/13 ECF-218 p. 25-42; Pet App. 33a-34a

As a result of the pinging of Wilford's cell-phone (4365) and, or the GPS tracking of his Honda and Oldsmobile vehicles, on May 5, 2011, the Government obtained the

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- FN3. The records of the GPS discovery disk were not presented at trial which shows the Government's tracking inside of Wash., D.C. for the Honda, however, data points reflecting that tracking was presented to the Fourth Cir. (DOC-130 Exhibit 4
- FN4 Agent Todd Edwards testified at trial that pinging of Wilford's phone placed him "at his girlfriend's residence" in California. Trial Tr. 12/13/13 ECF-305 p. 140.

indictment in this case against Wilford. DEA agents Mara Hewitt and Todd Edwards testified before the federal Grand Jury about information received from the pinging and GPS data, and Assistant U.S. Attorney John W. Sippel, Jr., personally provided the Grand Jury with the material falsehood that Wilford was the same person arrested by DEA during a controlled delivery of 136 kilos of cocaine.FN5

On September 16, 2011, based on the real-time pinging of cell phone owned by Wilford, agent Edwards located Wilford where he was then arrested by federal agents at a house in Baltimore on Laurel avenue and taken for an initial appearance in U.S. District Court of Maryland.FN6 The district court never conducted an Arraignment, never asked Wilford whether he was pleading guilty or not-guilty, nor did it ever provide him with a Bond Hearing. See Initial Appearance Tr. ECF-291.

Prior to trial, the district court held hearings on the various motions presented by counsel on January 25, 2013 and March 8, 2013, to resolve issues related to the warrantless pinging of Wilford's cell phone and GPS tracking of his two vehicles. See ECF-204 1/25/13; FN7 ECF-218,3/8/13. The hearings culminated in a Memorandum Opinion and Order of June 7, 2013, Pet. App. 17a , where the court granted inpart and denied in part Wilford's Motion For Disclosure (ECF-166), and ordered the Government to produce all directives or instructions issued to federal law enforcement agents involved in the investigation of

FN5. See May 5, 2011 Grand Jury transcript at p. 19-20, 27-31.

FN6. The record of the case affirmatively shows that all other defendants were arraigned, had bond hearings, and pleaded.

FN7* Case agent Mark Lester testified that pinging and GPS was utilized to locate Wilford to conduct physical surveillance.

Wilford that directed compliance with the August 6, 2010 decision in United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010); and denied the Motion To Suppress (ECF-160), without prejudice to Wilford's right to renew his argument as to the inapplicability of the good-faith defence to federal agents' warrantless use of GPS trackers, based on documents that might be produced by the Government. Relying on U.S. v. Knotts, 460 U.S. 276 (1983), the court ruled that the good faith exception as articulated in Davis v. U.S., 131 S. Ct. 2419 (2011) supports the government's reliance on Knotts as binding appellate precedent. The district court also "assumed, arguendo, that the repeated pinging" constituted a "search" of Wilford's phone and stated "I am persuaded that the orders authorizing the pinging satisfied the Fourth Amendment's warrant requirement." Pet. App. 47a - 50a . The court further recognized "several material inaccuracies" in the Nov. 18, 2010 (4365) pen/trap application, which were all affirmed by the agents, however, the court concluded that "the inaccuracies were the result of negligence" and denied suppression and a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978). Pet. App. 50a - 52a.

In response to the district court's order (ECF-206), the government produced a Department Of Justice's email dated August 6, 2010 which advised caution and warned that "prosecutor's and agents" may wish to consider obtaining warrants as a precaution pending final disposition of Maynard, particularly in the Fourth Circuit adjacent to D.C. area. Hr. Tr. 11/6/13 p. 27-29, 79; Pet. App. At a subsequent hearing on Nov. 6, 2013, where both case agents testified. It was revealed that AUSA Sippel did in fact email a copy of the DOJ's email/memo and called both case agents on Aug. 6, 2010. The hearing further revealed that the agents were aware of the private garage attached to Wilford's home. In its ruling, the court found no Franks issue; assumed that the vehicles tracked to and at Wilford's Elkton, Md. residence were parked inside of the garage and ruled to suppress all evidence connected to that tracking, but did not order suppression of any evidence or hold any hearing to determine what, if any, evidence was connected to the illegal tracking. Pet. App. 67a . The court's

June 7, 2013 Memorandum Opinion had previously laid out numerous instances of GPS tracking which was the subject of suppression. Pet. App. 33a-34a.

On December 11, 2013, without a duly interposed plea to the indictment, the district court proceeded with a jury trial against Wilford. FN 8 The jury was incorrectly advised that Wilford had entered a plea of "not-guilty." Trial. Tr. ECF- 308 p. 3 12/11/13.

During trial the government introduced a wealth of information as evidence, which was obtained through the real-time "pinging" and GPS tracking and relied on that information to establish Wilford's presence at certain times and locations during the course of the charged conspiracy. DEA special agent Mark Lester testified that agents were conducting "24/7" surveillance of Wilford through GPS tracking devices attached to his vehicles along with pinging of his cell phone. Trial Tr. 154-59, Dec. 12, 2013, ECF-304. DEA special agent, and licensed attorney, Todd Edwards testified that agents believed Wilford would be in a particular bugged vehicle whenever that vehicle leaves his Elkton, Maryland residence in the morning and travels around Baltimore City. Trial Tr. 107-09, Dec. 13, 2013, ECF-305. Information revealed at trial establishes that the Government was able, through GPS and pinging, to locate Wilford to conduct physical surveillance; as well as to catalog his movements and locations for "historical" information to determine what may have occurred in the past on certain days at specific times and locations. Trial Tr. id. at 31-37, 45-46, 54-58, 62-66, 122-24.

The jury convicted Wilford of "Count One" of the indictment. The conviction carried a mandatory minimum of 10 years FN 9 and subjected Wilford to \$5 Million Dollar Forfeiture pursuant to 21 U.S.C. § 853. As a result of the conviction the district court sentenced him to 340 month (about 28½ years) imprisonment with a \$3.8 Million Dollar money judgment. ECF- 369; ECF-370.

FN8. Also see, Trial Tr. 12/17/13, ECF-309 p. 82.

FN9. Wilford was never provided an opportunity to plead to the Forfeiture charge either.

On appeal to the Fourth Circuit, without Wilford's knowledge, his hired counsel abandoned him and abruptly filed to withdraw as counsel citing reasons as health and retirement. See 14-4643 DOC 103, Nov. 17, 2016. FN10 The Fourth Circuit did not provide Wilford with oral argument in the case and in a per curiam unpublished opinion affirmed the judgment and rulings of the district court. Pet. App. The panel of the Fourth Circuit made several rulings including that: the district court properly denied Wilford's motion to suppress evidence obtained by pinging of his cell-phone pursuant to Maryland's pen/trap statute, and motion for reconsideration, Pet. App. 5a ; the good-faith exception to the exclusionary rule applies to warrantless GPS evidence obtained prior to the decision in *United States V. Jones*, 132 S.Ct. 945 (2012), *id.* at 5a ; that Wilford lacked standing to challenge the government's agents use of a cell-site simulator A.K.A. StingRay device, *id.* at 5a ; Wilford failed to establish either prejudice or the impairment of a substantive right for the government's failure to arraign him, *id.* at 3a ; that Wilford waived any argument pursuant to the Speedy Trial Act, 18 U.S.C. §3161, because he did not raise the issue prior to trial, *id.* at 4a . Wilford filed for rehearing en banc on June 04 , 2017 with subsequent motions to amend. On June 9, 2017, the Fourth Circuit denied the rehearing. Pet. App. 13a.

