No. 12-12928-U

# In the United States Court of Appeals for the Eleventh Circuit

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United States of America

v.

Quartavious Davis

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On Appeal from the United States District Court
for the Southern District of Florida

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## En Banc Amicus Curiae Brief of the National Association of Criminal Defense Lawyers in Support of Appellant Quartavious Davis

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## CERTIFICATE OF INTERESTED PERSONS

**United States v. Quartavious Davis**
**Case No. 12-12928**

The National Association of Criminal Defense Lawyers is a non-profit association not owned in whole or in part by any corporation.

Counsel certifies that, in addition to those people and entities already identified in the appellant's Certificate of Interested Persons, these people and entities have an interest in the outcome of this case:

Bascuas, Ricardo

National Association of Criminal Defense Lawyers

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers is a nonprofit, voluntary, professional bar association that works to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of 10,000 and an affiliate membership of almost 40,000, including private criminal-defense lawyers, military-defense counsel, public defenders, law professors, and judges. NACDL is the only national professional bar association for public defenders and private criminal-defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization with full representation in its House of Delegates.

No one, including the parties and their counsel, either authored any part of this brief or contributed money to fund its preparation or submission.

## STATEMENT OF THE ISSUES

I. Whether those parts of the Stored Communications Act that purport to authorize police officers to obtain, without probable cause or a warrant, confidential information tracking a person's every move for weeks or months, 18 U.S.C. §§ 2703(c)(1)(B) and (d), are unconstitutional under the Fourth Amendment.

II. Whether records detailing the defendant's movements over the course of more than nine weeks, obtained with neither probable cause nor a warrant, should have been suppressed from trial as the fruits of an unconstitutional search or seizure.

## STATEMENT OF THE CASE

In an *ex parte* proceeding, a magistrate judge granted law enforcement agents an order directing a cellular telephone carrier to disclose information revealing every place four people's telephones had been over a nine-week period. *United States v. Davis*, 754 F.3d 1205, 1210 (11th Cir. 2014). Quartavious Davis was one of the four. *Id.* The agents did not claim to have evidence establishing probable cause. *Id.* Consequently, the magistrate judge did not find that there was probable cause to believe the records were evidence of any crime. *Id.*

Before trial, Davis argued that the records should be suppressed because the order requiring their production did not satisfy the Fourth Amendment's warrant and probable-cause requirements. *Id.* at 1209. On appeal, a unanimous panel of this Court agreed, but held that Davis was entitled to no remedy. *Id.* at 1217–18.

Nonetheless, the prosecution sought rehearing *en banc*, insisting that law enforcement's ability to use every person's cellular telephone as a precision tracking device raises no constitutional issue. Moreover, the argument continues, probable cause is too high a standard to require for tracking people.

This Court agreed to consider *en banc* whether the Fourth Amendment places any limits on the government's access to tracking information for millions of Americans.

## SUMMARY OF THE ARGUMENT

The government historically and habitually embraces technological innovation to expand its surveillance prowess at the expense of individual privacy. When these incursions on the sphere of privacy protected by the Fourth Amendment are challenged, the government reflexively responds with the claim that the Fourth Amendment protects only to outmoded ways of creating, recording, enjoying, and sharing information. The Supreme Court has almost invariably received those claims with great skepticism. In the context of electronic location tracking, that skepticism has been pronounced. Nonetheless, the government again raises that argument in this case to argue that automated tracking of four people over the course of nine-weeks raises no Fourth Amendment issue.

Just as it has been clear since the 19th century that a letter being carried in the mails enjoys the same degree of constitutional protection it would have if it were still in the writer's home, conversations and other information carried

by cellular telephone are protected by the Fourth Amendment. A cellular carrier's possession of such information is in the nature of a bailment. The carrier has no property rights in the information. Consequently, if the government wants to access it, it must obtain a warrant supported by probable cause to seize it. Just as a letter does not lose Fourth Amendment protection through the act of being mailed, conversations and information do not lose Fourth Amendment protection through the act of transmission. Were it otherwise, First Amendment freedoms would be seriously eroded, posing a fundamental threat to our open democracy.