REASONS FOR GRANTING THE WRIT

- I. THIS CASE PRESENTS AN IMPORTANT QUESTION ON THE SCOPE OF FOURTH AMENDMENT RIGHTS CONCERNING REAL-TIME CELL PHONE LOCATION DATA IN THE DIGITAL ERA. THE COURT HAS GRANTED CERTIORARI IN *CARPENTER V. UNITED STATES*, NO. 16-402 TO ADDRESS A COMPARABLE SORT OF PERVASIVE OBTAINING OF HISTORICAL LOCATION DATA. IF THIS COURT DOES NOT GRANT THE CERTIORARI IN THIS CASE, OR REVERSAL FOR ANY OTHER REASON, MR WILFORD ASKS THE COURT TO HOLD HIS CASE PENDING *CARPENTER*.

FN10. Hired counsel did not attempt to provide substitute counsel and Wilford proceeded pro se.

This case presents the particular vexing problem of Government warrantless acquisition of large amounts of real-time cellular phone location information which reveals a wealth of a person's locations and movements continuously for many months.

A. Lower Courts Are in Conflict Over Whether Probable Cause And A Warrant are Required Either Under the Statutory Scheme or Based on the Fourth Amendment for When Law Enforcement Seek to Obtain Real-Time Cell-Phone Location Information.

A question at the heart of this case is whether law enforcement must secure a warrant with a probable cause showing before obtaining real-time cell phone location data in order to track the location and movement of a cell phone and its possessor over time. Lower courts have expressed Fourth Amendment concerns as "there is no way to know before receipt of location data whether that phone is physically located in a constitutionally protected space." SEE In The Matter of an Application of The United States Of America For An Order Authorizing Disclosure of Location Information of A Specified Wireless Telephone, 849 F.Supp. 2d 526 (D.Md. 2011). This Court has said that "more than 90% of American adults...own a cell phone." *Riley V. California*, 134 S.Ct. 2473, 2490 (2014). It has been reported that most people carry their cell phone with them practically everywhere they go and are within five feet of it. *id.* Cell phone tracking can easily invade the right to privacy in one's home or other private areas. See *Tracey V. State*, 152 So. 504, 524, (Fla. 2014).

This case presents essential questions of public interest concerning ubiquitous electronic surveillance technology and raises serious legal issues of a far greater magnitude than that which warranted this Court's attention in *Kyllo V. United States*, 533 U.S. 27 (2001) - which the Court considered eventhough there were no circuit split at the time on the issue. *id.* at 46 N-4 (Stevens, J., Dissent). On the present issue the federal courts of appeals have split and a question of federal law exist that should be settled only by this Court. There also exist a question of law where

federal courts of appeals have entered rulings which conflict with State high courts of last resort.

When addressing the question of whether a person possess a reasonable expectation of privacy in his cell-phone locational information - just as in the instant case - numerous lower court judges are failing to conduct the proper Fourth Amendment analysis on unsettled law. See *City of Ontario, California V. Quon*, 560 U.S. 746 (2010) cautioning "the judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *id.* at 130 S.Ct. 2619, 2629. Pet. App. 49a.

The continuous pinging of a person's cell-phone for the government's acquisition of its real-time location data is conducted surreptitiously without any voluntary act by the phone's possessor. Rather it occurs without the owners knowledge and outside of the regular course of the service provider's normal business through a procedure not available to the general public. See *United States V. Caraballo*, 963 F. supp. 2d 341, 360 (D. Vt. 2013); also see *In the Matter...*, 849 f. supp. 2d at 532-35 (providing comprehensive finding of fact regarding the process of cell-phone pinging); *In Re United States*, 747 F. supp. 2d 827, 831-35 (S.D. Tex. 2010) (Explaining that " There are 2 distinct technological approaches for fixing the location of a cell phone: handset-based (GPS) and network-based (cell-sites)").

In *Smith V. Maryland*, the Court held that short-term use of a Pen-Register to capture the numbers dialed is not a Fourth Amendment search. 442 U.S. 735, 742-44 (1979). The Court based its ruling on the fact that when a person dials a phone number, that caller "voluntarily conveys numerical information to the telephone company." *id.* at 44. Additionally, the Court evaluated the level of invasiveness of the surveillance to determine whether the caller had a reasonable expectation of privacy and noted the "pen-register's limited capabilities." *id.* at 742.

In *Katz V. United States*, 389 U.S. 347 (1967), the Court held that "the Fourth Amendment protects people, not places,"

and concluded that attachment of an eavesdropping device to a public telephone booth violated the Fourth Amendment. *id.* at 351, 361 (Harlan, J., concurring). The Court stated that warrantless searches "are per se unreasonable under the Fourth Amendment, subject to a few specifically established and well delineated exceptions." *id.* at 375. Katz expanded what constitutes an unreasonable search and seizure to include intrusion by technology, and set the platform for the "reasonable expectation of privacy" test which became a staple in Fourth Amendment jurisprudence. The Katz Court found there was a search even without a trespass. *Id.*

In thousands of cases, as in the instant case, law enforcement have been circumventing the concerns of the Fourth Amendment through modifying standard pen/trap requests and inserting a statement of "probable cause" for an articulation in the resulting orders of merely probable cause that "information likely to be obtained ... is relevant to an ongoing criminal investigation," in order to obtain sensitive real-time location information. *Pet. App. 110a.* One of the most troubling facts surrounding this practice is that it converts a pen/trap into some sort of "general warrant" or "exploratory rummaging" as prohibited by the Fourth Amendment. See *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). A federal pen/trap authorization does not require probable cause. 18 U.S.C. § 3123(a)(1). The Government's limited showing does not meet the particularity requirement for issuance of a search warrant under the Warrant Clause. See *Illinois v. Gates*, 452 U.S. 213, 238 (1983) ("The task of the issuing magistrate is simply to make a practical, common-sense decision whether... there is a fair probability that contraband or evidence will be found in a particular place."). The Fourth Amendment also requires a particular description of the things to be seized. *Andersen v. Maryland*, 427 U.S. 463, 480 (1976).

In many cases, law enforcement had been taking a more direct approach and were secretly using a cell-site simulator a.k.a. StingRay device, which mimics the cell phone service provider's cell tower and forces cell phones in the area to

transmit pings the target phone is precisely located. See *United States V. Lambis*, 197 F. supp. 2d 606 (S.D. N.Y. 2016); *State V. Andrews*, 134 A.3d 324, No. 1496 (Md. Ct. Spec. App. 2016) explaining that the Maryland Pen/Trap authorization was not equivalent to a Warrant based on probable cause, *id.*, slip op. at 59-63, and that "Federal law specifies that the federal equivalent to the Maryland pen-register statute does not authorize location information," it allows the government to use a "mobile tracking device" by "warrant or other order" pursuant to 18 U.S.C. §3117 and Rule-41. *id.* at 55.

In many instances, as in the instant case, law enforcement acts with a lack of candor by failing to disclose in the case, the specific device and technology used to obtain sensitive real-time location information. Pet. App.-28^a. This sort of lack of disclosure obstructs a defendant's ability to succeed on a motion to suppress and prevents the court from a proper Fourth Amendment assessment of the functionality of the technology and the intrusiveness of the search. *Maryland V. King*, 133 S.Ct. 1958, 1969-70 (2013); *Rakas V. Illinois*, 439 U.S. 128, 130 N-1(1978)(The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated).