The agents in this case obtained Quartavious Davis' information without probable cause or a warrant. They relied on a statute that expressly gave them a choice between obtaining a warrant supported by probable cause or making a lesser showing and getting a mere court order. Despite ample Supreme Court precedent holding that warrantless searches are presumptively unconstitutional and that location tracking raises Fourth Amendment implications, the agents chose not to get a warrant. Under those circumstances, the agents did not act in objective good faith. Rather, they gambled that their chosen course of action might be found constitutional despite every reason to believe the opposite.

Consequently, the panel erred in affirming the admission of the location tracking evidence at Davis' trial.

## ARGUMENT

### I. For good reason, the Supreme Court has nearly always rejected the claim that the Fourth Amendment does not regulate advancements in surveillance technology, including location tracking.

Governments have long sought the ability to track people's movements. History leaves no doubt that, in a free society, this power can exist only subject to close, independent, judicial scrutiny. Had it been possible to track NAACP members in Alabama in the 1950s without implicating the Fourth Amendment, that state's attorney general and judiciary would have successfully exposed the membership and ousted the organization from the state, all without risk of federal judicial oversight. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (invalidating court order requiring production of NAACP membership lists); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964) (invalidating court order meant to end all NAACP activity in Alabama). As one of the NAACP's lawyers later wrote:

> Privacy in placing calls is of value not only to those engaged in criminal activity. The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide. Many individuals, including members of

> unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts. Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society.

*Smith v. Maryland*, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting) (citations omitted).

Searches and seizures that threaten the exercise of First Amendment rights require strict application of the Fourth Amendment's constraints on government power. *See Fort Wayne Books v. Indiana*, 489 U.S. 46, 66 (1989) (holding under the Fourth Amendment that a pre-trial seizure of forfeitable expressive materials requires more than probable cause because the seizure might chill First Amendment freedoms). Because the power to track people poses a grave threat to First Amendment rights, the need for Fourth Amendment limits on that power is at its zenith.

The government's present claim—that the Fourth Amendment does not regulate the government's exploitation of a technological innovation that vastly expands its surveillance prowess—is as old as the hills. In *Silverman v. United States*, 365 U.S. 505 (1961), the prosecution argued that touching a microphone to the petitioners' heating pipes by inserting it into the shared wall of the

adjacent rowhouse was neither a search nor a seizure. The Court disagreed, finding that there was "an actual intrusion into a constitutionally protected area." *Id.* at 512. In *Kyllo v. United States*, 533 U.S. 27 (2001), the prosecution similarly argued that measuring the relative heat of a home with a thermal imager was beyond the Fourth Amendment's scope. The Court again rejected the argument, reasoning it would "leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home." *Id.* at 35–36.

The one time the Court approved the argument that a new technology was outside the Fourth Amendment's scope—when it held that the Fourth Amendment did not reach telephone wiretaps—it was forced to repudiate its holding: "To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." *Katz v. United States*, 389 U.S. 347, 353 (1967), *overruling in part Olmstead v. United States*, 277 U.S. 438 (1928).

Not surprisingly, the Court has been inhospitable to government claims that any given form of electronic tracking is beyond Fourth Amendment regulation. Most recently, in *United States v. Jones*, 132 S.Ct. 945 (2012), the

Court unanimously held that warrantless electronic tracking of a Jeep throughout the city of Washington, D.C., for four weeks violated the Fourth Amendment. The Court's three opinions produced two holdings: (1) "Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, [a Fourth Amendment] search has undoubtedly occurred," *id.* at 950 n.3; *id.* at 954 (Sotomayor, J., concurring); and (2) "[T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy," *id.* at 964 (Alito, J., concurring); *id.* at 955 (Sotomayor, J., concurring). The former holding has five votes. The latter has at least five and possibly nine votes, no justice having intimated that tracking Jones' Jeep did *not* infringe reasonable privacy expectations.

The justices expressly disagreed in *Jones* only over whether the Fourth Amendment trespass test endures alongside the expectations-of-privacy rubric. Five justices held that it does. *Id.* at 950; *id.* at 955 (Sotomayor, J., concurring). The bottom line is that, apparently, no sitting Supreme Court justice believes that automated, long-term, round-the-clock location tracking does not implicate the Constitution.

There are the soundest reasons for this, as the three *Jones* opinions attest. Justice Alito's opinion expressed constitutional concern over the very practice at issue in this case: "Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of 2011, it has been reported, there were more than 322 million wireless devices in use in the United States." *Id.* at 963 (citation omitted). Justice Sotomayor, echoing the concerns Justice Marshall, joined by Justice Brennan, expressed in *Smith* observed: "Awareness that the Government may be watching chills associational and expressive freedom." 132 S.Ct. at 956. All nine justices agreed that the federal courts must do more than just mechanistically apply Fourth Amendment tests; they must ensure that outcomes square with the Fourth Amendment's overarching purpose: "At bottom, we must 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" 132 S.Ct. at 950 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)); *id.* at 958 (Alito, J., concurring).

Indeed, preserving a sphere of privacy that fosters freedom of thought, expression, and interaction must be the focus of any court examining any form

of electronic tracking; experience shows that government agencies will not restrain themselves. The very week this brief is being finalized for filing, *The Wall Street Journal* revealed the existence of a secret government program that uses airplanes to gather information from cellular phones nationwide:

> The Justice Department is scooping up data from thousands of cellphones through fake communications towers deployed on airplanes, a high-tech hunt for criminal suspects that is snagging a large number of innocent Americans ... .
>
> The U.S. Marshals Service program, which became fully functional around 2007, operates Cessna aircraft from at least five metropolitan-area airports, with a flying range covering most of the U.S. population ... .

Devlin Barrett, "Americans' Cellphones Targeted in Secret U.S. Spy Program," *Wall St. Journal* (Nov. 13, 2014). Even while keeping such tactics secret, the government insists that such measures do not implicate constitutional rights. The government believes the only secrets worthy of legal protection are its own.

Before *Jones*, the Court relied primarily on the expectations-of-privacy rubric, which *Jones* recognized can be needlessly complicated. 132 S.Ct. at 950. The Court's first foray into electronic location tracking, *United States v. Knotts*, 460 U.S. 276 (1983), involved a transmitter placed in a container of chloroform destined for use in manufacturing illicit drugs. The container was driven to Leroy Knotts' cabin, which the police then got a warrant to search. Knotts

claimed the tracking of the container to his house violated his rights. Critically, however, he disclaimed standing to "challenge the installation of the beeper in the chloroform containter ... ." *Id.* at 280 fn.**.

Because of Knotts' concession regarding standing, *Knotts* failed to answer any important question about electronic tracking. Relying in part on "the diminished expectation of privacy in an automobile" traveling "on public thoroughfares," the Court held only that, when police use a transmitter over the course of a few hours to help them follow a container on public roads to a house, there has been no search or seizure *of the house*. *Id.* at 281; *see also United States v. Karo*, 468 U.S. 712, 713–14 (1984) (restating *Knotts*' holding). The Court reserved deciding whether "'twenty-four hour surveillance of any citizen of this country ... without judicial knowledge or supervision'" would violate the Fourth Amendment. *Knotts*, 460 U.S. at 284.

Presaging the principal *Jones* majority's rationale, Justice Brennan's concurrence noted the case would have been "much more difficult" had Knotts challenged the installation of the transmitter: "[W]hen the Government *does* engage in physical intrusion of a constitutionally protected area in order to ontain information, that intrusion may constitute a violation of the Fourth

Amendment." *Id.* at 286 (Brennan, J., concurring). We now know that Justice Brennan's doubts about the constitutionality of the tactic used in *Knotts* were valid, and that Knotts blundered by conceding he lacked standing. *Jones*, 132 S.Ct. at 951 (approvingly quoting Justice Brennan's concurrence); *id.* at 955 (Sotomayor, J., concurring) (same).