Circuits are split on the issue of cell-site location information obtained by police and circuit law has not been uniform and does not account for the realities of rapid evolving digital technology and its impact on Fourth Amendment privacy concerns. The Third Circuit has stated that when a cell phone user makes a call "the only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed and there is no indication to the user that making that call will also locate the caller." *In re Application of U.S. for an Order...*, 620 F.3d 304, 317-18 (3rd Cir. 2010); See Also *Jones V. United States*, 15-CF-322, CF1-18140, Slip Op. at 20-21 (D.C. Cir. 2017) (holding that a person has an actual, legitimate, and reasonable expectation of privacy in his/her location information); *United States V. Caraballo*, 831 F.3d 95, 106 (2nd Cir. 2016) (allowed short-term real-time CSLI under exigent exception); *United States V. Graham*, 796 F.3d 332, 338 (4th Cir. 2015)(same)

(overruled by en banc, 824 F.3d 421); *United States V. Davis*, 754 F.3d 1205, 1217 (11th Cir. 2014)(same) (overruled by en banc, 785 F.3d 498); But see *United States V. Skinner*, 690 F. 3d 772 (6th Cir. 2012) holding that no warrant is required for short-term real-time tracking in public. id at 774-75.

The Fourth, Fifth, Sixth, and Eleventh Circuits have held "historical" CSLI to be exempt from Fourth Amendment protection under the third-party doctrine. See *United States V. Graham*, 824 F.3d 421, 424-25 (4th Cir. 2016)(en banc)(no reasonable expectation of privacy); *In re Application of U.S. for historical Cell-Site Data*, 724 F.3d 600, 613 (5th Cir. 2013)(same); *United States V. Carpenter*, 819 F.3d 880, 888 (6th Cir.-2016)(same); *United States V. Davis*, 785 F.3d 498, 511 (11th Cir. 2016)(en banc)(same).

The *Davis* court explicitly excepted from its reasonings and conclusions GPS tracking data, real-time location data, and prospective cell-tower location information. id. at 505, 509 N-10. (distinguishing precedent concerning real-time tracking). And in *Graham*, the Fourth Circuit expressed that a different result would have generated had the case involved real-time tracking over a pro-longed time. id. 824 F.3d at 435.

In the Fifth Circuit, the government agreed to exclude any data related to the phone's location while it was "in an idle state." *In Re United States*, 724 F.3d at 602, N-1.

In *United States V. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), aff'd on other grounds sub nom. *United States V. Jones*, 132 S.Ct. 945 (2012), the D.C. Circuit explained that "prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensamble. These types of information can each reveal more about a person than does any individual trip viewed in isolation." id. at 562. In *Carpenter*, the Sixth Circuit held that the 127 days of historical cell-site data was not a Fourth Amendment search. Id. at 890 (Certiorari granted by *Carpenter V. U.S.*, 2017 U.S. LEXIS 3686 6/5/17).

In a case where the Government obtains continuous CSLI and/or GPS pinging of an individual's cell-phone over a prolonged time, it would amount to the type of twenty-four hour surveillance which was left open in *United States V. Knotts*, 460 U.S. 276, 283-84 (1983) ("if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable."). The *Knotts* case involved monitoring of a beeper secreted in a container by law enforcement over a discrete journey on open public thoroughfares. *id.* at 278-79. The Court held that a person has no reasonable expectation of privacy in his movements in open public from one place to another. *id.* at 281. But the monitoring of a person's locations over an extended period time by collecting and analyzing cell-phone data can frequently expose extraordinarily sensitive details of a person's life including potentially "a wealth of detail about ... familial, political, professional, religious, and sexual associations." *United States V. Jones*, 132 S.Ct. 945, 955 (2012) (Sotomayor, J., concurring).

Federal law prohibits the government from obtaining cell phone location information pursuant to the Pen/Trap statute because Congress explicitly forbids service providers from such disclosure when the government proceeds "solely pursuant to the authority for pen-register and trap and trace devices," except to the extent that the location be determined from the telephone number. 47 U.S.C. § 1002(a)(2)(B). The Electronic Communications Privacy Act (ECPA) limits pen/trap devices to intercept and record data pertaining to the start and end of a call, 18 U.S.C. § 3121 et seq., thus, for information relating to numbers dialed, call duration, and the like, upon a less than probable cause showing. *id.* at 3122(b)(2). The critical limitation to the government's authority under the pen/trap statute is that - it does not authorize acquisition of real-time location data. Legislative history of § 1002 of CALEA shows that Congress did not intend to allow for disclosure of CSLI through the pen/trap

statute. See *In The Re application of the United States*, 416 F.supp. 2d 390, 394 (D.Md. 2005). The ECPA authorizes the use of "tracking devices" and defines the term as "an electronical or mechanical device which permits the tracking of the movements of a person or object. See 18 U.S.C. § 3117(b). And Federal Rules of criminal Procedures governs the procedures on tracking device warrants. Fed.R.Cri. P. - 41(a)(2)(E).

Federal courts have recognized that when the government seeks to acquire and use real-time cell site information to identify to location and movement of a phone and its possessor in real-time, the government must submit a sworn affidavit demonstrating probable cause. See *In The Matter...*, 849 F. supp. 2d at 584.

Lower courts have stated that cell phones "blur the historical distinction between public and private areas because they emit signals from both places. *State V. Earls*, 70 A.3d 630, 642 (N.J. 2013). When this occurs "there is a clear ... Fourth Amendment violation." *Tracey V. State*, 152 So. 3d 504, 524 (Fla. 2014) citing *United States V. Karo*, 468 U.S. 705, 714 (1984). Courts have viewed the repeated pinging of a person's cell phone to be a "search." Pet. App.-49a .

The altimate measure of the constitutionality of a governmental search is "reasonableness" and this Court has stated that "reasonableness generally requires the obtaining of a judicial warrant." *Riley*, at 2482. Warrants cannot be issued without a showing of probable cause as required under the Warrant Clause of the Fourth Amendment. But a warrant is not required to establish the reasonableness of all government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either. See *Vernonia School Dist. 47 V. Acton*, 515 U.S. 646, 652-53 (1995).

A significant majority of courts has reject the government's Statutory approach to obtaining real-time cell phone location information upon a less than probable cause showing. See United States V. Espudo, 954 F.supp. 2d 1029, 1038-39 (S.D. Cal. 2013) (collecting cases). Federal courts have held that the use of a pen-register to record telephone numbers dialed from a phone does not constitute a search under the Fourth Amendment. See United States V. Forrester, 512 F.3d 500, 509 (9th Cir. 2008) (citing Smith, 442 U.S. at 745-46 (holding that installation and use of a pen-register was not a Fourth Amendment search); Also see Brown V. Waddell, 50 F.3d 285, 292 (4th Cir. 1995) (citing Smith wrote "there are no legitimate expectation of privacy in the telephone numbers one calls, so that no warrant is required to install and use a pen/trap whose only capability is to intercept numbers.").

Lower court opinions further highlight the importance and need for this Court to resolve the conflict in this area of Fourth Amendment jurisprudence. See Tracey V. State, No. SC11-2254, Slip Op. at 13-14 (Fla. 2014) explaining that "The Supreme Court has yet to rule on whether probable cause and a warrant are require, either under the statutory scheme or based on the Fourth Amendment," for real-time CSLI; United States V. Graham, 824 F.3d at 425 stating "the Supreme Court may in the future limit, or even eliminate, the third-party doctrine... But without change in controlling law, we cannot conclude that the Government violated the Fourth Amendment"); and see, United States V. Carabollo, 831 F.3d at 106 stating "the fact that the question of the degree of privacy that adheres to these sorts of information, to date, divides those circuits that have spoken on the issue reinforces the conclusion that the intrusion here was not to an established, core privacy value.".). Federal appellate courts and state courts of last resort are divided and both are calling for This Court to act.