The next year, the Court tried again to tackle electronic location tracking. *United States v. Karo* presented the issue that Knotts waived—"whether the monitoring of a beeper in a private residence ... violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence." 468 U.S. at 714. The Court held that it did, rejecting the government's arguments that monitoring the transmitter was not a Fourth Amendment search and that, even if it was, no warrant was needed. *Id.* at 716–17.

*Karo* soundly rejected the government's favorite argument:

> We cannot accept the Government's contention that it should be completely free from the constraints of the Fourth Amendment to determine by means of an electronic device, without a warrant and without probable cause or reasonable suspicion, whether a particular article—or a person, for that matter—is in an individual's home at a particular time.

468 U.S. at 716.

Justice Stevens, joined by Justices Brennan and Marshall, would have further held that the government's installation of a transmitter in a container was a seizure as well as a search of the container:

> The owner of property, of course, has a right to exclude from it all the world, including the Government, and a concomitant right to use it exclusively for his own purposes. When the Government attaches an electronic monitoring device to that property, it infringes that exclusionary right; in a fundamental sense it has converted the property to its own use. Surely such an invasion is an "interference" with possessory rights; the right to exclude, which attached as soon as the can respondents purchased was delivered, had been infringed. That interference is also "meaningful"; the character of the property is profoundly different when infected with an electronic bug than when it is entirely germ free.

*Id.* at 728 (Stevens, J., dissenting in part) (footnote omitted). Justice Stevens relied on *Silverman*, the case involving the spike-mic used to make contact with a heating duct. *Id.* The majority did not disagree that there had been a trespass but decided that it did not matter:

> At most, there was a technical trespass on the space occupied by the beeper. The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, however, for an actual trespass is neither necessary nor sufficient to establish a constitutional violation.

*Id.* at 712–13. *Jones*, of course, overruled this part of *Karo* and validated Justice Stevens' view. Any common-law trespass—even a "technical" one—that

discloses information necessarily implicates the Fourth Amendment. *See Jones*, 132 S.Ct. at 949 (quoting *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)).

*Florida v. Jardines*, 133 S.Ct. 1409 (2014), dispels any doubt that even "technical" trespasses have Fourth Amendment significance. In *Jardines*, police officers walked a drug-sniffing dog to the front door of a home and obtained a search warrant based on the dog's having signaled the presence of drugs. *Id.* at 1413. The government argued that the officers were not trespassing because visitors to a home are licensed to knock on the front door. *Id.* at 1415. The Court agreed that visitors can do that "[b]ut introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*." *Id.* at 1416. "The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose." *Id.* Thus, the holding in *Jardines* turned on a trespass far more "technical" than the one in *Karo*; it depended on the common-law rules distinguishing licensees from trespassers. Together, *Jones* and *Jardines* leave no doubt that Part II of the *Karo* majority opinion is overruled and that Justices Stevens, Brennan, and Marshall got it right.

*Karo* also rejected the government's fall-back argument: that electronic tracking inside someone's home is reasonable without a warrant."The Government's contention that warrantless beeper searches should be deemed reasonable is based upon its deprecation of the benefits and exaggeration of the difficulties associated with procurement of a warrant." 468 U.S. at 717. The Court reaffirmed the already well-established principle that warrants are presumptively required: "The argument that a warrant requirement would oblige the government to obtain warrants in a large number of cases is hardly a compelling argument against the requirement." *Id.* at 718.

*Jones* two majority rationales both concluding that long-term, electronic location tracking requires both probable cause and a warrant. The instant case differs from *Jones* only in the type of tracking device used. *Jones* involved a device that, accessing a network of satellites deployed by the Department of Defense, could pinpoint a suspect's location within a few feet. This case involves a network of cellular antennas installed by a corporation that the government commandeered to monitor a telephone's movements. Because federal courts must "assure preservation of that degree of privacy against government that

existed when7 the Fourth Amendment was adopted," 132 S.Ct. at 950 & 958, the network used cannot make any difference.