The proliferation of legislature addressing the issue of CSLI tracking and pinging reflects a sense of concern regarding cell-phone technology and privacy concerns which

begun a change in the legal landscape in recent years. For example, several states have adopted a warrant requirement to obtain real-time cell phone locational data. See VA. Code Ann. §19.2 - 70.3(C); Ill. Comp. Stat. 168/10; Md. Code Ann. Crim. Proc. : 1-203.1(b); Ind. Code 35-33-5-12. Some states have made a warrant requirement for "historical" CSLI. See Commonwealth V. Augustine, 4 N.E. 3d 846 (Mass. 2014); Colo. Rev. Stat. § 16-3-303.5(2); ME. Rev. Stat. tit. 16 § 648; Mont. Code Ann. § 46-5-110(1)(a); Utah Code Ann. § 77-23c-102(1)(a). Requiring uniform warrant protection under the Fourth Amendment for the Millions of americans having the more that 377 million wireless subscriber accounts in the United States **FN11** is of importance.

It is critically important for this Court to clarify the scope of analog - age precedents to newer digital-age surveillance technologies and techniques - and the standards law enforcement must first establish in order to acquire real-time cell phone location data over time. Without such guidance from this Court, a cell phone user "cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." See New York V. Belton, 453 U.S. 454, 459-60 (1981). With the increasing quantity and quality of sensitive location information being obtained by the government through electronic means on minimal standards such as, in Wilford's case, that "information likely to be obtained...is relevant to an ongoing criminal investigation," there exist a public need for this Court to now act. Pet. App. 47a. Also see State V. Andrews, No.-1496, Slip Op. at 61-63 explaining that the above identicle

FN11. CTIA- The Wireless Association, Annual Wireless Industry Survey (2016), <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey>.

quoted language as articulated in the pen/trap order "was not equivalent to a warrant based on probable cause."

B. Recent Decisions By This Court Have Expressly Highlighted The Necessity For A Constitutional Evaluation Of Cell Phone Location Privacy Concerns In the New Digital Age.

In Riley this Court Stated that " Modern cell phone... are now such pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy," 134 S.Ct at 2484, and further cautioned - unexamined reliance on "pre-digital analogues" risks causing "a significant diminution of privacy." id., at 2493. The Court expressed that "any extension of... reasoning from decisions concerning analog searches to digital data has to rest on its own bottom." Riley, id. at 2489.

In City of Ontario, California, V. Quon, the Court stated "cell phone and text message communication are so pervasive that some persons may consider them to be essential means of necessary instruments for self-expression, even self identification." 560 U.S. 746, 760 (2010).

In United States V. Jones, this Court addressed the long-term pervasive real-time monitoring made possible by the attachment and use, by the Government, of cellular GPS technology warrantlessly and surreptitiously upon a private vehicle. 132 S.Ct. 945 (2012). In deciding the case the Court made certain to acknowledge that "situations involving merely the transmission of electronic signals without trespass would remain subject to Katz analysis," and further stated "It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but this case does not require us to answer that question." id. at 953-54. The Jones case was resolved on the basis of trespass. Justice Sotomayor recognized that electronic monitoring of a citizen's location can generate a comprehensive record of her public movements by monitoring trips to places that she may wish to keep private, such as "the psychiatrist, the plastic surgeon,

the abortion clinic , the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synogogue, or church, the gay bar and on and on." id. at 955-56 (Sotomayor, J., concurring). Justice Alito wrote in a concurring opinion which was joined by four other justices, "I would analyze the question presented in this case by asking whether respondent's reasonable expectation of privacy were violated by the long-term monitoring of the vehicles he drove." id. at 958 (Alito, J., concurring).

In *Kyllo V. United States*, the Court set precedent as a reminder to the government that law enforcement surveillance technology should not erode guaranteed Fourth Amendment privacy interest. 533 U.S. 27, 34(2001). The court held that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area,... constituted a search -- at least where (as here) the technology in question is not in general public use." id.

The earlier case of *United States V. Karo*, 468 U.S. 705 (1984) made clear that monitoring of an electronic device inside of a private residence, a location not open to visual surveillance, violates the Fourth Amendment. id. at 714. The *Karo* Court rejected the government's contention that it should be able to engage in warrantless monitoring of an electronic surveillance device inside of a private residence "if there is the requisite justification in the fact for believing that a crime is being or will be committed and **that monitoring the beeper wherever it goes is likely to produce evidence of criminal activity.**" id. at 717 (emphasis added).

Mr. Wilford's case illustrates that the Government's acquisition of "twenty-four hour" continuous pinging data is the surveillance and dragnet- type law enforcement practice left open in *Knotts* and is a national reality necessitating the present need for this Court's intervention to address

the vexing problem in this area of Fourth Amendment jurisprudence. Jones, id. at 954.

A search for information contained in a cell phone is subject to the warrant requirement regardless of its location, Riley, at 2489-91, highlighting Fourth Amendment privacy implications to cell phone location data by stating it "can reconstruct someone specific movements down to the minute, not only around town but also within a particular building." id at 2490 (citing Jones, 132 S.Ct. at 955 (Sotomayor, J., concurring)).

Eighty percent of people polled has considered details of their physical location over-time to be "sensitive," thus, evincing great concern over such information. FN12 The continuous pinging of a person's cell phone allows the government to monitor and track our cell-phone, and thus ourselves, with minimum expenditure of funds and manpower - is just the type of gradual and silent encroachment into the very details of our lives that we as society must be vigilant to prevent. See Tracey V. State, No. SC11-2254 Slip Op. at 37 (Fla. 2014).

C. The Fourth Circuit Erred By Failing To Recognize The Government Agent's Non-Compliance With Federal Law.

Federal Rules Of Criminal Procedures, including Rule-41, govern criminal proceedings in the United States courts and, "when a rule so states," proceedings before state and local judicial officers. Fed.R.Crim.P.-1(a). Rule-41(b) is such a rule authorizing state judges to issue search warrants if a federal magistrate judge is not reasonably available. The purpose of Rule 41 is to carry out the mandate of the Fourth Amendment. See 40 Stat. 228 (1917), Title XI, §1. It binds federal courts and federal law enforcement officers. Federal

FN12. Pew Research Ctr., Public Perception and Security in Post-Snowden era, 32, 34 (Nov. 12, 2014), http://www.pewinternet.org/files/2014/11/PI_PublicPerception-sofprivacy_111214.pdf.

agents must obey these rules - the federal policy is defeated if agents can flout them and use the fruits of their unlawful acts either in federal or state proceedings. See *Rea V. United States*, 350 U.S. 214, 217-18 (1956); also see David B. Levendusky, Annotation, Noncompliance with Requirements of Rule 41 Federal Rules Of Criminal Procedures as Ground for Exclusion, in Federal Prosecution of Evidence Procured Under State Search Warrant, 25 A.L.R. Fed. 247 (2015)

When federal agents initiates proceedings in a state court, as in Mr. Wilford's case, seeking authorization to obtain continuous real-time cell phone location information on a long-term basis pursuant to the Pen/Trap statute **FN13**- federal law applies. Decisions of this Court explains that whenever a joint search is initiated by or undertaken at the instigation or direction of agents of the federal government, in order for the evidence to be admissible in a federal court it must be in compliance with federal law and the Fourth Amendment. *Byars V. United States*, 237 U.S. 28 (1927). The *Byars* case involved the execution of a state search warrant by local and federal officers in which evidence was secured by the federal agents. *id.* at 32-33. The decisive factor in determining the applicability of the *Byars* case is the actuality of a share by federal officials in the total enterprise of securing and selecting evidence by other than sanctioned means. *Lustig V. United States*, 338 U.S. 74, 79 (1949). In a case where all of the relevant state court orders were applied for and executed by federal agents, the proceedings should be governed purely by federal and not state law. See *Navarro V. United States*, 400 F.2d 315 (5th Cir. 1968); *U.S. V. Krueger*, 809 F.3d 1109, 1114-15 (10th Cir. 2015).