*Jones* and this case present an even more serious issue than *Karo* and *Knotts*. *Knotts* specifically reserved ruling on long-term or autonomous tracking. *Jones*, 132 S.Ct. at 952 n.6; *id.* at 956 n.* (Sotomayor, J., concurring). Transmitters in the 1980s had to be monitored by people within a given range. *See Karo*, 468 U.S. at 708–09 (describing agents' intermittent monitoring of transmitter). But, today's technology realizes the spectre of fully autonomous, remote, surreptitious, perpetual, nearly universal surveillance. The government can now imperceptibly and indefatigably track the citizenry, all day, all night, weekdays, weekends, and holidays, just in case some agent ever gets curious about where someone has been. *See Jones*, 132 S.Ct. at 956 (Sotomayor, J., concurring) (stating that GPS monitoring "evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'").

Technology marches on, but the government raises the very same argument against the traditional requirements of a warrant supported by probable cause. The government's claim in this case is this: Federal agents

obtained records tracking the movements of five people over a nine-week period but this does not implicate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ... ." U.S. CONST. amend. IV. This argument finds no support in the Supreme Court's jurisprudence. Neither does the argument that, absent exigency, agents can proceed to search and seize location tracking data without a warrant.

## II. Obtaining the location data sent by the defendant's telephone without a warrant supported by probable cause was an unconstitutional seizure of the defendant's private information.

The Fourth Amendment has always been understood to protect communication and, in this way, to complement First Amendment freedoms. Accordingly, the Fourth Amendment circumscribes even Congress' exclusive authority over the U.S. Mail:

> Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to

> search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.

*Ex parte Jackson*, 96 U.S. 727, 733 (1877).

That principle would have been applied to telephone conversations much earlier in the Nation's history if the Supreme Court had not erroneously agreed with the government that intangible conversations could not be seized or trespassed. *See Olmstead*, 277 U.S. at 464. Relying on *Jackson*, Judge Frank Rudkin, sitting on the circuit panel that reviewed *Olmstead* on its way to the Supreme Court, wrote:

> [I]t is the contents of the letter, not the mere paper, that is thus protected. What is the distinction between a message sent by letter and a message sent by telegraph or by telephone? True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed; but these are distinctions without a difference. A person using the telegraph or telephone is not broadcasting to the world. His conversation is sealed from the public as completely as the nature of the instrumentalities employed will permit, and no federal officer or federal agent has a right to take his message from the wires, in order that it may be used against him. Such a situation would be deplorable and intolerable, to say the least.

*Olmstead v. United States*, 19 F.2d 842, 850 (9th Cir. 1927) (dissent). People using cellular phones likewise are "not broadcasting to the world." Their communications incidentally include data, such as location information, that they cannot withhold. Their communications nonetheless are "sealed from the public as completely as the nature of the instrumentalities employed will permit."

History vindicated Judge Rudkin's conclusion that conversations, like letters, can be seized despite their being intangible. Three decades later, *Silverman v. United States* held that the Fourth Amendment was violated when "officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office—a heating system which was an intergral part of the premises ... ." 365 U.S. at 511. *Silverman*'s holding that conversations can be trespassed and seized just like a letter was reaffirmed six years later. *Berger v. United States*, 388 U.S. 41 (1967), struck down a New York statute that authorized wiretapping a private office without a proper warrant. An indispensable premise of the Court's rationale was that *Olmstead* was wrong to hold that conversations were incapable of being seized: "Statements in the opinion that a conversation passing over a telephone wire cannot be said to

come within the Fourth Amendment's enumeration of 'persons, houses, papers, and effects' have been negated by our subsequent cases ... ." *Id.* at 51; *see also Katz v. United States*, 389 U.S. 347, 372 (1967) (Black, J., dissenting) ("It is the Court's opinions in this case and *Berger* which for the first time since 1791, when the Fourth Amendment was adopted, have declared that eavesdropping is subject to Fourth Amendment restrictions and that conversation can be 'seized.'"). Further in the *Berger* opinion, the Court again described conversations as a type of property. It held that the statute was constitutionally defective for not requiring "that the 'property' sought, the conversations, be particularly described." *Id.* at 58–59.

*Silverman* and *Berger* together establish that conversations are property. As such, they can be seized and trespassed even though they are intangible. Conversations, like the "papers" the Constitution expressly protects, belong to their authors, the people who bring the conversations into being. Any conversion or "usurpation" of property—even one as slight as touching a microphone to a pipe in a wall—that facilitates capture of the conversation implicates the Fourth Amendment.

*Jackson* makes clear that the carrier of a conversation—even when the carrier is the government itself—has no property rights over the communication, notwithstanding his incidental possession of it. *Jackson* means that the carrier of constitutionally protected information is akin to a bailee—one who "temporarily receives property from its owner, usually to the benefit of the owner, and holds the property for a specific purpose *without obtaining any rights to ownership*." BOUVIER LAW DICTIONARY, Vol. I at 229 (2012) (emphasis added). Consequently, just as letters enjoy full Fourth Amendment protection "wherever they may be" in the course of the mails, information transmitted from a cellular telephone is fully protected.

*United States v. Miller*, 425 U.S. 435 (1976), does not vitiate this constitutional protection. The holding in *Miller* depended on the fact that the records obtained in that case were checks evidencing financial transactions that were overt acts furthering the charged conspiracy. 425 U.S. at 439. It is true that the Court decided the records belonged to the bank but not merely because the bank happened to have custody of them. Rather, it was because the bank was a "'part[y] to the instruments with a substantial stake in their continued availability and acceptance.'" *Id.* at 440 (citation omitted). The Court

emphasized that, unlike personal papers, the checks were documents used to effect transactions: "The checks are not confidential communications but negotiable instruments to be used in commercial transactions." *Id.* at 442.

*Miller*'s reasoning does not apply to information transmitted by a cellular telephone to a carrier incident to the provision of communication services. First, cellular communications *are*, unlike negotiable instruments, confidential virtual "papers" at the core of the Fourth Amendment. Second, unlike banks, cellular telephone carriers are not parties to the conversations and data they transmit the way a bank is a party to the transactions it effects.

Rather, a carrier is just that—a conduit that *carries* people, goods, or data. Like other common carriers, they have a common-law duty to keep their clients "safe from harm and free from insult" that extends to protecting those clients from unlawful searches and seizures. *Nashville, Chattanooga & St. Louis Railway v. Crosby*, 70 So. 7, 9–11 (Ala. 1908) (affirming verdict against railroad for neglecting "the duty imposed on railroads to protect their passengers against search or arrest at their stations by a known officer of the law" where jury found that the railroad's agent abetted the unlawful search).

> It is settled in this state that, where a known officer of the law, in the apparent exercise of his official authority, disturbs the peace

> and personal security of a passenger of a common carrier, it is not incumbent upon the agent or servant of the carrier in charge of the train to interfere unless the conduct of the officer is known to be illegal. Where, however, it is plain to such agent or servant of the carrier that the officer is not so in the exercise of his official authority, or that he is abusing that authority—that is, is exceeding the limits of his customary functions in disturbing the peace and personal security of a passenger—it is the duty of such agent or servant to interfere for the protection of the passenger.

*Birmingham Railway, Light & Power Co. v. Lipscomb*, 73 So. 962, 963 (Ala. 1917).

Accordingly, the government should not be demanding that telephone carriers turn over their customers' private information on any lesser showing than probable cause evidenced by a judicial warrant. Congress' abrogation of common-law liability for telephone carriers who abet unlawful searches and seizures, 18 U.S.C. § 2703(e), does not give carriers greater rights in their clients' papers and effects than they had before. Even if no cause of action lies, telephone carriers still, unlike banks, have a duty to protect their clients from unlawful searches and seizures.