FN13 . Federal Pen/Trap statute does not authorize for a federal agent to apply for such order pursuant to 18 U.S.C. § 3122 (a)(b)(1).

The panel of the Fourth Circuit erred by failing to recognize the numerous violations of Rule 41 by the government concerning its acquisition of cell phone pinging data in real-time. For example, a federal law enforcement must seek a federal magistrate before going to a state judge (Rule 41(b)(1)); Tracking Warrants are issued pursuant to Rule 41(e)(A)-(C) to federal officials and require a return to the designated judge, use for up to 45 days; and service within 10 days after to use has ended (Rule-41(f)(2)(C)). This Court should make clear that that Rule-41 governs when government agents seeks to obtain CSLI and GPS pinging data of an individual's cell phone.^{FN14} The Fourth Circuit's ruling on this issue is erroneous. Pet. App. 5a. It would not be unreasonable to conclude that the search might not have occurred or would not have been so abrasive if Rule-41 had been followed or that there has been an intentional disregard for the rule. The facts which actually occurred controls over any "proposition that the existence of probable cause renders noncompliance with the warrant procedure an irrelevance." *Coolidge*, 403 U.S. at 450-51. Because suppression furthers the purpose of the exclusionary rule by deterring law enforcement from seeking and obtaining court authorizations that clearly violates Rule-41, the Fourth Circuit erred. See *Herring V. United States*, 555 U.S. 135, 144 (2009) (explaining that the exclusionary rule serves to deter not only deliberate reckless police conduct but also gross negligent conduct). This court should reject the ruling of the Fourth Circuit in this case.

FN14 . The Government conceded to noncompliance with various provisions of Rule 41. See Govt. Res. ECF-165 p. 38, N. 9 .

II. **THIS COURT SHOULD GRANT WRIT TO DECIDE WHETHER
MR. WILFORD WAS PROPERLY DENIED A FRANKS HEARING
AND THE SUPPRESSION OF EVIDENCE BASED ON THE AGENT'S
AFFIRMATIVE MATERIAL FALSEHOODS AND OMISSIONS.**

It is well-settled that a strong "presumption of validity" attaches to an affidavit in support of a search warrant. See *Franks v. Delaware*, 438 U.S. 154, 171 (1978). In limited circumstances, a defendant challenging the veracity of statements in a supporting affidavit is entitled to an evidentiary hearing to determine whether the warrant was issued in reliance on a deliberately or recklessly false affidavit. *Id.* at 156. It is not enough to merely identify false statements: if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. *Id.* at 171-72. This is also true in the context of omissions of material facts. See *United States v. Tate*, 524 F.3d 449, 456 (4th Cir 2008).

When the Fourth Amendment demands a factual showing sufficient to comprise "probable cause," the obvious assumption is that there will be a truthful showing - But surely it is to be "truthful in the sense that the information put forth is believed or appropriately accepted by the affiant as true. *Franks*, *id.* at 164-65. Whether to prosecute, issue a warrant, indict and convict are serious matters that are decided in large measure based on what a police relates. So when an officer does not tell the whole truth, public confidence in the fair administration of criminal justice inevitably is eroded. See *United States v. Fisher*, 711 F.3d 460, 770 (4th Cir. 2013).

It is beyond dispute, the November 18, 2010 state pen/trap application authored by DEA agent Mara Hewitt, is riddled with false and misleading material information and omissions, which has been affirmed by the agents. Pet. App. 52a. It is a serious matter when a federal agent asserts to a judge that not one, but two, confidential source has provided material information to federal agents about an individual under investigation for serious drug offenses, only to later admit that the information was falsely provided in the application to the court, and that nonconsensual warrantless GPS installation and use to his vehicles was purposely omitted. *Id.*

"The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. Herring, at 144. Mr. Wilford's case illustrates how DEA Special Agent Hewitt's several material falsities listed in her sworn November 18, 2010 court order request for authorization to obtain real-time cell phone locational data over Wilford's cell phone; was also presented verbatim in her October 27, 2010 court order request for a cell phone that she falsely attributed to Wilford; and was continued over in a subsequent sworn application for continued acquisition of real-time CSLI and pinging data over Wilford's cell phone on January 19, 2011. Pet. App. 61a. Suppression is appropriate when an affiant knows or is reckless in not knowing that the affidavit contains false information which is material to a probable cause showing. Leon, 468 U.S., at 897. Franks, 438 U.S., at 156, 165-66.

In United States V. Fisher, the Fourth Circuit dealt with a strikingly similar circumstance, but involved a guilty plea. There, a DEA Task Force Officer falsely testified in his sworn affidavit that a "reliable confidential informant" provided him with information about Fisher distributing narcotics, having a handgun, address, vehicles description, and identity. 711 F.3d, at 466. As a direct result of this false information, a court issued a warrant for the search of Fisher's residence and vehicle where physical evidence were found, causing Fisher's arrest and formed the basis for his subsequent guilty plea. *Id.* Over a year after Fisher's guilty plea, the DEA officer (Lunsford) was charged with fraud and theft offenses related to his duties as a DEA officer, including falsely attributing information to a confidential informant whom he was splitting reward money. *Id.* at 463. DEA officer Lunsford subsequently admitted that his search warrant affidavit contained known false information, to wit, the confidential informant he identified in the affidavit in fact "had no connection to the case." The CI listed on the affidavit did not provide the material information sworn to by Lunsford. *Id.*, at 468. The Fourth Circuit held that the officer's affirmative misrepresentations tinged the entire proceedings and violated Fisher's due-process rights. *Id.*, at 462-63. The court further noted, just as the district court did in Wilford's case, that without the material false information a court could reasonably conclude that the probable cause was lacking. *Id.*, 468; Pet. App. 52a. The evidence obtained through the use of the Nov. 18, 2010 application by Hewitt was used at trial against Wilford.

In *United States V. Reinholz*, 245 F.3d 765, 774 (8th Cir. 2001), the Eighth Circuit held that a preliminary showing were made where the officer misrepresented the nature of source by implying the informant had personal knowledge of drug distribution. Mr. Wilford's case also shows that the DEA agent omitted the extensive use of warrantless GPS tracking throughout all of the requests for court orders and warrant. Pet. App. 51a. **FN15** In *United States V. Gonzalez, Inc.*, 412 F.3d 1102, 1110-11 (9th Cir. 2005), the Ninth Circuit held that a preliminary showing were made that supported a finding of recklessness concerning a material omission in the affidavit, amended by 437 F.3d 854 (9th Cir 2006); Also see *Tate*, supra (preliminary showing made when officer omitted from affidavit facts that suggested unconstitutional trespass). This Court has elaborated that "evidence should be suppressed if it can be said that law enforcement officer had knowledge, or may be properly charged with knowledge that the search was unconstitutional under the Fourth Amendment. See *Illinois V. Krull*, 480 U.S. 340, 348-349. (1987).

This Court should reject the ruling by the Fourth Circuit and Reverse its Judgment. As this Court has so eloquently stated "Constitutional provisions for the security of person and property are to be liberally construed, and it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. *Byars*, 273 U.S., at 33. The Fourth Circuit erred in failing to consider the important fact that when a federal agent admits to material falsehoods contained in a sworn application to the court, the authorization may be voided and the fruits of any search suppressed.