Nor does *Smith v. Maryland*, 442 U.S. 735 (1979), stand for the broad proposition that any information transmitted by telephone, other than spoken words, is in the public domain. In *Smith*, one telephone customer, Michael

Smith, used his telephone to make threatening and obscene calls to another customer, Patricia McDonough, whom he robbed some days earlier. Critical to the holding that Smith had no privacy expectation in the numbers he dialed was this premise: "Although most people may be oblivious to a pen register's esoteric functions, they presumably have some awareness of one common use: to aid in the identification of persons making annoying or obscene calls." 442 U.S. at 742. Just as a train, bus, or airplane passenger understands that a carrier has a duty to keep him from harassing other passengers, telephone users expect carriers to prevent them from using their phones to harass other customers.

*Smith* does not stand for the proposition that anything one's telephone transmits, other than one's voice, enjoys no Fourth Amendment protection. It stands for the proposition that, if one knows carriers use certain information to fulfill their duties to other customers, their disclosure of that information to police, in furtherance of that same duty, does not violate the Fourth Amendment.

In this case, law enforcement agents applied to a magistrate judge for an order rather than a warrant supported by probable cause. That was a choice.

*See* 18 U.S.C. § 2703(c). The order purported to compel a cellular telephone carrier to disclose information that belonged to one of its customers without observing the safeguards required by the Fourth Amendment. The information unlawfully demanded could be used to piece together the movements of four people over the course of nine weeks, an astonishing invasion of property and privacy rights with ominous implications for First Amendment rights. Even before *Jones*, no one could plausibly think this was constitutional. *Karo* dispelled any doubt on that score.

## III. In this case, the investigating officers could not have believed in good faith that the order requiring production of the defendant's location tracking records was constitutional.

Law enforcement agencies have a duty to make every effort to respect the Constitution. When they choose instead to push the envelope of what might be constitutional, they must shoulder the consequences of their miscalculation. Cases acknowledging the "good faith" exception to the otherwise mandatory exclusion of evidence, including *United States v. Leon*, 468 U.S. 897 (1984), and *Illinois v. Krull*, 480 U.S. 343 (1987), are not to the contrary. Those cases hold that exclusion of evidence is not appropriate only when the police sincerely and

reasonably believe their actions are in fact constitutional. Those cases do not apply when the police take chances with people's rights.

*Leon* is inapposite because in that case, unlike in this one, there was an actual, albeit erroneous, probable cause finding by a judicial officer. 468 U.S. at 902. Noting the case was a close one, *id.* at 903, the Court held that the police were entitled to rely on the finding that probable cause supported the search, *id.* at 922.

Here, in contrast, the agents made no attempt to demonstrate probable cause. *See Davis*, 754 F.3d at 1210. Instead, they opted to take their chances by making a lesser showing and relying on a court order rather than a warrant. Because no judicial officer made a probable cause finding to support the search and seizure agents undertook in this case, *Leon* is inapposite and the panel clearly erred in holding otherwise. *See Davis*, 754 F.3d at 1217–18.

*Krull* held that a Fourth Amendment violation attributable to "objectively reasonable reliance on a statute" does not call for application of the exclusion remedy. 480 U.S. at 350. The existence of a statute alone, however, does not *ipso facto* establish good faith. Rather, as *Krull* says, once a court has determined that the statute is constitutionally infirm, good faith cannot

objectively exist; good faith can objectively exist only "prior to such a judicial declaration". *Id.*

In *Krull* itself, the Court could conclude that the officers acted in good faith only after reviewing its own precedents in similar cases. *Id.* at 359. Only then did the Court hold that any alleged "defect in the statute was not sufficiently obvious so as to render a police officer's reliance upon the statute objectively unreasonable." *Id.* Additionally, if "a statute is clearly unconstitutional," the good-faith exception does not apply. *Id.*

Justice O'Connor's dissent, joined by Justices Brennan, Stevens, and Marshall, cautions against applying *Krull* in situations other than those where a statute's constitutionality is a close call. "Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment." *Krull*, 480 U.S. at 362 (O'Connor, J., dissenting). The statute in *Krull* subjected salvage yards to comprehensive regulation that included the authority to undertake warrantless *regulatory* searches—a close question involving a complex framework that the Supreme Court later found constitutional, *see New York v. Burger*, 482 U.S. 691 (1987). Justice O'Connor, the only Supreme Court justice ever to have served as a legislator, noted: "Legislators have, upon

occasion, failed to adhere to the requirements of the Fourth Amendment ... . Indeed, as noted, the history of the Amendment suggests that legislative abuse was precisely the evil the Fourth Amendment was intended to eliminate." *Id.* at 364.

Because the four dissenting justices were undoubtedly correct about this history, *Krull*'s good-faith exception should be applied only in situations similar to those presented by that case: where judicial precedent gives agents every reason to believe that a complex statutory scheme comports with the Constitution. The statute at issue in this case is comparatively straightforward. It gave police a choice between a plainly constitutional option—obtaining a warrant supported by probable cause—and a constitutionally dubious option—making a lesser showing. They chose to take the riskier path, despite clear warning signs that they might be violating people's rights.

Under these circumstances, objective good faith is lacking. The very fact that the statute itself suggested getting a warrant "using the procedures described in the Federal Rules of Criminal Procedure" suffices to dispose of the matter. 18 U.S.C. § 2703(c)(1)(A). Many Supreme Court cases, including *Karo*, warn law enforcement agencies that "[w]arrantless searches are presumptively

unreasonable ... ." 468 U.S. at 717. Under the express terms of the statute, then, the agents here faced a choice between getting a warrant and taking a "presumptively unreasonable" path. They chose the path that accorded less respect for constitutional rights and should not now be heard to say that no consequences should follow from that deliberate election.

Additionally, law enforcement agents are as aware as anyone that searches and seizures on less than probable cause are very rarely constitutional and generally only upon a showing of circumstances calling for immediate action to respond to an imminent threat. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that the Constitution allows for a "narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime"). As Justice Harlan succinctly put it: "There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." *Id.* at 33 (concurring opinion). Here, the police officers had every opportunity to get a warrant. They simply chose not to.

*Karo* itself completely negates any assertion of good faith in this case. Justice White's opinion for the Court put all objectively reasonable law enforcement agents on notice that using electronic tracking to uncover information they could not otherwise learn implicates the Fourth Amendment. *Karo*, in fact, as already explained, rejected the very same arguments the government now advances. It unequivocally held that electronic tracking *does* implicate the Fourth Amendment and (absent exigent circumstances) requires a warrant, not merely a court order. 468 U.S. at 718. The government's good-faith argument in this case thus amounts to nothing more than this: *How could we know that much more extensive electronic tracking than that already found to be unconstitutional without probable cause and a warrant would also be held to be unconstitutional without probable cause and a warrant?*

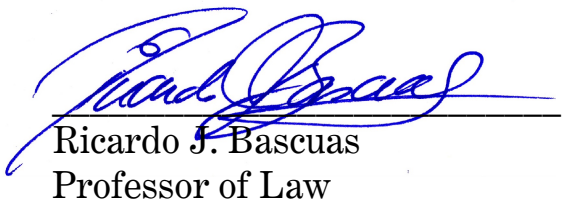
At the very least, the agents who chose to rely on a court order rather than a warrant knew or should have known they were taking a chance with people's constitutional rights. Under those circumstances, they can hardly be said to be acting in objective good faith. On the contrary, they were knowingly assuming the risk that their calculation was wrong and that they might well be exceeding the limits of constitutional law enforcement.

Where police take chances with people's rights, the exclusionary remedy applies. Good faith means just that—a sincere belief that the action being undertaken is respectful of people's rights. The deterrence rationale for the exclusion of evidence, in other words, does not apply when police gamble on the extent of individual rights. We should expect no less from government agents than that they make a sincere effort to honor their oaths to uphold the Constitution of the United States of America.

## CONCLUSION

WHEREFORE the Court should vacate the conviction and sentence in this case and remand the case to the district court for further proceedings.

Respectfully submitted,



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