FN15 . DEA Special Agent Mark Lester testified that agents purposefully omitted the use of warrantless GPS to "not hinder future use of the devices" ECF-204 p. 91.

III. THIS COURT SHOULD ALSO GRANT WRIT TO ANSWER THE IMPORTANT QUESTION OF WHETHER THE GOOD FAITH EXCEPTION APPLY TO NON-CONSENSUAL WARRANTLESS GPS TRACKING DEVICE ATTACHMENT AND USE ON A PRIVATE VEHICLE BY THE GOVERNMENT FOR MANY MONTHS.

A. The Fourth Circuit Erred In Applying Knotts For Good-Faith Under Davis to the Pre-Jones Warrantless GPS Tracking in this Case.

1. The Good Faith Exception to the Exclusionary Rule

The question at the core of this issue is where without consent of the owner, may agents of the Government usurp an individual's private vehicle to monitor the movement and location of that vehicle over a prolonged time including while the vehicle is parked inside of a private garage.

The "good faith" exception was first recognized in United States V. Leon, 468 U.S. 897 (1984) (holding that "evidence obtained by the police in objectively reasonable reliance on a subsequently invalidated search warrant" is not subject to the exclusionary rule. *id.* at 922. This holding was based on the premise that "the deterrence rationale for exclusion loses much of its force" "when the police act with an objectively reasonable good-faith belief that their conduct is lawful." Leon, at 909, 919. The Court has since extended the good-faith exception to apply in various other situations involving nonculpable or merely negligent law enforcement conduct. See Davis V. United States, 564 U.S. 229, 239-40, 132 S.Ct. 2419 (2011) (holding that the good-faith exception applied to "when the police conduct a search in objectively reasonable reliance on binding judicial precedent").

It is beyond dispute that a vehicle is an "effect" as that term is used in the Fourth Amendment. This was clarified, United States V. Jones, 132 S.Ct. 945, 949(2012), citing United States V. Chadwick, 433 U.S. 1, 12(1977) and Entick V. Carrington, 95 Eng. Rep. 807 (C.P. 1765). When the agent of the government attaches a GPS device to that property, it encroaches against exclusionary rights to exclude from it all the world - in a fundamental sense it has converted the property to its own use.

In United States V. Jacobsen, the Court explained that a "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interest in that property," 466 U.S. 109, 113 (1984), and that the assertion of "dominion and control" over the property is a "seizure" in the most basic sense of the term. *id.* at 120.

In Jones, Justice Scalia writing for the Court wrote "the text of the Fourth Amendment reflect its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous." *id.* at 949. The Court held that the Government's "attachment" of the GPS device to the vehicle, and its "use" of that device to monitor the vehicle's movement, constituted a search under the Fourth Amendment. *Id.* The Court should apply the principles of Jones to the case of Mr. Wilford.

In United States V. Knotts, law enforcement, with consent of the then owner, placed a beeper inside a container prior to becoming in possession of the target subject to monitor its location while the defendant traveled on public thoroughfares, 460 U.S. 276, 279 (1983). The Court concluded that the defendant did not have a "reasonable," "justifiable," or "legitimate" expectation of privacy stating that "a person traveling on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *id.* at 282. The Court further explained that "Respondent does not challenge the warrantless installation" and "we have not before and do not now pass on the issue." *id.* at 279 N-*.

In Karo, the Court addressed the question left open in Knotts, whether the installation of a beeper in a container amounted to a search or seizure, 468 U.S. at 713. The Court held that the informant's consent was sufficient to validate the installation. *id.*, at 711. The Court further held that the monitoring of a beeper in a private residence, a location not open to visual surveillance violates the Fourth Amendment rights of those who have a justifiable interest in the property of the residence. *id.*, at 714-18.

In the context of a Fourth Amendment violation in a case involving a trespass against personal property - the law were well-established and clear. The same can be said for the electronic monitoring by the government of the GPS tracking devices inside of the private garges area.^{FN16} The government agents are bound by federal law and the constitution. At the time of their actions there were precedent mandating a warrant for their conduct, requirements established under the federal rules of criminal procedures, and cautionary instructions from the Department Of Justice advising caution for warrantless GPS tracking. Pet.App.61a-66a.

Between Novenber 2010 and May 2011, the time of the relevent GPS conduct in Wilford's case, the Circuits were split on whether law enforcement could attach and use GPS tracking devices to monitor a vehicles movement in public areas. See United States V. Garcia, 474 F.3d 994, 997-98 (7th Cir. 2007) (GPS installation and limited use is not a search and no search warrant was required); United States V. Marquez, 605 F.3d 604, 610 (8th Cir. 2010) (GPS installation and use requires only reasonable suspicion and no warrant needed); United States V. Pineda-Moreno, 591 F.3d 1212, 1215-17 (9th Cir. 2010) (GPS installation and use is not a search); But See United States V. Maynard, 615 F.544 (D.C. Cir. 2010), creating circuit split which set the stage for this Court's intervention in Jones (2012).

In Maynard, the D.C. Circuit explicitly distinguished the case from Knotts and held that warrants were required for GPS tracking over a prolonged time. Id., at 555-57. As a direct result of the Maynard decision, on August 6, 2010, the Department of Justice's (DOJ) Office Of Enforcement Opperation (OEO) disseminated an email/memo to government officials in which the prosecuting attorney in this case received thenforward a copy to the case agents and also called them both. The DOJ's OEO email/memo specifically

^{FN16} .. 2006 Amendments to Fed.R.Crim.P. 41, provided a warrant requirement for GPS tracking of vehicles while inside of a private garage.

warned that "prosecutors and agents outside of the 7th, 8th, and 9th circuits may wish to consider obtaining warrants as a precaution pending final disposition of Maynard." It went further and pointed out that districts in the Fourth Circuit should carefully give thought to the possibility that the tracked vehicles could travel inside of D.C.. Pet. App. 61a-62a.

Only this Court can determine whether the good-faith exception as articulated in Davis applies under this set of circumstances based on the principles in Knotts and render the Fourth Amendment irrelevant.

In the cases of Garcia, Marquez, and Pineda-Moreno the court expressly reserved the issue left open in Knotts, to wit, whether "wholesale" or "mass" electronic surveillance requires a warrant. Garcia, 474 F.3d at 996; Marquez, 605 F.3d at 610; Pineda-Moreno, 591 F.3d At 1216 N-2. Chief Judge Kozinski, joined by four other judges - authors vigorous dissent from denial of rehearing en banc in Pineda-Moreno stating that "The electronic tracking devices used by the police in this case have little in common with the primitive devices in Knotts," and noted the GPS satellites pinpointed the car's location on a continuous basis while "recording the car's movements without human intervention -- quietly, invisibly, with uncanny precision." *id.*, 617 F.3d at 1124.

At the time of the nonconsensual warrantless GPS attachment and use involved in Mr. Wilford's case, the Fourth Circuit had not opined on the issue. The Government's case agent Todd Edwards did, however, utilize a sixty day court authorization for the placement and use of a GPS device upon a car in United States V. Berry, 300 F. supp. 2d 366 (D.Md. 2004), where the court expressed that "the Supreme Court might conclude, however, that the new technology is so intrusive that the police must obtain a court order before using it," and suppressed the GPS usage which "occurred outside the permitted sixty day period." *id.*, at 368.

This Court has made clear that in addressing the question of law enforcement's good-faith to a warrantless search, the "pertinent analysis of deterrence and culpability is objective," and "the good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal in light of all of the circumstances." *United States V. Herring*, 555 U.S. at 145. When law enforcement conduct a search in objectively reasonable reliance on "binding appellate precedent," police culpability is wholly absent. *Davis*, at 2419.

Courts have declined to apply the good-faith exception when police have not been "frank with the magistrate in proceedings to obtain the warrant." *United States V. Reilly*, 76 F.3d 1271, 1273 (2nd Cir.), on reh'g, 91 F.3d 331 (2nd Cir. 1996). The good faith exception has also been denied in cases where the police omitted from an affidavit facts that suggested an "unconstitutional trespass." *United States V. Tate*, 524 F.3d 449, 457. (4th Cir. 2008). Subject to a few well-delineated exceptions, warrantless searches are per se unreasonable under the Fourth Amendment. *Katz*, 389 U.S. at 375. In *Riley*, this Court recognized the need for "consideration of case specific exception to the warrant requirement." *id.*, 134 S.Ct. at 2486.

2. Knotts Cannot Be Used as Binding Appellate Precedent Under Davis and Does Not Control the Outcome Here.

The controlling principles of *Knotts* explains that a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. 460 U.S. 276, 281. The Court explicitly distinguished between the limited information learned from the use of the beeper -- movements during a discrete journey -- and more comprehensive or sustained monitoring of the type involved here and limited its holding to the facts of the case. *id.*, at 283-85. The Court specifically reserved the question whether a warrant would be necessary in a case involving "twenty-four hour surveillance," of the sort now present. *id.* After the warrantless GPS tracking of the two vehicles owned by Mr. Wilford in this case, *Jones* clarified that the conduct was an unlawful search within the meaning of the Fourth Amendment. *id.* at 949. Whether the *Davis* good-faith exception applies depends on "binding appellate precedent" that pre-dates *Jones*. See *United States V. Hill*, 776 F.3d 243, 252-53 (4th Cir. 2014).

The Jones Court made clear that a person may make challenges to warrantless GPS attachment and use upon a vehicle which he owned and possessed at the time of the attachment, to which it stated that Jones "was on much different footing." id., at 952. Furthermore, Knotts did not concern tracking inside of a private area where an individual "may seek to preserve something as private." 460 U.S. at 281-82. The electronic beepers used in Knotts had far less capabilities than the GPS tracking devices used here. See Pineda-Moreno, 617 F.3d at 1124 (Kozinski, C.J., Dissent).

In applying the good-faith exception in Mr. Wilford's case, the Fourth Circuit erred. Pet.App. 5a. Circuit court judges have recognized a duty to study carefully the particular facts of the case to determine for themselves whether the denial of a motion to suppress is sustainable. See Price Jones V. United States, No. 15-CF-322, Slip Op. at 61, 66. (D.C. Cir. 2017) (Thompson, Assoc. J., dissenting); Herring, at 145. The knowledge of the case agents at the time of the warrantless GPS activities is a necessary factor in the Circuit Court's determination of "objective reasonableness in the good-faith calculus." Davis, 131 S.Ct. at 2427. It is also necessary to consider the pervasiveness of the GPS usage in connection with the intrusion into the private area - which is prohibited by the controlling principles of Jones, 132 S.Ct. at 949; Karo, 468 U.S. at 714-15; and Kyllo, 522 U.S. at 34. Federal law, since 2006, specifically required a warrant for GPS tracking of a vehicle while it is parked in a private garage. Fed.R.Crim.P.-41 (2006 Advisory Committee Notes to Rule 41(b) state, in part: "and the warrant is needed if the device is installed ... or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy"). Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its scope and manner of execution. Maryland V. King, 131 S.Ct. at 1970.

The protections of the Fourth Amendment is not limited to times when the electronic monitoring extends inside of the private area. Karo, at 715, 733, N-8 (explaining that when the agents monitoring the beeper at a later point and learned that ~~ther~~ can was no longer in the home, the invasion of the privacy of Karo's home continued). The critical inquiry is whether "the evidence...has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint. Wong-sun V. United States, 371 U.S. 471, 488 (1963). The Fourth Circuit erred in its ruling on the issue and not recognizing that the extensive nonconsensual warrantless GPS tracking to, at, and from Mr. Wilford's private garage attached to his home, were all connected as fruits of the poisonous tree. Id.; Pet. App. 4a-5a.

This Court should act in this case to protect precious Fourth Amendment rights and to clarify that Knotts cannot be used as binding appellate precedent, for pre-Jones GPS tracking, when the Government physically occupied private for the purpose of obtaining information - over many months - including while the vehicles were parked inside of a private garage. The law of trespass at the time was clear and Mr. Wilford, who owned and possessed the vehicles at the time is on much different footing. Jones, Id. at 952. The GPS tracking data reveals "a precise, comprehensive record" of Wilford's public and private movements that "reflects a wealth of detail about his familial, political, professional, religious, and sexual association." Id. at 955. Mr. Wilford deserves for this Court to grant his petition and vacate the judgment of the Fourth Circuit affirming the conviction; and the public deserves to have confidence in the protection against stealthy government encroachment upon privacy rights.

IV. THIS COURT SHOULD ALSO GRANT CERTIORARI IN ORDER
TO RESOLVE CONFLICT OVER WHETHER PROCEDURAL DUE
PROCESS IS VIOLATED WHERE A DEFENDANT IS CONVICTED AT
JURY TRIAL WITHOUT ARRAIGNMENT, BAIL HEARING OR PLEA.

This case presents a important question of whether procedural due-process is violated, thereby, rendering the proceedings and resulting conviction and judgment invalid - when the district court proceeds with a jury trial against an accused over two years after indictment and arrest for an infamous crime without the entry of a duly interposed plea of not guilty thereon.

It is well-established in the United States and in England, that a person indicted and arrested for an infamous crime must be brought to answer in the proper court for an arraignment upon the indictment expeditiously. At the arraignment the court is to read the indictment to the accused distinctly for his full understanding of the charges; after which the court is to demand of the accused his plea of guilty or not guilty to the indictment. See 4 B1. Comm.-318; also, Rule 10(a) of Fed.R.Crim.P.; In Re Bonner, 151 U.S. 242, 257-58 (1894). When the accused is brought before the appropriate court for an arraignment, objections to the validity or form of the indictment may be made for the formulation of issue of law, or the joining of issue of fact may be formulated upon a plea of not guilty. When issue is thus joined, the court must proceed to jury trial, except in a case where the accused has confessed the charges. Bonner, id. In Mr. Wilford's case, this process was never had.FN17

In all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment, therefore, no person shall be deprived of his life, liberty or property without due process of law. See U.S. Constitution Amendment V. Due process of law requires that the accused plead, or in the proper case, that a plea of not-guilty be filed for him before his trial can rightfull proceed. See Cox V. Turely, 506 F.2d 1347, 1352 (6th Cir. 1974) (quoting Crain V. U.S., 162 U.S. 625); Shelp V. United States, 81 F.2d 694 (9th Cir) (same). (reversal of conviction where the record failed to show defendant's plea to the indictment.); See also, Mallory V. United States, 354 U.S. 449 (1957) (Reversal on an arraignment-less conviction).

FN17 Fed.R.Crim.P. 11, provides for a defendant to confess to the charges by the entry of his plea of guilty.

In *Hamilton V. Alabama*, the Court explained that under federal law the arraignment normally allows the accused to "plead, as a condition precedent to trial." 368 U.S. 52 (1961). The *Hamilton* Court further explained that arraignment is a "critical stage" of the criminal proceedings which affects the entire trial because certain defenses if not then and there pleaded were irretrievably lost. *Id.*, at 53-54, N-4. Of importance is the essential requirement to plead to the charges. *Id.* Mr. Wilford's case presents the circumstance where the court never even asked him for his plea to the indictment. Mr Wilford literally never pleaded to anything. FN18 SEE Pet. App. 71a.

Mr. Wilford's case involves a question over which federal courts of appeals have split, and a question of federal law that should only be settled by this Court. See R. S. Ct. 10(a) & (c). Circuit court precedent expresses that when the Government initiates new criminal proceedings against a defendant, the defendant must be arraigned and must "plead" in open-court to the charges to ensure that the defendant knows the proceedings have begun against him and also knows the true nature of those proceedings. See. *United States V. Reiter*, 879 F.2d 639, 644 (2nd Cir. 1990) citing *United States V. Tortora*, 464 F.2d 1202 (2nd Cir. 1972) stating "No defendant can be tried until after he personally has entered a plea to the charge." *Id.* at 1209.

Circuit courts has also reasoned that a defendant's rights are satisfied if he received notice of the charges against him, and has ample opportunity to defend himself at trial. See *United States V. Rogers*, 73 F.3d 774, 777-78 (8th Cir. 1996); *United States V. Williams*, 152 F.3d 294 (4th Cir. 1998) (on a claim of lack of an arraignment, the defendant must show prejudice

FN 18 During the Aug. 7, 2014 sentencing hearing, Wilford made exception to the trial proceedings where he did not understand the indictment and never was provided with the opportunity to plead thereto; as well as a violation of speedy trial. Hr. Tr. 8/7/14, ECF-369 p. 159-170.

or impairment of a substantial right.). In *United States V. Dolic*, the Fifth Circuit in an unpublished opinion, reversed a conviction where the defendant never pleaded to the charges, 439 Fed. Appx. 425 (5th Cir. 2011), stating that the record revealed the "egregious fact" that "the district court never asked Dolic how he was pleading, guilty or not-guilty." *Id.* at 429. In the Third Circuit case of *United States V. Willaman*, the court explicitly stated "in the absence of a not-guilty plea there will be no trial." 437 F.3d 354, 358 (3rd Cir 2006). Pet. App. 71a.

Historically, it has been understood that there must be a duly interposed plea of not-guilty interposed of record upon the indictment before the court may proceed with a valid trial. 4 BL. Comm. 333-35, 345; *United States V. Klein*, 7 F.2d 255 (D. RI. 1925) (stating that the defendant's plea of not-guilty is a record of a fact essential to the court's right to proceed with a trial). The district court has an obligation to -- obtain the plea of the accused, as the plea of not-guilty has irreparable affects on other rules of procedure. For example, FN 19 the Speedy Trial Act requires the plea of "not-guilty" to be entered before a defendant may access the protections of the act. 18 U.S.C. § 3161 (c)(1); *United States V. Tootle*, 65 F.3d 381, 383 (4th Cir. 1995). FN 20

Where an accused has been indicted and arrested, as in Mr. Wilford's case, he cannot be deprived of his liberty indefinitely without a bail hearing and an opportunity to plead to the charged indictment, "without offending fundamental principles of justice deeply rooted in the conscience of our people." See *Jauch V. Choctaw County*, 2017 BL 381459, No. 16-60690 (5th Cir. 2017) (applying procedural analysis of due-process and referencing circuit split). Courts has found post indictment delay to be considered oppressive incarceration. The right to a speedy trial "has its roots at the very foundation of our English law heritage." *Klopper V. State of N.C.*, 386 U.S. 213, 225 (1967).

FN19 A defendant's plea of not-guilty places Knowledge and Intent at issue in a case of conspiracy to violate §841; §846. See *United States V. Mark*; 943 F.3d 444, 448 (4th Cir. 1991).

FN20 Pet. App. 3a-4a; Where the Government deprived the accused from triggering the STA on a plea of not guilty, the procedure is fundamentally inadequate to vindicate the substantive rights.

The record of a felony case should be a permanent memorial of what the issue tried, and show whether the judgment whereby it was proposed to take the life of the accused or to deprive him of his liberty was in accordance with the law of the land: due-process. See *Hopt V Utah*, 110 U.S. 574, 579; *Lewis V. United States*, 146 U.S. 370, 387 ("The record must show affirmatively that the accused did plea to the charge"); *Dowdell V. United States*, 221 U.S. 325 (1911) ("The record must show affirmatively that the accused did plea to the charge."). The Tenth Circuit had recognized that the failure to observe the due-process safeguard of arraignment [to enter the defendant's plea to the charges], "deprives the court of jurisdiction." *Merritt V. Hunter*, 170 F.2d 739, 741 (10th Cir. 1948). As stated in *Crain*, "before a court of last resort affirms a judgment of conviction of at least an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken." *Crain*, 162 U.S., at 645.

The Constitution itself protects physical liberty. *Turner V. Rogers*, 564 U.S. 431, 445 (2011) (describing "loss of personal liberty through imprisonment" as sufficient to trigger Due Process protections). As a matter of procedure, defendants are to be arraigned on an indictment promptly after arrest and provided with the opportunity to enter his plea to that indictment, if the procedural scheme is to be fair. The Fifth Circuit held in *Jauch* that "prolonged-detention cases do raise the immediate question of whether the pre-trial detainee's procedural due process rights have been violated." *Id.*, Slip Op. at 7. The procedure employed against a defendant should not transgress recognize principles of "fundamental fairness" in operation. When the fault lies in a denial of "fundamental procedural fairness," the question is one of due-process. See *County of Sacramento V. Lewis*, 523 U.S. 833, 845-46 (1998); *Madina V. California*, 505 U.S. 347, 446, 448 (1992). The touchstone of due-process is the protection of an individual against arbitrary action of government. *Wolf V. McDonnell*, 418 U.S. 539, 558 (1974). Moreover, "official negligence" in bringing a prosecution without undue delay can often suffice constitutional relief. See *Doggett V. United States*, 505 U.S. 647, 657-57 (1992). The omission of the plea of an accused may have an impact on the outcome of the district court proceeding and affect the fairness, integrity, or public reputation of the criminal proceeding as a whole. An erroneous deprivation of liberty interest may eliminate certain procedures at the detriment of an accused. *Mathews V. Eldridge*, 424 U.S. 319, 335 (1976).

The Fourth Circuit erred in its ruling against Wilford and concluding "Wilford has failed to establish prejudice or the impairment of a substantive right. Pet. App. 3a . When the Government initiates criminal proceedings against an individual, it must follow minimum due-process appropriate to the circumstances to ensure that liberty is not arbitrarily abrogated, by scheduling for arraignment in order for the court to exercise its obligation of extracting the defendant's plea to the charge. The improvident procedure used in this case turns on whether Wilford was deprived of a protected interest. See Oviatt V. Pearce, 954 F.2d 1470 (9th Cir. 1992) (holding that "failing to provide prompt pre-trial procedures evidenced deliberate indifference to the rights of inmates."). This Court should make clear that the challenged procedure is fundamentally inadequate to vindicate the substantive rights provided, thus, being unjust and unfair. If the Court does not grant writ or provide other relief, please hold pending Carpenter.

CONCLUSION

Petitioner, Richard A. Wilford, is a pro se litigant without having any formal training and study in the science of law and prays for this Court to do not elevate form over substance when reviewing his petition, as it deserves to be liberally construed. Haines V. Kerner, 404 U.S. 519 (1972).

For the foregoing reasons, the petition for writ of certiorari in this case should be granted.

Dated: November 15, 2017

Respectfully Submitted


Richard Anthony Wilford, pro se